(2011) 06 MAD CK 0198

In the Madras High Court

Case No : Writ Petition No. 30798 of 2007 and M.P. No''s. 1 and 2 of 2007

The Superintending Engineer, Tamil Nadu Electricity Board	APPELLANT
Vs	
The Regional Provident Fund Commissioner, Employees' Provident Fund Organisation, The Assistant Provident Fund Commissioner, Employees' Provident Fund Organisation and The Manager, Indian Bank	RESPONDENT

Date of Decision : 07-06-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 12(3), 13(4), 7A, 7B, 7I
Foreign Exchange Management Act, 1999 — Section 35

Citation : (2011) 06 MAD CK 0198

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : Pushpa Sathyanarayana, for the Appellant; K.Ramu, for RR1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner is the Superintending Engineer, Tamil Nadu Electricity Board, Dharmapuri Electricity Distribution Circle.

They have come forward to challenge the notice issued by the second Respondent PF department, dated 10.09.2007.

2. By the aforesaid notice, it was informed that the Electricity Board had entered into an agreement with the Unions regarding absorption of

contract employees and that notice was issued u/s 7A. They have sought for cancellation of the action initiated under the Act. However, the

Petitioner Board was informed that the Electricity Board being the principal employer is also eligible to pay PF contribution towards contract employees and any agreement between the Petitioner and the employees will not bind on the authority. Therefore, the action initiated u/s 7A cannot

be cancelled and the Petitioner Board was also directed to register their establishment under the provisions of the Act. In the meanwhile, the PF

department had also directed the Indian Bank being the banker of the Petitioner Board to make good the amount of Rs. 8,29,02,612/-being the

amount payable towards PF dues.

3. The Petitioner placed reliance upon the settlement entered between the parties u/s 12(3), dated 10.8.2007. In paragraph 9 of the terms of

settlement, it was agreed as follows:

9) The Contract Labourers to be absorbed as Mazdoors, Helpers, Helper-Cum-Meter Reader/Assessor-Grade-II and to be appointed as

Temporary casual labourers, and to be engaged as contract labourers on daily wages, as the case may be, shall not make any claim including

E.P.F. with retrospective effect by virtue of their engagement as contract labourers in the past."" It is in this context, the Board seeks waiver of the

payment.

4. When the matter came up for hearing, notice on admission was given on 24.9.2007. Pending the notice, an interim stay was granted. On notice

from this Court, on behalf of the department, a counter affidavit, dated 21.4.2011 has been filed.

5. In the counter affidavit, it was stated that the matter was discussed with the Central Board of Trustees. They had directed them to conduct an

enquiry u/s 7A of the EPF Act with reference to recovery of amount payable by the Board towards engagement of contract labours. The enquiry

was conducted on several dates. Since the Board never disputed the records and the unions were pressing for early solution, by an order dated

9.8.2007, the amount due and payable was computed. It was also stated that the settlement reached between the parties has No. relevance. But,

since the Board has filed an appeal before the Supreme Court, the amounts were not recovered through coercive proceedings.

6. If there is determination u/s 7A, the Petitioner board has right of review u/s 7B, failing which an appeal u/s 7-I can be filed. But, it would not

open to them to seek for such an order to be challenged before this Court in a writ petition under Article 226 of the Constitution of India.

7. 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.

8. 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.

9. 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 45A 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 45A 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 45A, the same is enforced, as envisaged u/s 45B, 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 45B 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 45A 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 45C to 45I 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 45C to 45I, after determination of contribution, recovery can be made

straightaway. If the employer disputes the correctness of the order u/s 45A, 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 45A(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 45A are read

with Section 45B 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 45A becomes final against the employer as well. As such, there is No. hurdle for recovery of

the amount determined u/s 45B of the Act, by invoking the mode of recovery, as contemplated in Sections 45C to 45I.

31. In ESI Corporation v. F. Fibre Bangalore (P) Ltd. 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 45A. 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 45A 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.

10. In the light of the above, the writ petition will stand dismissed. However, there will be No. order as to costs. Consequently, connected

miscellaneous petitions stand closed.

