(2011) 04 MAD CK 0044

In the Madras High Court

Case No : Writ Petition No''s. 11063 and 11064 of 2010 and M.P. No''s. 2, 3 and 1 of 2010

Sree Gokulam Sizing Mills APPELLANT

Vs

The Regional Provident Commissioner, The Employees' Provident Fund Organization and Others RESPONDENT

Date of Decision : 27-04-2011

Acts Referred:

Constitution of India, 1950 — Article 258A
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 13, 13(2), 2A, 5(1)

Citation : (2011) 130 FLR 563

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : N. Umapathi, for the Appellant; K. Ramu and R. Murali, G.A. for Respondents 1 to 5, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—Both the writ petitions were filed by the same Petitioner. The Petitioner is a sizing mill. In the first writ petition, they have

challenged the order of the Respondents 3 to 5 viz., dated 07.07.2006 as well as the consequential order passed by the second Respondent

Assistant Provident Fund Commissioner dated 21.08.2006 and the order passed by the first Respondent Regional Provident Fund Commissioner

dated 18.01.2010 and after setting aside the same, seeks for a consequential direction to forbear the Respondents from demanding or collecting

Employees Provident Fund amount from the Petitioner.

2. In the second writ petition, they sought to challenge the order of the State Government in G.O. Ms. No. 5 Labor Employment Department,

dated 23.01.2009 as arbitrary, without jurisdiction and ultra virus of Article 258A of the Constitution of India.

3. Both the writ petitions were admitted on 20.05.2010. Pending the writ petitions, an interim order was granted for a limited period.

4. On notice from this Court, a counter affidavit was filed in both the writ petitions dated 23.12.2010.

5. It was the contention of the Petitioner that they were engaged in the business of sizing and warping of cotton yarn. It is an unit engaging 8

persons and at no point of time, they had engaged more than 10 workers. u/s 1(3) of the EPF Act, the Act applies to an establishment, which is a

factory engaged in any industry specified in Schedule I.

6. In Schedule I of the EPF Act, the following entry has also been made.

Any industry engaged in the manufacture of any of the following namely:

x x x

x x x

x x x

x x x

x x x

Textiles (made wholly or in part of cotton or wool or jute or Silk, whether natural or artificial.

Therefore, it is contended that doing the work of sizing or warping of cotton yarn will not come under the term #textile#.

7. The second contention was that an order u/s 7-A of the EPF Act can be made only by an authority such as the Central Provident Fund

Commissioner, Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner or Assistant Provident Fund Commissioner. In

respect of Section 13, where a provision for the appropriate Government to appoint by notification in the Official Gazette Inspectors have been

made for the purpose of the Act and the Scheme including Pension or the Insurance Scheme. u/s 13(2) of the Act, the Inspector soap pointed has

been empowered for the purpose of enquiring into the correctness of any information furnished or for the purpose of ascertaining whether any of

the provisions of the Act have been complied with. It is only that Inspector who can seek for information from the employers and examine the said information and he disempowered to exercise such power which are required to calling for and decide the said issues. Therefore, the power of

calling for information can be exercised only by the authority constituted u/s 13. In respect of the Petitioner Mills, the appropriate Government is

only the State Government in terms of Section 2A of the EPF Act.

8. But in the present case, the impugned notices were issued by the authorities who were not an Inspector appointed by the State Government

which is the appropriate Government and they cannot make any Inspection of the records and pass an order in terms of the Section 7-A of the Act

and any order passed pursuant to the information received or inspection conducted by the incompetent authority is illegal and void.

9. In the earlier batch of writ petitions filed by several similarly placed persons, since the Department had conceded that there were no Inspectors

appointed by notification u/s 2(a)(i) or 2(a)(ii) of the Act constituting the authorities, the writ petitions were allowed on that ground. During the

pendency of those writ petitions, the State Government has issued G.O. Ms. No. 5 Labor and Employment Department, dated 23.01.2009. The

said notification reads as follows:

In exercise of the power conferred by Sub-section (1) of Section 5 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952

(Central) Act XI X of 1952 the Governor of Tamil Nadu hereby appoints all the Provident Fund Officers and Enforcement Officers of the Office

of the Regional Provident Fund Commissioner, Tamil Nadu, to be Inspectors for the whole of the State of Tamil Nadu for the purposes of the said

Act, and the Employees Provident Funds Scheme, the pension Scheme and the Insurance Scheme in relation to the establishments other than those

specified in Sub-clause (1) Clause (a) of Section 2 of the said Act."" In the light of this notification, the other writ petitions were disposed of stating

that since competent authority has been notified, there is no impediment for the departmental authorities in exercising their power u/s 7-A of the

Act.

10. The Petitioner, notwithstanding the notification has filed the second writ petition challenging the very notification. The contention raised by the

Petitioner was that the notification was issued in terms of Section 5(1) of the EPF Act, wherein the State Government is incompetent to appoint officers who are appointed by the Central Government. Therefore, the impugned notification must be struck down as beyond the legislative

competence of the State Government.

