IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CWP No. 1289 of 2013 (O&M)
Date of Decision : 4.11.2016

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All India Food Corporation of India Workers
Union, Jagraon, District Ludhiana and another
................Petitioners
vs.

Presiding Officer, Employees Provident Fund
Appellate Tribunal, New Delhi & others.................Respondents

Coram: Hon'ble Mr. Justice P.B. Bajanthri

Present: Mr. Vikas Bahl, Senior Advocate with
Mr. Akshay Rawal, Advocate for the petitioners

Mr. Sanjay Tangri, Advocate for respondent No.2.

Mr. Manav Bajaj, Advocate for
Mr. Sumeet Goel, Advocate for respondent Nos.3 & 4.

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P.B. Bajanthri, J.

The petitioner – All India Food Corporation of India Workers Union and another (for short, hereinafter referred as 'Workers Union') are aggrieved by the order dated 8.10.2012 by which the Employees Provident Fund Appellate Tribunal, New Delhi (for short, hereinafter referred as 'Tribunal'), set aside the order dated 28.2.2011 (Annexure P-7), by which the 2nd respondent had directed the Food Corporation of India to comply with the provisions of

Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short, hereinafter referred as 'EPF Act, 1952'), and to deposit the determined amount of Rs. 80,32,663/- being the provident fund in respect to the Workers Union in Jagraon, District Ludhiana, for the period December 1980 to October 1985 and June 1988 to July 1988 and further Tribunal remanded the matter to the 2nd respondent to decide 7-A of EPF proceedings afresh.

2) On 30.3.1992, under Section 7-A proceedings of the EPF Act, 1952, Assistant Provident Fund Commissioner, determined the provident fund amount towards Workers Union of Food Corporation of India and directed the 4th respondent to deposit the determined amount of Rs. 80,32,663/- for the period December 1980 to October 1985 and June 1988 to July 1988. The 4th respondent is stated to have questioned the validity of the identical orders before this Court. On 18.9.2006, this Court disposed of writ petitions filed by the 4th respondent. Still aggrieved by the order of the learned Single Judge, the 4th respondent preferred LPA. The 4th respondent's LPA No. 164 of 2008 was dismissed.

3) On 13.3.2009 Regional Provident Fund Commissioner, decided identical matters. Consequently, appeal was preferred before the Tribunal and the Tribunal dismissed the appeal on 8.1.2011. Whereas on 28.7.2009, the Supreme Court remanded the matter to this Hon'ble Court vide Annexure P-5 and on 1.11.2010, the Division Bench of this Court decided the cases after remand by common judgment.

4) On 28.2.2011, Regional Provident Fund Commissioner, Ludhiana, directed the 4th respondent to deposit the determined amount, after due considering the claim made by the Workers Union. On 8.10.2012, the 4th respondent preferred an appeal before the Tribunal. The Tribunal set aside the order dated 28.8.2011 and remanded the matter to the Regional Provident Fund Commissioner for fresh enquiry. Thus the petitioners- Workers Union presented this petition contending that it is not a case for remanding the matter to the Regional Provident Fund Commissioner.

5) Learned counsel for the petitioners submitted that the petitioners – Workers Union who were working through the contractors in the Food Corporation of India, consequently, Food Corporation of India is principal employer and the contractor is the employer. Either of them were required to deposit the EPF amount in the EPF Department on behalf of each of the worker. Due to non-compliance of EPF Act, 1952, the Assistant Provident Fund Commissioner, on 31.3.1992, after holding an enquiry determined the EPF amount to the tune of Rs.80,32,663/- for the period from December 1980 to October 1985 and June 1988 to July 1988. The Food Corporation of India, instead of complying the order dated 31.3.1992 of the Assistant Provident Fund Commissioner, preferred an appeal and the matter went up to the Supreme Court and Section 7-A proceedings were freshly redrawn by the Regional Provident Fund Commissioner on 28.2.2011 and determined the same amount as determined by the Assistant Provident Fund Commissioner way back

on 31.3.1992. The petitioners' grievance/claim is pending consideration since 1992 and the EPF is to be deposited in the EPF Department relates back to 1980 to 1988. Therefore, unnecessarily, the Food Corporation of India delaying in deposit of provident fund determined in 7-A proceedings whereby claim of the Workers Union is being deferred indefinitely.

