

(2003) 09 KL CK 0022
In the High Court Of Kerala
Case No : O.P. No. 19664 of 1998

Vijayan

APPELLANT

Vs

Secretary to Government

RESPONDENT

Date of Decision : 02-09-2003

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 12

Citation : (2004) 1 KLT 695 : (2004) 2 LLJ 846

Hon'ble Judges : R. Rajendra Babu, J

Bench : Single Bench

Advocate : M. Pathrose Mathai, for the Appellant; N.N. Sugunapalan, for the Respondent

Final Decision : Dismissed

Judgement

R. Rajendra Babu, J.—Ext.P1 Government Order dated 24.9.1998 directing the Kerala Co-operative Milk Marketing Federation to comply with Clause 26A of the Employees Provident Fund Scheme and directing the respondents from discontinuing or reducing the rate of employees contribution under the E.P.F. Act from 12% on the amount of salary in excess of Rs. 5,000/- per month was under challenge at the instance of some of the employees and the Ernakulam Regional Co-operative Producers Union Officers Association.

2. Heard the learned Counsel for the petitioner and the learned Government Pleader. The Kerala Co-operative Milk Marketing Federation was contributing an equal amount of contribution as employers share to the Employees Provident Fund Scheme. The Audit Department raised objection noting that the share of contribution made by the employer was in excess of the limits under Clause 26A(2) of the Employees' Provident Fund Scheme. The above matter was brought to the notice of the Government. Accordingly, the Government issued Ext.P1 letter to the Kerala Co-operative Milk Marketing Federation to discontinue the remittance of the employers share of contribution in excess of the statutory limits and comply with Clause 26A(2) of the Employees Provident Fund Scheme.

The above order (Ext.P1) is under challenge at the instance of some of the employees as well as the representative of the trade Union.

3. One of the arguments advanced by the learned Counsel for the petitioner was that the Government was not competent to issue such an order like Ext.P1 and as such it was illegal. A reading of Ext.P1 would reveal that the Audit Department made certain objections relating to the contributions made by the employer in excess of the statutory limits to the E.P.F. Scheme and that was brought to the notice of the Government and accordingly, the Government issued Ext.P1 directing to comply with the statutory provisions. Ext.P1 order reads:

"I am directed to invite attention to the letter cited in which you had given replies to several audit queries. Vide Note No. 4 in Part-A of your reply, it is stated that the Employer's share of contribution to EPF have been made by the management to the officer category in excess of the limit fixed. The audit objection in this regard is seen confirmed by you.

As per Clause 29 of the EPF Scheme, 1992, the employer is bound to contribute 8-1/3% (subsequently increased to 10% and now 12% with effect from 22-9-1997) of the Basic Pay+DA of an Employee as Employer's contribution to the EPF Scheme. However, as per Clause 26(A)(2) of the said Scheme, it is stated that if the monthly salary (Basic Pay + Dearness Allowance of an employee exceeds Rs. 1600/P.M. (subsequently increased to Rs. 3000/- and now to 5000/-) the contribution payable by the employer, shall be limited to the amounts payable on the monthly pay of Rs. 1,600/- now this limit is Rs. 5,000/- P.M.

The practice stated to have been followed in the KCMMF and the 3 unions for the last several years is totally against Clause 26(A) of the EPF Scheme.

Therefore, I request you to stop this practice forthwith. It should be made sure that in future the Employers contribution towards EPF be remitted strictly in accordance with the relevant provision in the EPF Scheme, 1992."

Orders regarding recovery of the excess amount paid will be issue subsequently".

Clause 29 of the Employees Provident Fund Scheme deals with the of contribution. Sub-clauses (1) and (2) read as follows:

"(1) The contributions payable by the employer under the Scheme shall be at the rate of (ten percent) of the (basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any) payable to each employee to whom the Scheme applies:

(Provided that the above rate of contribution shall be (twelve per cent) in respect of any establishment or class of establishments which the Central Government may specify in the Official Gazette from time to time under the first proviso to Sub-section (1) of Section 6 of the Act.)

(2) The contribution payable by the employee under the Scheme shall be equal

to the contribution payable by the employer in respect of such employee:

(Provided that in respect of any employee to whom the Scheme applies, the contribution payable by him, may, if he so desires, be an amount exceeding (ten percent) or (twelve percent), as the case may be, of his basic wages, dearness allowance and retaining allowance (if any) subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Act)".

Sub-clause (1) of Clause 29 prescribes the percentage of contribution to be made to the E.P.F. by the employer. Sub-clause (2) says that the contribution payable by the employee under the Scheme shall be equal to the contribution payable by the employer in respect of such employee. The proviso to Sub-clause (2) says that the employee can contribute more than the prescribed limit, but by such payment by the employee in excess of the prescribed limit, it shall not be obligatory on the part of the employer to make such contribution in excess of the prescribed limit. In other words, the employee can contribute in excess of the prescribed limit, but the contribution to be made by the employer can be limited up to the prescribed limit.

Clause 26A of the Schedule deals with retention of membership. Clause 26A reads as follows:

"(1) A member of the Fund shall continue to be member until he withdraws under paragraph 69 the amount standing to his credit in the Fund or is covered by a notification of exemption u/s 17 of the Act or an order of exemption under paragraph 27 or paragraph 27A.

Explanation :- In the case of claim for refund by a member under sub-paragraph (2) of paragraph 69, the membership of the Fund shall be deemed to have been terminated from the date the payment is authorised to him by the authority specified in this behalf by Commissioner irrespective of the date of claim.

