
(2011) 06 MAD CK 0317

In the Madras High Court

Case No : Writ Petition No. 19171 of 2006 and M.P. No. 1 of 2006

The Management of Alpha Instruments

APPELLANT

Vs

The Enforcement Officer and The Assistant Provident Fund
Commissioner, Employees' Provident Fund Organisation

RESPONDENT

Date of Decision : 07-06-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Foreign Exchange Management Act, 1999 — Section 35
Provident Funds Act, 1925 — Section 2

Citation : (2011) 06 MAD CK 0317

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : S. Ravindran, for T.S. Gopalan and Co, for the Appellant; V.J. Latha, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner is an employer. He has come forward to challenge an order of the first Respondent, dated 10.4.2006 and the consequential order of the second Respondent, dated 24.5.2006 and after setting aside the same, seeks to forbear the Respondents from holding any proceedings against the Petitioner claiming contribution in respect of Group Organisation Development Reward payment made to their workmen.

2. Notice of motion was ordered on the writ petition on 23.6.2006. Pending the notice, an interim stay was granted. Subsequently, when the matter came up on 27.10.2006, this Court admitted the writ petition and also granted the interim stay with a condition that the Petitioner shall file an affidavit of undertaking stating that he will make good the amount to the department in case they lost the writ petition. No affidavit has been filed by the Petitioner management till date.

3. The case of the Petitioner was that it is a manufacturing firm of Semi finished

speedo meter, electrical temperature gauges and warning lamps. It is covered by both the ESI and PF Acts. The wages are paid to workmen under different heads. Every year a revision was done during the month of July. Prior to the year 1998, the basic wages and Dearness Allowance constituted 50% of the total wages. On request made by the workmen, it was decided that further increase in wages would be in the form of allowances and they will not attract contribution towards PF, bonus and gratuity. The basic wage and dearness allowance constituted 45% of total emolument and the remaining amount was to be apportioned among HRA and variance allowances as well as to fulfill the production target. 25% of the emolument was given to attendance and that the production target was subject to variation from one worker to another. The production target was named as Group Organisation Development from April 2002.

4. It was stated that the first Respondent herein had visited the Petitioner's establishment on 7.2.2006 and directed allowances paid under Group Organisation Development should be treated as basic wages. The Petitioner sent a reply, dated 22.3.2006. On 10.04.2006, the Respondents Department by their reply had clarified their stand. In the order dated 24.5.2006, the Petitioner was informed that they should attend the enquiry in respect of allowance payable by producing necessary register. When the Petitioner sent a reply, the Enforcement Officer had replied that the Group Organisation Development reward was nothing but an incentive and it should be added in the PF calculation. The Petitioner was also requested to submit the Acquittance register from 1.3.2002 for calculating arrears.

5. It must be noted that in the present case, no final order has been passed and that the Petitioner must produce necessary registers as ordered by the department. In the absence of the order passed by the competent authority, i.e., second Respondent, the Petitioner cannot rush to this Court to stall further proceedings. Ultimately whether the Group Organisation Development payment would amount to basic wage u/s 2(b) of the PF Act is not a mere question of law, but also question of fact involved upon the determination by the authorities. Merely relying upon the settlement u/s 18(1) to state that the management and the workmen had agreed to keep certain payments outside the purview of the Act cannot take out the power of the authorities from determining the said issue. The authority constituted under the Act can decide the said issue on the basis of the materials placed by the parties.

6. The Supreme Court in Union of India (UOI) and Another Vs. Ogale Glass Works, has held in paragraph 47 as follows:

47. Admittedly the Appellants were not parties to the award. No doubt under the Industrial Disputes Act the award will be binding, as against the Respondent and its workmen. But the Appellants are seeking in these proceedings to enforce the statutory duty cast upon them to collect the contributions due from the Respondent which again is a statutory liability under the Act and the Scheme. The object of the Appellants in enforcing the Act is only to discharge the

statutory duty enjoined on them for the benefit of the employees concerned. In view of the decision of this Court, it is clear that the Act and the Scheme apply to all the sections of the Respondent, and if so it follows that the Respondent is liable to make contributions and that at the rate specified in the Act.

7. The said judgment of the Supreme Court was quoted and followed by the Bombay High Court in *Gosalia Shipping Pvt. Ltd., Goa and Another Vs. Regional Provident Fund Commissioner, Goa and Anr*, . In paragraph 11, the Bombay High Court had observed as follows:

11... This judgment of the Apex Court should conclude the matter. Therefore any settlement and the Award between the parties cannot be binding on an Authority under the Act who can arrive at a conclusion based on all materials available including settlements if any produced before him.

8. The question as to the authority u/s 7A can go into the question as to whether certain items can come within the term "basic wages" and he can lift the veil to determine the issue has also been considered by the Supreme Court in *Rajasthan Prem Krishan Goods Transport Co. Vs. Regional Provident Fund Commissioner, New Delhi and Others*, . The Supreme court in paragraph 6 of its judgment had observed as follows:

6... Now, this finding is essentially one of fact or on legitimate inferences drawn from facts. Nothing could be suggested on behalf of the Appellant as to why could the Regional Provident Fund Commissioner not pierce the veil and read between the lines within the outwardliness of the two apparents. No legal bar could be pointed out by the learned Counsel as to why the views of the Regional Provident Fund Commissioner, as affirmed by the Central Government, be overturned.