6) Learned counsel for the petitioners further submitted that list of workers was made available in 7-A proceedings on two occasions vide Annexures P-9 and P-10. The same are authenticated and further Annexure P-11 relates to some of the identity cards of the workers which were issued on behalf of the Food Corporation of India. Even reading of zimini orders dated 17.2.2011, 9.2.2011, 17.2.2011 and 23.2.2011, it is evident the Presiding Officer while deciding 7-A proceedings has made efforts to summon the contractors. However, the contractors have not come forward. Thus the 7-A proceedings have been decided in favour of the Workers Union based on the list of workers vide Annexures P-9 and P-10, respectively and so also affidavits filed by the petitioners – Workers Union. Therefore, there is no point in remanding the matter to the Regional Provident Fund Commissioner to decide 7-A proceedings afresh, as directed by the Tribunal.

7) It was further contended by the learned counsel for the petitioners that perusal of para 30 and 36-B of the EPF Scheme, 1952, read with sub-section 3 (A) of Section 7-A and Section 8-A, it was bound down duty of the principal employer – Food Corporation of

India to remit the EPF amount from time to time. In fact EPF Act provides or mandates principal employer to deduct EPF amount from the contractor and to remit the EPF amount in the EPF Department. If such procedure was not adopted, an alternative mode is also provided with the principal employer, in the present case FCI, is required to deposit EPF amount and to deduct the same in the contractors' bill. In other words the Food Corporation of India is the principal employer who is bound down duty to remit the EPF amount irrespective of whether contractor who is employer of the Workers Union failed to deposit. Therefore, Tribunal fell into error in setting aside the order passed under 7-A proceedings by the Regional Provident Fund Commissioner and remanding matter for fresh consideration on the ground that the contractors are not being heard in the matter before determining the EPF to be remitted by the principal employer – Food Corporation of India or contractors.

8) Learned counsel for respondents No. 3 and 4 submitted that 7-A proceedings have been initiated and completed without hearing the contractors through whom the petitioners – Workers Union were working in the respondent – Food Corporation of India. The contractors were supposed to furnish material evidence to demonstrate that petitioners – Workers Union were working under Food Corporation of India or not. Therefore, without hearing the contractors drawing of 7-A proceedings are arbitrary. In support of the said contention, learned counsel for respondents No. 3 and 4 relied on decision of the Apex Court reported in ***Food Corporation***

of India vs. Provident Fund Commissioner and others 1990 (1) SCC 68, wherein appeal filed by the Food Corporation of India was allowed on the score that contractors were not made party to the proceedings and the Commissioner has not exercised all his powers to collate all evidence and material before passing the order.

9) Learned counsel for the EPF Department submitted that 7-A proceedings drawn by the Commissioner are in accordance with the EPF Act, 1952. He relied on Sections 2-A, 6 and 8-A of the EPF Act, 1952. Further he relied on para 30, 36 and 36-B of the EPF Scheme, 1952 and also relied on para 4 of Pension Scheme 1995, so as to contend that principal employer is Food Corporation of India, whose bound down duty is to collect PF contribution from the contractors or deduct such PF amount as and when the contractors claim bills. Therefore, for non-remittance of PF in respect of petitioners – Workers Union, burden is on the principal employer – Food Corporation of India. It was further submitted that Commissioner while deciding 7-A proceedings has given ample opportunity to contractors by summoning from time to time vide Annexures P-12 to P-16. On more than three occasions, contractors were summoned and given opportunity. The contractors have not come forward to assist in 7-A proceedings. Therefore, the Commissioner was compelled to draw 7-A proceedings on the available material like Annexures P-9 to P-11, which relates to list of workers and identity cards of the workers which were attested by the Food Corporation of India. At the same time, respondent No.4 – Food

Corporation of India have not utilized opportunity to produce any material to show that list of workers produced were contrary to any materials.

