

GAHC010122472012



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4904/2012

M/S DIMS HOSPITAL and ANR.
NO. 2 MATHGHARIA, ZOO-NARENGI ROAD, B.G. TINIALI, GUWAHATI,
DIST.- KAMRUP, ASSAM, REP. BY ITS MANAGING DIRECTOR DR. TARINI
KANTA SARMA.

2: DR. TARINI KANTA SARMA
MANAGING DIRECTOR
M/S DIMS HOSPITAL NO. 2
MATHGHARIA
ZOO-NARENGI ROAD
B.G. TINIALI
GUWAHATI
DIST.- KAMRUP
ASSAM

VERSUS

THE UNION OF INDIA and ORS
REP. BY ITS SECY. TO THE GOVT. OF INDIA, MINISTRY OF LABOUR, NEW
DELHI.

2:EMPLOYEES' PROVIDENT FUND ORGANIZATION
MINISTRY OF LABOUR
GOVT. OF INDIA
REGIONAL OFFICE
NORTH EAST REGION
G.S. ROAD
BHANGAGARH
GHY- 5.

3:THE RECOVERY OFFICER
EMPLOYEES' PROVIDENT FUND ORGANIZATION
MINISTRY OF LABOUR
GOVT. OF INDIA

REGIONAL OFFICE
NORTH EAST REGION
G.S. ROAD
BHANGAGARH
GHY- 5

Advocates :

Petitioners : Mr. A. Dhar, Advocate

Respondents : Mr. P.K. Roy, Senior Advocate,
Ms. N. Dutta, Advocate

Date of Hearing, Judgment & Order : 17.08.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER [ORAL]

By invoking the extra-ordinary jurisdiction under Article 226 of the Constitution of India, the writ petition has been preferred challenging three orders, that is, [i] Order dated 21.07.2009; [ii] Order dated 08.09.2010; & [iii] Order dated 03.07.2012 passed by the respondent authorities in the Employees Provident Fund Organization [EPFO].

2. The Order dated 21.07.2009 was an Order passed after conclusion of an inquiry proceeding under Section 7A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 whereby the respondent EPFO authority empowered thereunder, had found an amount of ₹ 8,00,265/- due from the petitioner no. 1, M/s DIMS Hospital as dues under the Employees Provident Funds & Miscellaneous Provisions Act, 1952 for the period from May, 2004 to February, 2009. By the Order dated 08.09.2010, a direction was given to the respondent no. 3 to recover an amount of ₹ 7,61,796/- from the petitioner no. 1. The said Order was in the nature of a Prohibitory Order passed by the Recovery Officer, EPFO purportedly under Section 7Q of the Employees Provident Funds & Miscellaneous Provisions Act, 1952. By the Order dated 03.07.2012, the petitioner no. 2, who is the Managing Director of the petitioner no. 1 establishment, was directed to remit an amount of ₹ 6,14,527/- in favour of the respondent no. 3 within 10 [ten] days from the date of receipt of the said Order, failing which, necessary actions under the provisions of the Employees Provident Funds &

Miscellaneous Provisions Act, 1952 would be initiated for realization of the same without further information.

3. The petitioners have averred that the petitioner no. 1 is a unit of M/s May Flower Health Care Private Limited and it runs a hospital named Ms/ DIMS [Dharanidhar Memorial Institute of Medical Sciences and Research] Hospital [‘the Hospital’, for short]. As the Hospital was an establishment under provisions of the Employees Provident Funds & Miscellaneous Provisions Act, 1952 [‘the Act’ and/or ‘the PF Act’, for short], the same was brought under the purview of the PF Act with effect from 01.04.2004 and it was assigned a code number being PF Code no-AS/5614. As per the Proforma for Coverage submitted by the petitioner no. 1, the total nos. of employees in the establishment at the time it was brought under the purview of the PF Act was 28.

4. I have heard Mr. A. Dhar, learned counsel for the petitioners and Mr. P.K. Roy, learned Senior Counsel assisted by Ms. N. Dutta, learned counsel for the respondent nos. 2 & 3.