11. In the counter affidavit filed by the Respondents, it was contended that the activity carried on by the Petitioner Mill comes under the definition

of the term ''textile''. The State Government while declaring Minimum wages under the head employment textile mills vide Entry No. 88 made in

G.O. Ms. No. 1 Labor and Employment Department dated 03.01.2007 had given the extended definition of the term Textile and it reads as

follows:

88. Employment in Textile Mills: including Composite Mills, Spinning Mills, Weaving Mills, Open ended Mills, and the various processes in the

above said Mills like blow room, carding, drawing, fly frames, spinning, winding, doubling, reeling, packing, Warping-Sizing and other processes in

the textile mills, whether carried out singly or together.

12. In view of the above, the contention that they are not covered by the provisions of the EPF Act under the relevant entry Textiles cannot be

accepted. The further contention that they have less than 10 workers is a question of fact which will have to be decided before the authorities. On

that ground an order u/s 7A of the EPF Act cannot be challenged. Even if any error had crept in, the Act provides for remedial measure by way of

review u/s 7-B and further appeal u/s 7-I before the EPF Tribunal.

13. In the light of the same, the writ petition challenging the impugned orders cannot be maintained. In this context it is necessary to refer to the

judgment of the Supreme Court in Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement and Anr. reported in 2010 (4) LW 1 has

held that the statutory forum is created for redressal of grievance that too in a fiscal statute, a writ petition should not be entertained. In that case,

an appeal itself was available to the High Court. In repelling that contention, in paragraphs 44 and 45, it was observed as follows:

44. Therefore, principle laid down in the Ratan''s case (supra) applies in the facts and circumstances of this case. If the Appellant in this case is

allowed to file a writ petition despite the existence of an efficacious remedy by way of appeal u/s 35 of FEMA this will enable him to defeat the

provisions of the Statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fees or deposit of some

amount of penalty or fulfillment of some other conditions for entertaining the appeal. (See para 13 at page 408 of the report). It is obvious that a

writ court should not encourage the aforesaid trend of by-passing a statutory provision.

45. Learned Counsel for the Appellant relied on a decision of this Court in Monotosh Saha Vs. Special Director, Enforcement Directorate and

Another, . That was a decision entirely on different facts. In that decision Saha preferred an appeal before the appellate tribunal with a request for

dispensing with requirement of pre-deposit, but the tribunal directed the deposit of 60% of the penalty amount before entertaining the appeal.

When an appeal was preferred before the High Court u/s 35 of the FEMA, the same was dismissed by the High Court holding that no case for

hardship was made out either before the tribunal or before it. In the background of those facts, this Court observed that since pursuant to this

Court''s interim order Rs. 10 lacs have been deposited with the Directorate, the Appellant was directed to furnish further such security as may be

stipulated by the tribunal and directed that on such deposit tribunal is to hear the appeal without requiring further deposit.

14. The other contention that notification issued by the State Government appointing the officers of the PF Department as Inspectors u/s 13 is

invalid and violative of Article 258A of the Constitution is concerned, it must be noted that the argument was based upon the wrong notion that the

officers of the EPF Department were appointed by the Central Government and therefore, the State Government by exercise of its power u/s 2A

r/w Section 13 cannot notify those officers. It is a fallacy to cot end that the officers of the PF department were appointed by the Central

Government. On the other hand, u/s 5-A of the EPF Act, a Central Board is constituted by the Central Government. u/s 5-D of the Act, the

Central Government appoints only Central Provident Fund Commissioner as the Chief Executive Officer of the Central Board and it also appoints

a Financial Adviser and a Chief Accounts officer. But in terms of Section 5D(3) of the Act, it is the Central Board which appoints the Additional

Central Provident Fund Commissioner, Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner and Assistant Provident

Fund Commissioner, Therefore, there was no illegality or unconstitutionality in the State Government notifying the existing officers of the Central

Board as also Inspectors in terms of Section 13. Reliance placed upon Article 258A of the Constitution is misconceived and improper.

15. In the present case, since the officers who are notified as Inspectors by the impugned notification are not Central Government servants, the

question of the Governor of the State getting consent of the Government of India to entrust the functions to those officers in relation to any matter

to which the Executive power of the State extends. Therefore, there is no illegality or infirmity in the order of the Government in G.O. Ms. No. 5,

Labor and Employment Department, dated23.01.2009.

16. In view of the above, both the writ petitions are liable to be rejected. The learned Counsel for the Petitioner submitted that the impugned order

refers to the inspection and enquiry conducted by the officers of the department who are not notified at the relevant time. Therefore, any materials

seized or information gathered were illegal and cannot be utilized by the Department.

17. It must be noted that the officers who had passed orders u/s 7-A were validly appointed by the Central Government and they are empowered

to discharge their duties u/s 7-A. In so far as appointment of Inspectors by the appropriate Government is concerned, in the impugned notification,

notifies the very same officers as Inspectors under the said provision. Though the said notification came into existence with effect from 23.01.2009,

the power exercised by the authorities u/s 7-A of the Act cannot be found fault with. Even assuming without admitting that they had illegally

conducted inspection or that they have called for records without any legal authority is concerned, that will not invalidate the orders passed by the

authorities.

18. The Supreme Court vide its judgment in Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, has held that

materials gathered by illegal means cannot be rejected in an adjudication. The Supreme Court also made a distinction between an unlawful

collection of material and the inadmissibility of evidence of such material in an adjudication.

19. In the light of the above, there is no case made out. Accordingly, both the

writ petitions will stand dismissed. No costs. Consequently, connected Miscellaneous petitions are closed.