(2) Every member employed as an employee other than an excluded employee, in a factory or other establishment to which this Scheme applies shall contribute to the Fund, and the contribution shall be payable to the Fund in respect of him by the employer. Such contribution shall be in accordance with the rate specified in paragraph 29:

Provided that subject to the provisions, contained in sub-paragraph (6) of paragraph 26 and in sub-paragraph (1) of paragraph 27, or sub-paragraph (1) of paragraph 27A, where the monthly pay of such a member exceeds (six thousand and five hundred rupees) the contribution payable by him, and in respect of him by the employer, shall be limited to the amounts payable on a monthly pay of (six thousand and five hundred rupees) including (dearness allowance, retaining allowance (if any) and cash value of food concession)."

4. (At the relevant time the monthly pay was Rs. 5000/- instead of Rs. 6,500). Sub-clause 2 of Clause 26-A says that the employee also shall contribute to the

Fund and the same shall be remitted by the employer and the rate of contribution shall be fixed under Clause 29. Clause 29 prescribes the rate payable by the employer and further says that the employee was at liberty to contribute more than the prescribed limit but the employer can limit the payment at the prescribed rate. Proviso to Sub-clause 2 of Clause 24A says that if the wages of the employee exceeds the prescribed limit, the rate of contribution by the employer and employee shall be limited to the amount payable in the wages limited for the purpose. Thus, there is prohibition in making contribution to the Fund in excess of the wage limits by the employer as well as employee. In the present case, the amount of contribution paid by the employer was in excess of the limits regarding wages prescribed by the Scheme and such pay merit was objected to by the Audit Department. It was in such circumstance, the Federation addressed the Government regarding the future course of action to be taken on the matter, and accordingly Ext.P1 letter was issued by the Government directing compliance as per the Scheme.

5. The main argument advanced by the learned Counsel for the petitioners was that Ext.P1 order was in violation of Section 12 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short the Act) and hence it was illegal. Section 12 of the Act would read :

"Employer not to reduce wages etc.- No employer in relation to (an establishment) to which any (Scheme or the Insurance Scheme) applies shall, by reason only of his liability for the payment of any contribution to (the Fund or the Insurance Fund) or any charges under this Act or the (Scheme or the Insurance Scheme), reduce, whether directly or indirectly, the wages of any employee to whom the (Scheme or the Insurance Scheme) applies or the total quantum of benefits in the nature of old age pension gratuity (provident fund or life insurance) to which the employee is entitled under the terms of his employment, express or implied)"

Section 12 would prohibit the employer from reducing the wages of the employee for avoiding his liability to pay contribution to the E.P.F. Scheme. It would further stipulate that the employer should not reduce whether directly or indirectly the benefits in the nature of old age pension, Gratuity, Provident Fund or Life Insurance to which the employee was entitled under the terms of his employment, express or implied. The learned Counsel for the petitioner submitted that Section 12 should prohibit the employer to reduce the benefits enjoyed by the workmen either directly or indirectly and by reducing the quantum of contribution paid by the employer, there would be a reduction in the benefits and hence Ext.P1 was illegal. But Section 12 does not contemplate all such cases of reduction of the quantum of contribution by the employer. By Section 12 of the Act, an employer was prohibited from reducing the wages of the employee so as to escape from a liability for the payment of any contribution to the fund or to the E.P.F. Scheme. Likewise, when the employee was entitled to the benefits in the nature of old age pension, gratuity, P.F or Life Insurance under

the terms of employment express or implied, such benefits should not be reduced by any act done from the part of the employer. The petitioners had no case that for avoiding payment of the contribution, the wages of the employees had been reduced. They had no case that under the terms of their employment the employees were entitled to any such benefits and those benefits had been reduced by the respondents in any way. In the present case, the employer was contributing to the scheme the employers share in excess of the prescribed limit which was objected to by the audit department. Such deposit in excess of the prescribed limit could be by a mistake or without noticing the proviso to Sub-clause 2 of Clause 29A. By Ext.P1 the Federation was directed to comply with the statutory provision.

6. The learned Counsel for the petitioners placed reliance on the decision of the High Court of Bombay in Consolidated Corporation Protection Pvt. Ltd. v. Hema Chandra Rao 1977 LLJ 114. The facts of the above case were entirely different from the facts of the present case. That was a case where the Company had a voluntary P.F. Scheme to which the employees were contributing at a higher rate. Later the exemption was cancelled and the employees were brought under the statutory scheme. There it was held:

"However not only there is no provision for permitting reduction by the employer but there is a strict direction u/s 12 that the employer shall not be allowed to do so. If this is the real intent and meaning of Section 12, it is obvious that the petitioner cannot claim to reduce his contribution below 10 percent which was his former contribution under the voluntary scheme. It would also follow that until a reduction by an appropriate order has been granted, the employees also cannot contribute less than what they were contributing voluntarily".

Section 12 of the Act had been considered in the above case in an entirely different context/The learned Counsel for the petitioners placed reliance on the decision of the SC in Som Prakash Rekhi v. Union of India and Anr. . The facts of the above case also had no similarity with the facts of the case in hand. That was a case where the pensionary provisions for the Burmah Shell Company employees depended on the terms of a Trust deed under which a pension fund was set up. Later by the provisions of the Burmah Shell (Acquisition of Undertaking in India) Act (2 of 1976), the Company vested with the Central Government. As per the above Act there was reduction in the pension. Section 12 of the Act was relied on in that context. In the present case, the employees were not denied of any existing benefits but the contributions were made by the employer in violation of the provisions of the Scheme and the violation was being rectified. Thus no benefit allowable under the Scheme was denied or reduced and as such Section 12 of the Act cannot have any application in the present case. Hence, I do not find any reasons for interfering with Ext.P1 direction issued by the Government for complying with the provisions of the Scheme. I find no reasons to quash Ext.P1 and this OP has only to be dismissed.

In the result this Original Petition is dismissed.