IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.08.2017

CORAM

THE HON'BLE MR.JUSTICE NOOTY.RAMAMOHANA RAO
AND
THE HON'BLE Mr. JUSTICE M.DHANAPALAN

W.A.No.2175 of 2012 and
M.P.No.1 of 2012

Indian Officer's Association
rep. by its General Secretary,
Justice Pratap Singh Maaligai,
No.69, Thiru.Vi.Ka. High Road,
Royapettah High Road,
Chennai-14. ... Appellant/Petitioner

Versus

The Assistant Provident Fund Commissioner,
Employees Provident Fund Organizsation,
Regional Office, Tamil Nadu Region,
No.37 Royapettah High Road,
Chennai-14. ... Respondent/Respondent

Writ Appeal filed under Clause 15 of the Letters Patent against the order dated 18.10.2011 passed in W.P.No.22397 of 2008 by a Single Judge of this Court.

Prayer in WP.22397/2008

This Writ Petition is preferred under Article 226 of the Constitution of India praying for the issue of a Writ of certiorari, calling for the records of the impugned order passed by the respondent herein in CC II (26)/ TN/48931/Enf/Reg1/08 (Assessment order) dated 9.7.2008 and quash the same

For Appellant : Ms.Vijayakumari Natarajan

For Respondent : Mr.V.Vibishnan

J U D G M E N T

(JUDGMENT OF THE COURT WAS DELIVERED BY NOOTY.RAMAMOHANA RAO, J.,)

This Writ Appeal under Clause 15 of the Letters Patent is directed against the judgment and order rendered on 18.10.2011 by this Court in W.P.No.22397 of 2008. The Writ Petitioner Association is the appellant before us.

2. It appears that some of the well placed and good mannered officers of native India have decided to come together and establish an Association called ''The Indian Officers' Association'' and accordingly, got it incorporated under Act XXI of 1860 as a Society. The Registrar of Joint Stock Companies, Madras, has issued the necessary Certificate of Incorporation on 20.04.1909. That is how, the Writ Petitioner/Appellant Society was brought up and started functioning.

3. The objects of the Association are to equip the public servants with knowledge, skills and behaviour required for managing the task of governance, to enhance the leadership, managerial and administrative capabilities of the executives in Government by organising lectures, seminars, workshops, etc. including projects in collaboration with national and international organisations. One of the aims and objects of the Association was to establish, run, develop or improve any school, college or other educational institution or adopt, assist or help any existing educational institution without profit motive for the benefit of the public in India. It is also one of the aims of the society to establish and maintain Hostel for those who are pursuing academic and/or professional courses in any educational institution in the Metropolitan areas of Chennai recognized by Government of Tamil Nadu and/or by Central Government. One of the other objectives runs as follows:

> ''To establish, promote, set up, run, maintain, assist, finance support and/or running schools and other institutions orphanages, widow homes, senior citizen homes or other establishment for relief and/or help to the poor, old and infirm people and/or destitutes.''

Thus, there appears to be a service motto without an eye on profit making behind establishing the writ petitioner/Appellant Association.

4. It appears that the Regional Commissioner for Employees' Provident Funds had noticed that the establishment of the Writ Petitioner Association has employed 21 persons as on 01.03.2000 and hence, has arrived at a provisional finding that

the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the Schemes framed thereunder are applicable to the Writ Petitioner Association w.e.f. 01.03.2000 and accordingly, Code No.TN-48931 was allotted to the Writ Petitioner/Appellant Association for securing compliance with the various provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 - for short called the Act- and the Schemes framed thereunder.

5. On 20.01.2000, the respondent directed the appellant to file an Investigation Proforma as the total employees found engaged are more than 20. In response thereto, the appellant has disputed that it has not employed 20 or more number of persons, but, instead has appointed a total staff of 19 and the hostel employees are only 8 while there is one Project Staff and one Instructor for blind children and one Part time Scavenger and two Vessel Cleaners and 2 Security Guards provided by M/s.Eagle Securities Agencies.