5. Mr. Dhar, learned counsel for the petitioners has submitted that though the Hospital/Establishment started its functioning in the right earnest, an untoward incident took place on 19.05.2003 and the said incident had ultimately resulted into an Order dated 30.05.2003 from the State Health Establishment Authority, Assam whereby the said authority directed closure of the Hospital/Establishment. The events thereafter, resulted into arrest of the petitioner no. 2 who is the Managing Director of the Hospital/Establishment. As a result, the functioning of the Hospital/Establishment was severely affected and there was exodus of employees from the Hospital/Establishment for engagements elsewhere. As the employees in significant numbers had left the Hospital/Establishment, the number of employees in the Hospital/Establishment came down below 20. Despite all such odds, the Management of the Hospital/Establishment with the hope that the things would turn around, continued to retain the Provident Fund account with the EPFO authorities and did not formally close down the Hospital/Establishment despite the Order of closure from the State Health Establishment Authority, Assam on 30.05.2003. Mr. Dhar has submitted that the petitioner no. 2 being a doctor by profession, had utilized the premises of the Hospital/Establishment for consultation. As it faced severe financial crisis, the Hospital/Establishment made defaults in depositing the dues under the PF Act with the respondent EPFO authorities in time during the period : 2004 to 2009. The same led to initiation of a proceeding before the Assistant Provident Fund Commissioner [Compliance], Regional

Office, North East Region [NER], Guwahati as the Assessing Authority under Section 7A of the PF Act. On receipt of notice, the representatives of the Hospital/Establishment appeared before the said authority and tried to represent the situations then faced by the Hospital/Establishment and with such representation, a prayer was made for waiver of the provident fund dues on the ground of financial crisis. The Assistant Provident Fund Commissioner [Compliance], EPFO did not, however, pay any heed to the difficulties expressed by the petitioners and had gone ahead to determine the statutory dues under the Employees' Provident Funds Scheme, 1952, Employees' Deposit Link Insurance Scheme, 1976 and Employees' Pension Scheme, 1995. Mr. Dhar has contended that such statutory dues were calculated @ ₹ 5,81,708/- under the provisions of Section 7A of the PF Act and in addition, the said authority had also imposed penal interest to the extent of ₹ 2,18,557/- under Section 7Q of the PF Act. It is his contention that the determination which was purportedly made on the basis of an Inspection Report, was arbitrary. After passing of the Order dated 21.07.2009 under Section 7A of the PF Act, the petitioners submitted Representations, dated 14.09.2009 & dated 02.04.2010, before the respondent authorities in the EPFO to reconsider the demand made by them as regards the statutory dues vide Order dated 21.07.2009. The petitioners had represented that the Hospital/Establishment had been facing severe financial crisis subsequent to the Order of closure passed in May, 2003 and exodus of doctors/employees from the Hospital/Establishment en masse. It was further represented before the respondent EPFO authorities that the Hospital/Establishment had to repay a substantial loan to the lender financial institution. But no heed was paid to those Representations and the respondent EPFO authorities had issued a Show Cause Notice on 23.02.2010 directing the Hospital/Establishment to show cause as to why the legal action and prosecution under Section 14 of the PF Act should not be initiated for non-compliance of the Order of the Assessing Authority passed under Section 7A of the PF Act. Thereafter, a Notice of Demand dated 05.05.2010 and a Prohibitory Order dated 08.09.2010 were passed. A First Information Report [FIR] was also lodged before the Officer In-Charge, Noonmati Police Station and the same led to registration of Noonmati Police Station Case no. 17/2011. Mr. Dhar has drawn attention to the contents of the FIR to submit that in the FIR, the respondent authorities had mentioned about default of ₹ 3,97,526/- but later on, the same authorities in the Order dated 03.07.2012, had mentioned about default of ₹ 6,14,527/- as arrear dues. He has contended that the figures mentioned in the FIR and the Order dated 03.07.2012 are at variance and the same makes it clear that the respondent authorities have not proceeded with the matter by proper assessment of the statutory dues of the Hospital/Establishment. Mr. Dhar has submitted that the petitioners had made deposits from time to time with the respondent EPFO authorities but the respondent EPFO authorities

have not provided the statements indicating how those amounts were adjusted and how different figures had been arrived at by them at different point of time. As a result, the petitioners are not in a position to find out the correctness of the demands made by the respondent EPFO authorities.