10) Heard learned counsel for the parties.

11) The Appellate Tribunal remanded the matter to the Regional Provident Fund Commissioner, EPF Department for holding a fresh enquiry on the sole reason that the contractors have not been heard when 7-A proceedings were drawn, without the assistance of the contractors, identification of the petitioners – Workers Union, 7-A proceedings have been drawn. Workers Union were appointed through contractors for discharging the duties in the Food Corporation of India. The Food Corporation of India hired workers through contractors, therefore, the Food Corporation of India would be the principal employer who would be paying wages to the Workers Union through contractors. The Food Corporation of India was bound down duty to remit PF after deducting necessary PF amount and remit the same in the EPF Department. Even provision of the EPF provides that if the contractor failed to settle the PF amount with Food Corporation of India, even then the Food Corporation of India – principal employer is required to remit PF and the same shall be recovered from the contractor while settling bills of the contractor. In this backdrop, it is necessary to peruse the various provisions of the EPF Act, 1952 and EPF Scheme 1952, in particularly Section 2 (f), Section 6, sub-section 3-A to Section 7-A, Section 8-A of EPF Act, 1952 read with para 30, 36 and 36-B of EPF Scheme, 1952 and para 4

of the Employees Pension Scheme 1995. For facility of reference, the relevant provisions of the EPF Act and Scheme are reproduced herein:-

EPF Act, 1952

2. Definitions. - In this Act, unless the context otherwise requires, -

(f) "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer, and includes any person,-

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961) or under the standing orders of the establishment;

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6. Contributions and matters which may be provided for in Schemes. – The contribution which shall be paid by the employer to the Fund shall be ten percent. Of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees whether employed by him directly or by or through a contractor, and the employee's contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten percent 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 this section:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words "ten percent", at both the places where they occur, the words "12 percent" shall be substituted:

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding off of such fraction to the nearest rupee, half of a rupee, or quarter of a rupee.

Explanation I – For the purposes of this section dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

Explanation II. – For the purposes of this section, "retaining allowance" means allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services.

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7A. Determination of moneys due from employers. –

(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.

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8A. Recovery of moneys by employers and contractors.

(1) The amount of contribution that is to say, the employer's contribution as well as the employee's contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of an employee employed by or through a contractor may be recovered by such employer from the contractor, either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

(2) A contractor from whom the amounts mentioned in sub-section 1 may be recovered in respect of any employee employed by or through him, may recover from such employee the employee's contribution under

any Scheme by deduction from the basic wages, dearness allowance and retaining allowance if any payable to such employee.

(3) Notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer's contribution or the charges referred to in sub-section 1 from the basic wages, dearness allowance, and retaining allowance if any payable to an employee employed by or through him or otherwise to recover such contribution or charges from such employee.

Explanation. – In this section, the expressions "dearness allowance" and "retaining allowance" shall have the same meanings as in section 6.

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EPF Scheme 1952

30. Payment of contributions

(1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable

by such member (in this Scheme referred to as the member's contribution).

(2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges.

(3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.

Explanation: For the purposes of this paragraph the expression "administrative charges" means such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, and in respect of which Provident Fund Contribution are payable as the Central Government may, in consultation with the Central Board and having regard to the resources of the Fund for meeting its normal administrative expenses, fix.

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36. Duties of employers

(1) Every employer shall send to the Commissioner, within fifteen days of the commencement of this Scheme, a consolidated return in such form as the Commissioner may specify of the employees required or entitled to become members of the Fund showing the [basic wage, retaining allowance (if any) and dearness allowance including the cash value of any food concession] paid to each of such employees:

Provided that if there is no employee who is required or entitled to become a member of the Fund, the employer shall send a 'NiL' return.