6. It is also the case of the Appellant Association that out of 19 persons employed, seven of them are aged more than 60 years and hence the establishment of the petitioner Association is not covered under the provisions of the EPF Act. It is, in disregard of this contention, proceedings dated 25-26th April 2000 have been passed declaring that the petitioner Association is covered by the provisions of the EPF Act w.e.f. 01.03.2000. The Appellant Association has preferred a Review before the respondent and that was rejected on 14th June 2004. Aggrieved thereby, W.P.No.19538/2004 was instituted. This Court, by its order dated 03.02.2006, remitted the matter back for consideration afresh to examine and decide such question of fact as to whether there are really 20 persons employed or not. The matter was once again examined by the respondent and an order was passed on 01.06.2007. The operative portion of the said order reads as under:

> ''Now, therefore, I Sh.Manoj Kumar, Assistant Provident Fund Commissioner in exercise of the powers conferred on me under Section 7A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 having gone through the case file and on consideration of the facts of the case the submission made and evidence on record thereby order that the coverage under Section 1(3)(b) communicated to the employer on 14.06.2004 holds good.''

7. That gave rise to the second Writ Petition No.27693/2007 filed by the appellant. This Court examined this matter once again on 23.08.2007 and by its order dated 23.08.2007 and finding that no reasons have been assigned for arriving at the conclusion that the establishment is covered by

Section 1(3)(b) of the EPF Act and hence, set aside the said order dated 01.06.2007 and remitted the matter back for consideration afresh. It is, in pursuance of the order passed by this Court dated 23.08.2007, the issue came to be considered afresh by the Assistant Commissioner of Provident Fund and he passed a detailed order on 09.07.2008, assigning reasons as to how the Establishment has utilised the services of 3 Security Persons making the employees strength as 20 and hence the establishment is covered under Section (1)(3)(b) of the EPF Act and held that the order passed earlier on 14.06.2004 holds good. This order dated 09.07.2008 passed by the respondent is challenged in W.P.No.22397/2008.

8. The learned Single Judge (Justice K.Chandru) by judgment rendered on 18th October 2011, has dismissed the Writ Petition for two reasons. The first question as to the number of employees engaged by the Establishment is essentially a question of fact and any dispute in respect thereof can only be adjudicated based upon the material available on record. In so far as the Exemption Notification under Section 16(2) of the EPF Act is concerned, it has no relevance to the case on hand. It is against this order of the learned Single Judge, the present appeal has been preferred.

9. We have heard Smt.Vijayakumari Natarajan, learned Counsel for the appellant at great length as well as Mr.V.Vibishnan, learned Standing Counsel for the Employees Provident Fund.

10. The learned Counsel for the appellant would contend that the petitioner Association is a non-profit making Public Charitable Association and consequently, it is an exempted Establishment. The learned Single Judge has erroneously brushed aside such a contention by tersely observing that it has no relevance. The learned Counsel for the appellant would submit that Section 16 of the EPF Act has specified that the provisions of the Act will not be applicable to certain establishments. Sub-Section (2) of Section 16 reads as under :

> ''(2) If the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification exempt, whether prospectively or retrospectively that class of establishment from the operation of this Act for such period as may be specified in the notification.''

Thus, if the Central Government is of the opinion that any Class of establishment subject to such conditions as may be specified may be exempted either prospectively or retrospectively from the operation of the provisions of the Act for such period as may be specified in the Notification. Therefore, it is entirely open to the Central Government to exempt any class of establishments from the cover of the provisions of the Act. Accordingly, the Central Government has issued a Notification No.S.O.2121 on 04.07.2003 granting exemption to certain establishments specified therein from the operation of the Act for the period commencing from 1st April, 1999 up to 31st March, 2005. The Notification S.O.2121 dated 04.07.2003 clearly exempted those establishments which are run by Public Religious or Charitable Trusts or Endowments including maths, temples, gurudwaras, wakfs, churches or Societies and Trusts for religious or charitable or other public purposes and notified as such by the Central Government under the Income Tax Act, 1961. It is, therefore, urged before us that the Writ Petitioner/Appellant Association, being a Society established for accomplishing other public purposes, is covered by the Notification of the respondent No. S.O.2121 dated 04.07.2003.