6. Per contra, Mr. Roy, learned Senior Counsel appearing for the respondent EPFO authorities has contended that the Hospital/Establishment itself in the Proforma for Coverage had declared that it had 28 nos. of employees as on January, 2005. It was never the case of the Hospital/Establishment that the Hospital/Establishment was not functioning and was closed for ever. When the proceeding was initiated under Section 7A of the PF Act, the representatives of the Hospital/Establishment had not even projected in the aforesaid manner but had submitted a Representation for only waiver of the statutory dues on the ground of financial crisis. He has contended that the Enforcement Officers for the purpose of ascertaining the dues of the Hospital/Establishment made enquiries and thereafter, submitted an Inspection Report. The Assessing Authority, that is, the Assistant Provident Fund Commissioner [Compliance], EPFO before passing the Order dated 21.07.2009 had considered the case of the Hospital/Establishment as well as the Inspection Report submitted by the Enforcement Officers. It was after such consideration, the Assessing Authority had arrived at the figure of statutory dues for the period for May, 2004 to February, 2009 and the petitioners have never challenged seriously the manner in which the said figure was arrived at by preferring either any appeal or any review as per the procedure and provisions of the PF Act. He has contended that it is merely stated on behalf of the petitioners that the Representations submitted by it were in the nature of review. The same cannot be termed as either appeal or review as a review or an appeal to be termed so, is required to be filed as the laid down procedure in conformity with the provisions of the PF Act. He has submitted that the figures mentioned in the FIR and the Order dated 03.07.2012 are different for the reason that in the FIR, only the employees' share was mentioned.

7. I have given due consideration of the submissions of the learned counsel for the parties and have also perused the materials brought on record by the learned counsel for the parties through their pleadings.

8. It has emerged that the Hospital/Establishment itself submitted a Proforma for Coverage along with the essential documents before the EPFO authorities stating that as on January, 2005, it had employees strength of 28 [twenty-eight]. As per the Proforma of Coverage, the

Hospital/Establishment was commissioned in April, 2003. Though it mentioned that the functioning was irregular and intermittent upto March, 2004 due to court cases but it also mentioned that with utmost difficulty, the Hospital/Establishment started to function from April, 2004 onwards. It had declared its business activity as Nursing Home with Health Care activity. It had further declared in the Proforma of Coverage that wages disbursed for the month of January, 2005 was around ₹ 1,55,000/-. The details of the 28 nos. of the employees were also provided in the said Proforma of Coverage. It was on the basis of such Proforma of Coverage, the EPFO, Regional Office, North East Region [NER], Guwahati brought the Hospital/Establishment under the purview of the PF Act by an Order dated 11.02.2005 and allotted Code no. AS/5614 to the Hospital/Establishment for the purpose of compliance of the various provisions of the PF Act. The Order dated 11.02.2005 had reported that the Hospital/Establishment had been brought under the purview of the PF Act on the basis of the particulars furnished by the Hospital/Establishment and on the basis of the inspections of the records of the Hospital/Establishment by the Enforcement Officer on 04.02.2005. The Order dated 11.02.2005 had further mentioned that as the Hospital/Establishment had completed the infancy period of 3-years, the provisions of the PF Act and the Scheme framed thereunder would be applicable to the Hospital/Establishment from 01.04.2004. When the Hospital/Establishment defaulted in its payment of dues under the PF Act, the Assessing Authority, that is, the Assistant Provident Fund Commissioner [Compliance], EPFO initiated the proceeding under Section 7A of the PF Act for determination of dues from employers.

9. For ready reference, the provisions contained in Section 7A of the PF Act are quoted hereunder :-

7A. Determination of moneys due from employers.—

[1] The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,—

[a] in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

[b] determine the amount due from any employer under any provision of this Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case

may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary;

[2] The officer conducting the inquiry under sub-section [1] shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 [5 of 1908], for trying a suit in respect of the following matters, namely :—

[a] enforcing the attendance of any person or examining him on oath;

[b] requiring the discovery and production of documents;

[c] receiving evidence on affidavit;

[d] issuing commissions for the examination of witnesses; and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code [45 of 1860].