(2) Every employer shall send to the Commissioner within fifteen days of the close

of each month a return- (a) in Form 5, of the employees qualifying to become members of the Fund for the first time during the preceding month together with the declarations in Form 2 furnished by such qualifying employees, and (b) [in such form as the Commissioner may specify], of the employees leaving service of the employer during the preceding month: Provided that if there is no employee qualifying to become a member of the Fund for the first time or there is no employee leaving service of the employer during the preceding month, the employer shall send a 'NIL' return.

(3) [Omitted]

(4) Every employer shall maintain an inspection note book in such form as the Commissioner may specify, for an Inspector to record his observation on his visit to the establishment.

(5) Every employer shall maintain such accounts in relation to the amounts contributed to the Fund by him and by his employees as the Central Board from time to time, direct, and it shall be the duty of every

employer to assist the Central Board in making such payments from the Fund to his employees as are sanctioned by or under the authority of the Central Board.

(6) Notwithstanding anything hereinbefore contained in this paragraph, the Central Board may issue such directions to employers generally as it may consider necessary or proper for the purpose of implementing the Scheme, and it shall be the duty of every employer to carry out such directions.

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36-B. Duties of contractors

Every contractor shall, within seven days of the close of every month, submit to the principal employer a statement showing the recoveries of contributions in respect of employees employed by or through him and shall also furnish to him such information as the principal employer is required to furnish under the provisions of the Scheme to the Commissioner.

<u>Employees Pension Scheme, 1995</u>

4. Payment of contribution

(1) The employer shall pay the contribution

payable to the Employees' Pension Fund in respect of 10[each member] of the Employees' Pension Fund employed by him directly or by or through a contractor. 10. Subs. by G.S.R.134 dated the 28th February, 96, for "the member" (w.e.f. 16th March, 1996)

(2) It shall be the responsibility of the principal employer to pay the contributions payable to the Employees' Pension Fund by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor.

[Provided that the Central Government shall pay the contribution payable to the Employees’ Pension Fund in respect of an employee who is a person with disability under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) and under the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999) respectively, up to a maximum period of three years from the date of commencement of membership of the Fund.]

12) Perusal of the above provisions, it is made clear that liability of the principal employer towards remittance of PF amount.

13) Having regard to the facts and circumstances of the present cases, read with aforesaid provisions, the Appellate Tribunal fell into error to the extent that contractors have not appeared and assisted in the matter of deciding 7-A proceedings, is not defective so as to remand the matter to the Commissioner to decide 7-A proceedings afresh. Learned counsel for the respondent – Food Corporation of India cited decision in ***Food Corporation of India's case (Supra),*** wherein contractor was not arrayed as party, whereas in the present case contractors were arrayed as party and on more than three occasions, notices were served and there is no representation on behalf of the contractors. Thus the Commissioner proceeded to pass order under Section 7-A of the EPF Act, 1952 with material available like Annexures P-9 to P-11. Moreover, it is to be noted that respondent – Food Corporation of India never disputed Annexures P-9 to P-11, apparently for the reason that the same were attested by the Food Corporation of India. Therefore, even assuming that if the contractors are not heard, there will be no change of material and decision. That apart, the PF dues relates back to December 1980 to October 1985 and June 1988 to July 1988. At this juncture hearing

the contractors is impracticable for the reasons that Food Corporation of India – principal employer had ample power to demand and deduct such EPF amount from the contractors under the EPF Act. Perusal of the records, the Food Corporation of India – respondents have not produced any contrary material to Annexures P-9 to P-11, so as to contend that list of workers, who were petitioners, are different from the workers engaged through contractors. Therefore, the order of the Tribunal dated 8.10.2012 is set aside and 7-A proceedings passed by the Regional Provident Fund Commissioner vide order dated 28.2.2011 are upheld.

14) The petition stands allowed.

(P.B. Bajanthri)
Judge

November 4th, 2016
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Whether speaking / reasoned Yes / No

Whether reportable Yes / No