11. In that context, the learned Counsel for the appellant has also drawn our attention to the fact that the Director of Income Tax (Exemptions), Chennai, has registered the Writ Petitioner/Appellant Society as a Public Charitable Trust under Section 12(AA) of the Income Tax Act, 1961. It is, hence contended that the observation made by the learned Single Judge that the exemption notification is issued under Section 16(2) of the EPF Act by the Central Government is of no relevance to the case of the Writ Petitioner/Appellant Association and is an unsustainable one and the Writ Petitioner/Appellant should be held as an exempted establishment.

12. It is true that Section 16 of the EPF Act has conferred power on the Central Government to grant exemption in favour of certain class of establishments and in exercise of that power, it did really notify the exemptions through its Notification No.S.O.2121 dated 04.07.2003. It has granted the exemption from the purview of the provisions of the enactment for the period from 01.04.1999 up to 31.03.2005. But, however, it is absolutely relevant to notice that in Clause (b) of the said Notification S.O.2121 dated 04.07.2003, it was required that the Societies or Trusts established for religious or charitable or other public purposes must also be notified as such by the Central Government under the Income Tax Act, 1961.

13. Under Section 12 (AA) of the Income Tax Act, the procedure for registration of a Trust or Institution under Clause (a) or Clause (aa) of Sub-Section 1 of Section 12(A) has been detailed therein. Section 12 (A) of the Income Tax Act declares that the provisions of Sections 11 and 12 of the Income Tax Act shall not apply in relation to the income of any Trust in whose case, the conditions specified therein are fulfilled.

Thus, the Writ Petitioner/Appellant Association, which is registered under Section 12 (AA) of the Income Tax Act, can derive the benefit of the provisions contained under Section 12 A of the Income Tax Act. But, however, the Writ Petitioner/Appellant Association has sought for such benefits by filing its application in Form-10 A before the competent Income Tax Authority only on 03.08.2001 and without much loss of time thereafter, the Director of Income Tax passed appropriate orders on 29.08.2001 registering the Writ Petitioner/Appellant society as a Public Charitable Trust under Section 12 (AA) of the Income Tax Act. Thus, on and from 27.08.2001, the Writ Petitioner/Appellant Society can derive of such benefits that flow from this registration under Section 12 AA of the Income Tax Act and consequently, can also derive the benefits of exemption notified by S.O.2121 dated 04.07.2003 issued under Section 16(2) of the Act.

14. In the instant case, the Writ Petitioner/Appellant Society is sought to be covered as an Establishment for the period commencing from 01.03.2000. Therefore, the fact that the Writ Petitioner/Appellant Society is registered under Section 12 (AA) of the Income Tax Act on 29.08.2001, which is a subsequent date to 01.03.2000, will not confer the benefit of the exemption notified by S.O.2121 dated 04.07.2003 under the Employees' Provident Fund Act.

15. We have, therefore, no hesitation to hold that for the period as on 01.03.2000, the benefit of the exemption notification issued in S.O.2121 dated 04.07.2003 (and the consequential similar notifications of exemption granted by the Central Government through S.O.931 (E) dated 17.08.2004 or the Notification S.O.1431 dated 14.05.2010, extending the period of exemption up to 31.03.2015) cannot be extended to it as the Writ Petitioner/Appellant was registered by the Income Tax Department under Section 12AA only on 29.08.2001.

16. The issue with which we are concerned is not for the period beyond 29.08.2001 and hence, the aforesaid exemption Notification issued under Section 16(2) of the ESI Act will not get attracted. We express no opinion as to whether beyond 29.08.2001, the Writ Petitioner/Appellant Society can avail of such benefit, as such issue is outside the purview of the present case.