[3] No order shall be made under sub-section [1], unless the employer concerned is given a reasonable opportunity of representing his case.

[3A] Where the employer, employee or any other person required to attend the inquiry under sub-section [1] fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.

[4] Where an order under sub-section [1] is passed against an employer ex parte, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation.—Where an appeal has been preferred under this Act against an order

passed ex parte and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the ex parte order.

[5] No order passed under this section shall be set aside on any application under sub-section [4] unless notice thereof has been served on the opposite party.

10. On perusal of the Order dated 21.07.2009 passed by the Assessing Authority, it is noticed that the Hospital/Establishment was initially issued the notice under Section 7A of the PF Act on 19.07.2007. The hearing originally fixed on 29.08.2007 and subsequently, adjourned to 27.09.2008, could not be held due to non-appearance of the authorized representatives of the Hospital/Establishment. The Hospital/Establishment was again put on notice under Section 7A of the PF Act on 08.05.2009 and in response to the said notice, two authorized representatives of the Hospital/Establishment appeared before the Assessing Authority on 06.07.2009 and submitted a Representation seeking waiver of the statutory dues on the ground that the Hospital/Establishment was facing financial crisis. The said request was considered by the Assessing Authority and was rejected on the ground that the Hospital/Establishment had not shown any compliance since May, 2004. The Assessing Authority went ahead with the inquiry by considering the Inspection Report submitted by the Enforcement Officer. From the Table depicting details of dues, which was part of the Order dated 21.07.2009, it is evident that the Assessing Authority had taken a sum of ₹ 52,767/- as payable to the employees of the Hospital/Establishment for the month of May, 2004. The figures under the head, 'wages' showed different amounts in different months but it recorded a declining trend under the head, 'wages' during the period from May, 2004 to February, 2009. In February, 2009, the Assessing Authority had recorded a sum of ₹ 13,930/- under the head, 'wages'. The Assessing Authority after having gone through the documents placed before him, assessed the dues for the period from May, 2004 to February, 2009 at ₹ 8,00,265/-. The said amount of ₹ 8,00,265/- comprised of ₹ 5,81,708/- towards dues payable under Section 7A of the PF Act and ₹ 2,18,557/- towards penal interest under Section 7Q of the PF Act. From the Order dated 21.07.2009, it is noticed that the figures are upto the date of assessment and would be increased till the date of actual payment and production of deposit challan.

11. Section 7B of the PF Act has provided for review of orders passed under Section 7A while Section 7-I of the PF Act has provided for appeal against orders passed under Section 7A[I]. The Order

dated 21.07.2009 was subject to both review and appeal. An application for review under Section 7B is to be filed in such form and manner and within such time as may be specified in the Employees Provident Fund Scheme, 1952 ['PF Scheme', for short]. Para 79A of the PF Scheme has provided that any person aggrieved by an order made under sub-section [1] of Section 7A of the PF Act and who desires to obtain a review of such order may apply for a review of that order, as provided in sub-section [1] of Section 7B of the PF Act, can file a review in Form 9 to the authority, who passed such order. It has further provided that no application for review of an order would be entertained by the concerned Officer unless the application for review is submitted within 45 days from the date of making such order. On the other hand, as per Section 7-I, any person aggrieved by an order passed under sub-section [1] of Section 7A may prefer an appeal to a Tribunal against such order. As per sub-section [2] of Section 7-I, every appeal filed under sub-section [1] has to be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed. Section 7-O of the PF Act has prescribed that no appeal by the employer shall be entertained by a Tribunal unless he has deposited with it seventy-five per cent of the amount due from him as determined by an officer referred to in Section 7A. As per the proviso thereof, the Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under the Section.