9. Ultimately if an order is passed u/s 7A and the Petitioner is still aggrieved, he has a right of review u/s 7B followed by an appeal u/s 7-I before the EPF Appellate Tribunal. The advice given by the first Respondent Enforcement Officer is not a final order.

10. Since the Act provides for determination by quasi judicial authority with power of review and also an appeal before a judicial appellate Tribunal, the Petitioners will have to necessarily avail the remedies under the Act. In this context, it is necessary to refer to a judgment of the Supreme Court in *Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another*, , wherein the Supreme Court while dealing with an alternative remedy available under the FEMA Act held that the Act cannot be bypassed and the jurisdiction under Article 226 of the Constitution of India cannot be invoked. In the following passages found in paragraphs 31 and 32, the Supreme Court had observed as follows:

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the

statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the Appellant's counsel to demonstrate why the appellate jurisdiction of the High Court u/s 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

11. The Supreme Court in *United Bank of India Vs. Satyawati Tondon and Others*, dealt with SARFAESI Act and DRT Act and in paragraphs 55 and 56, it had held as follows:

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

56. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the Appellant from taking action in furtherance of notice issued u/s 13(4) of the Act. In the result, the appeal is allowed and the impugned order is set aside. Since the Respondent has not appeared to contest the appeal, the costs are made easy.

12. Even under the ESI Act, the Supreme Court has held that if authorities make determination u/s 45A, unless it is challenged in a proceedings u/s 75, it can be deemed to become final and the authority can proceed to execute the order vide judgment in *E.S.I.C. Vs. C.C. Santhakumar*, . The following passages found in paragraphs 17, 25, 28, 30 and 31 of the said judgment may be usefully reproduced below:

17. Prior to the incorporation of Section 45-A under Act 44 of 1966, the only resort available to the Corporation was Section 75, for recovery of contribution through the court. Since this procedure was found to be impracticable and delayed process involved, a special provision was contemplated whereunder adjudication is to be made by the Corporation itself. By reason of incorporation of Section 45-A with effect from 17-6-1967, it became possible for the Corporation to have determination of the question, binding on the principal employer, without resorting to the ESI Court. In regard to the order u/s 45-A, the same is enforced, as envisaged u/s 45-B, which was similarly brought into the Act, by which the contribution may be recovered as arrears of land revenue. With regard to the decision reached by the ESI Court in the application u/s 75, the said decision is

enforced, as envisaged in Sub-section (4) of Section 75 as if it is a civil court. The mode of recovery u/s 45-B of the Corporation and the mode of recovery as per Section 75(4) by the ESI Court as the civil court are entirely different as both Sections 45 and 75 operate in different spheres." 25. Section 45-A of the Act contemplates a summary method to determine contribution in case of deliberate default on the part of the employer. By Amendment Act 29 of 1989, Sections 45-C to 45-I were inserted in the Principal Act, for the purpose of effecting recovery of arrears by attachment and sale of movable and immovable properties or establishment of the principal or immediate employer, without having recourse to law or the ESI Court. Therefore, it cannot be said that a proceeding for recovery as arrears of land revenue by issuing a certificate could be equated to either a suit, appeal or application in the court. u/s 68(2) and Sections 45-C to 45-I, after determination of contribution, recovery can be made straightaway. If the employer disputes the correctness of the order u/s 45-A, he could challenge the same u/s 75 of the Act before the ESI Court. 28. What Section 75(2) empowers is not only the recovery of the amounts due to the Corporation from the employer by recourse to the ESI Court, but also the settlement of the dispute of a claim by the corporation against the employer. While this is so, there is no impediment for the Corporation also to apply to the ESI Court to determine a dispute against an employer where it is satisfied that such a dispute exists. If there is no dispute in the determination either u/s 45-A(1) or u/s 68, the Corporation can straightaway go for recovery of the arrears. 30. The legislature has provided for a special remedy to deal with special cases. The determination of the claim is left to the Corporation, which is based on the information available to it. It shows whether information is sufficient or not or the Corporation is able to get information from the employer or not, on the available records, the Corporation could determine the arrears. So, the non availability of the records after five years, as per the Regulations, would not debar the Corporation to determine the amount of arrears. Therefore, if the provisions of Section 45-A are read with Section 45-B of the Act, then, the determination made by the Corporation is concerned. It may not be final so far as the employer is concerned, if he chooses to challenge it by filing an application u/s 75 of the Act. If the employer fails to challenge the said determination u/s 75 of the Act before the Court, then the determination u/s 45-A becomes final against the employer as well. As such, there is no hurdle for recovery of the amount determined u/s 45-B of the Act, by invoking the mode of recovery, as contemplated in Sections 45-C to 45-I.

31. In *ESI Corpn. v. F. Fibre Bangalore (P) Ltd.*² it was observed that it is not necessary for the Corporation to seek a resolution of the dispute before the ESI Court, while the order was passed u/s 45-A. Such a claim is recoverable as arrears of land revenue. If the employer disputes the claim, it is for him to move the ESI Court for relief. In other cases, other than cases where determination of the amount of contributions u/s 45-A is made by the Corporation, if the claim is disputed by the employer, then, it may seek an adjudication of the dispute before

the ESI Court, before enforcing recovery.

13. In the light of the above, the writ petition will stand dismissed. The Petitioner is directed to cooperate with the second Respondent's proceedings for proper determination of the issue. However, there will be no order as to costs. Consequently, connected miscellaneous petition stands closed.