17. The only other question which we are required to deal with was as to whether the writ petitioner/appellant Society has employed 20 or more employees as on 01.03.2000, for getting covered by the scope of Section 1(3)(b) of the Act. Pursuant to the order passed by this Court, on 23.08.2007 in W.P.No.27693/2007, a painstaking exercise has been carried out by the Assistant Commissioner of Provident Fund.

18. We have carefully analysed all the materials that were brought on record. The Assistant Provident Fund Commissioner had no difficulty to arrive at a finding of fact that M/s.Eagle Security Services has provided 3 Security Guards, but not two Security Guards to be employed by the Writ Petitioner/Appellant Society. The explanation offered by the Writ Petitioner that it was paying for only two Security Guards supplied by M/s.Eagle Security Services is disbelieved. The reasons are not far to seek. It is brought on record that during the relevant period, Rs.5,400/- were paid to M/s.Eagle Security Services for providing round the clock security cover to the establishment. M/s.Eagle Security Services was paying Rs.1800/- as wages for each Security Guard. Thus, it is clearly inferable that 3 Security Guards are provided by M/s.Eagle Security Services to the establishment of the Writ Petitioner/Appellant Society and for whose wages, a sum of Rs.5,400/- was paid each month by the Writ Petitioner/Appellant Association.

19. This apart, each Security Guard can only be deployed for a eight hour shift duty. The shift duty cannot be assigned for 12 hours, as is sought to be urged on behalf of the Writ Petitioner Society. Perhaps, on a given day, a Security Guard or a couple of them may be asked to stretch themselves and cover the duties for 24 hours. But any such arrangement of 12 hours duty cannot go on day in and day out. A Security Guard cannot be deployed on a 12 hour shift duty, but can be assigned only 8 hours duty. We have, therefore, no hesitation to hold that the finding of fact arrived at by the Assistant Commissioner of Provident Fund to hold that there are 20 or more number of persons employed at the Writ Petitioner Society at the relevant point of time is a finding of fact based upon proper and correct appreciation of the materials marshalled before it and it is a reasonable one.

20. Further, the contention that more than 60 years old are employed for attending to certain other duties by the Writ Petitioner/Appellant Association and hence the establishment cannot be covered by the Act is also rightly found to be of no legal consequence for covering the establishment by the provisions of the Act and the schemes framed thereunder. The Act in principle is a Social Welfare Enactment meant essentially for securing social security for the unorganised private sector employees. Therefore, when the Statute has not linked its coverage to the age of the persons employed, the Assistant Commissioner is right in his opinion that the employment of aged persons cannot secure exemption from the provisions of the Act. Per se, we are in agreement with such a view, which does not fit within the scope of the Act, could not have been accepted by the Assistant Commissioner of Provident Fund, whose primary duty is to ensure that all establishments should be covered by the scope of the enactment and provide necessary social welfare

benefits to the employees concerned. The enactment being for the benefit of the employees, the age of the employees for covering the establishment, perhaps is of no consequence much less of any legal consequence. Therefore, we have no hesitation whatsoever to hold that this Writ Petition does not contain any merit and it is accordingly dismissed. But, without costs. Consequently, connected Miscellaneous Petition is also closed.

21. We must necessarily advert to one submission made by the learned Counsel appearing on behalf of the appellant that some time frame or accommodation should be granted to make the contributions. We grant six months time to the Writ Petitioner to make the contributions as demanded. It is open to make such contributions in 6 monthly instalments or in 2 or 3 monthly instalments as desired by it. The acceptance of such instalment payment shall not be resisted by the respondent.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

tsi

To

The Assistant Provident Fund Commissioner,
Employees Provident Fund Organizsation,
Regional Office, Tamil Nadu Region,
No.37 Royapettah High Road,
Chennai-14.

+ 1 cc to Mr.V.Vibishnan, Advocate,SR.55189

+ 1 cc to Mr.S.Natarajan, Advocate in sr.no.55161(03/10/2017)

W.A.No.2175/2012

AK(CO)
NR 07/09/2017