12. On a scrutiny of the two Representations stated to have been filed on 14.09.2009 and on 02.04.2010 respectively on behalf of the petitioners allegedly in the nature of review or appeal, it is found that they did not conform to the provisions of either Section 7B or Section 7-I or Section 7-O or Para 79 of the Scheme of the Act either in form or on the point of limitation or as regards compliance of deposit of necessary fees. The non-deposit of necessary fees under the PF Act, assessed by Order dated 21.07.2009 by the Assessing Authority, on the part of the petitioner Hospital/Establishment had led to the issuance of [i] the Show Cause Notice dated 23.02.2010; [ii] the Notice of Demand to Defaulter dated 05.05.2010 by the Recovery Officer in accordance with the provisions of Section 8B to Section 8G of the PF Act; and [iii] the Prohibitory Order in Form no. EPF CP-3 dated 08.09.2010 by the Recovery Officer under the provisions by treating the Hospital/Establishment as deemed defaulter. The petitioners have not been able to show any infirmity in respect of either the Show Cause Notice or the Notice of Demand to Defaulter dated 05.05.2010 or the Prohibitory Order dated 08.09.2010. The contention as regards discrepancy in the figures of arrear dues appearing in the FIR dated 13.01.2011 and the Order dated 03.07.2012 appears to be a misplaced one as the respondent EPFO authorities had explained the reason as to why the figures mentioned in the FIR and in the Order dated 03.07.2012

were at variance. As per the EPFO authorities, the figure mentioned in the FIR was in relation to the employees share of PF Contribution, which was ₹ 3,97,526/-. On the other hand, the amount of ₹ 6,14,537/- mentioned in the Notice dated 03.07.2012 was for both employees share and the employers share of PF Contribution and also interest payable under Section 7Q of the PF Act.

13. The contention advanced on behalf of the Hospital/Establishment that in course of time, since in the course of time, there was exodus of employees from the Hospital/ Establishment en masse and the same had led to the default, is not to be accepted, in view of the provision contained in sub-section [5] of Section 1 of the PF Act and the statements made by the Hospital/Establishment itself in the Proforma for Coverage declaring its position as on January, 2005. As per sub-section [5] of the Section 1 of the PF Act, an Establishment to which the PF Act applies shall continue to be governed by the PF Act, notwithstanding that number of persons employed therein at any time falls below 20.

14. The explanation provided from the end of the Hospital/Establishment that the statutory dues under the PF Act as determined by the Assessing Authority, could not be paid on the ground of financial crisis faced by it is also not a ground, which can be accepted. Similarly, the prayer seeking waiver of the arrear amount, full or part, also cannot be accepted. It has been held in **Hindustan Times Limited vs. Union o India [UOI] and others**, reported in [1998] 2 SCC 242 that the obligation to pay the statutory dues into the fund of the EPFO under the provisions of the PF Act is unqualified. The explanation of the employer that the default was due to financial problem faced by the establishment has been held to be not acceptable. In the case in hand also, it is canvassed by the petitioners due to financial problem, the arrear dues could not be deposited and as such, the Court does not find the said ground as a tenable one.

15. In the light of the discussion made and for the reasons assigned, the challenges made by the petitioners in the instant writ petition to the orders, mentioned above, are found not sustainable. Subsequently, the writ petition is found to be bereft of merit and the same is liable to be dismissed. It is accordingly dismissed.

16. During the course of his submissions, Mr. Dhar, learned counsel for the petitioners has submitted that the Hospital/Establishment was never supplied an accurate Statement of Accounts by the EPFO authorities providing details about the manner how the adjustments were made by the EPFO

authorities against the payments received from the Hospital/Establishment from time to time till 03.07.2012 and as such, the Hospital/Establishment was not in a position to find out the exact nature of its liabilities under different heads. He has further submitted that apart from a Statement of Account upto the date of the Order dated 03.07.2012, the respondent EPFO authorities should also provide the Statement regarding the liabilities for the period thereafter. In response, Mr. Roy, learned Senior Counsel appearing for the respondent EPFO authorities has submitted that if any application is received from the Hospital/Establishment mentioning in detail what information about the statutory dues, payments received, adjustment made, etc., are required, there would be no impediment from the ends of the EPFO authorities to provide the necessary information/ documents, to the Hospital/Establishment to the extent permissible, within a reasonable period of time, preferably within a period of 4 [four] weeks from the date of receipt of such application. In view of such submissions made at the Bar by the parties on the aforesaid aspect, there is no necessity to observe anything further except observing that the respondent EPFO authorities are expected to act in the manner submitted above.

JUDGE

Comparing Assistant