

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 04-07-2018

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.16106 of 2013

And

M.P.No.1 of 2013

M/s.BNP Paribas Sundaram Global
Securities Operations Pvt. Ltd.,
New No.165, Old No.110,
'Menon Eternity', St. Mary's Road,
Chennai-600 018 represented by its
Vice President-HR. ... Petitioner

Versus

The Regional Provident Fund Commissioner,
Employees Provident Fund Organization,
Regional Office,
37, Royapettah High Road,
Chennai-600 014. ... Respondent

PRAYER: Writ petition is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Mandamus, forbearing the respondent from continuing proceedings in No.CHN/TN/54058/Enf/ Regl/2013 and direct the respondent from continuing the enquiry till such time the pronouncement of the judgment of the Supreme Court on the issue.

For Petitioner : Mr.G.Anand for M/s.T.S.Gopalan & Co.
For Respondent : Mr.V.Sundareshwaran

O R D E R

The summons to appear in person under Section 7A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 [for brevity "EPF&MP Act"] issued by the Competent Authority to the writ petitioner in proceedings dated 3.5.2013 is under challenge in this writ petition.

2. The writ petitioner is an establishment covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The writ petitioner is regularly paying the contribution

in respect of all its eligible employees. As understood by the writ petitioner, all along, in term of Para 29 of EPF scheme, contribution is liable to be paid only on Basic Pay, Dearness Allowance, cash value of Food Concessions and Retaining Allowances, if any. The petitioner has been paying various other allowances like, Conveyance Allowance, Special Allowance, Adhoc Allowance, Chilling Allowance, Stipend, LTA, Medical, Dress Reimbursement, Cold Room Shift Allowance, Attendance Incentive and Meals Allowances part from Basic Pay.

3. However, the writ petitioner was paying the contribution on basic pay excluding allowances as they were not covered under Section 2(b) of the EPF&MP Act which was duly accepted by the Respondent all these years.

4. However, the dispute arose in respect of payment of contribution in relation to all other allowances paid by the writ petitioner to its employees. The matter is now sub-judice before the Supreme Court and an interim order passed by the Hon'ble Supreme Court is enclosed in Page No.25 of the typed set of papers filed along with the writ petitions. In para 4 of the interim order passed by the Hon'ble Supreme Court is extracted hereunder:

"4. By order dated 13th July 2012, another bench of this Court has granted stay of the impugned order by directing the petitioners to deposit 60% of the amount demanded after getting credit to the amount already paid. We are informed that the amount has been deposited with the Provident Fund office concerned.

6. We quite see the merit of the submission. Hence, though we grant leave in these special leave petitions, let all these appeals be listed along with Civil Appeal No.6221 of 2011 for final hearing in the second week of August, 2013. In the meanwhile the petitioners will join two of their employees to represent the employees, and they will be served in the meanwhile. No separate formal order in this regard is required. All the parties are expected to complete the pleadings in the meanwhile.

7. Pending disposal of the present appeals, the interim order granted by this Court earlier will continue to operate. We, however, add that the Provident Fund Commissioner may proceed to make the assessment but no demand will be raised thereon."

5. The learned Senior Counsel appearing on behalf of the writ petitioner cited the order passed in M/s.TVS Logistics Services Ltd. Vs. The Regional Provident Fund Commissioner-I dated 05.03.2014 in W.P.No.6856 of 2014 and the Learned Judge relying upon the interim order granted by the Hon'ble Supreme Court of India concluded that the competent authorities may be permitted to conclude the proceedings under Section 7A of the EPF&MP Act and arrive the quantum and raise the demand based on the Basic Wages and not by including the disputed allowances. Paragraphs 4, 5, 6, 7 and 8 of the order is extracted hereunder:

"4. In this regard, the respondent has issued a notice for enquiry to appear as per the proceedings of the Regional Provident Fund Commissioner-I, under Section 7(A) of the EPF Act. While so, the petitioner has come up with this petition seeking to keep the enquiry in abeyance till such time of pronouncement of the judgment by the Hon'ble Supreme Court on the issue. What are pending before the Hon'ble Supreme Court are by way of Special Leave Petition (Civil) in SLP (C) No.8781- 8782/12. They were taken up to Hon'ble Supreme Court by one M/s.Surya Roshini Limited. In the above matters, similar issued came up before the High Court of Madhya Pradesh. The High Court Madhya Pradesh took the view that the above stated allowances could be included into the basic wages for the purpose of payment of EPF contribution. Challenging the said findings of the High Court of Mdhya Pradesh. High Court, the above SLPs have been filed. In the said SLPs, the Hon'ble Supreme Court has issued an interim order dated 12.04.2013 wherein the Hon'ble Supreme Court has in paragraph 7 directed as follows:

"7.Pending disposal of the present appeals, the interim order granted by this court earlier will continue to operate. we, however, add that the Provident Fund Commissioner may proceed to make the assessment but no demand will be raised thereon."

5. Referring to the above interim order passed by the Hon'ble Supreme Court, which is still in force, the learned counsel for the petitioner would submit that since

precisely the same issue is involved in the present writ petition also, there may be a direction issued to the respondent to keep the enquiry in the abeyance until the final order is passed by the Hon'ble Supreme Court in the above said Special Leave Petitions. That is how, the writ petition is before me for admission.

6. I have heard Mr.S.Ravindran, the learned counsel for the petitioner and Mr.K.Gunasekar, the learned counsel taking notice for the respondent. By consent, the writ petition itself is taken up for final disposal and the same is being disposed of by this order.

7. As I have already pointed out, the only issue which needs to be resolved in this matter is as to whether the allowances enumerated herein above which are paid to the employees shall be included in the basic wages for the purpose of payment of EPF contribution. There are judgments taking conflicting views. So far as this court is concerned, in a batch of writ petitions in W.P.no.15823 of 2010, etc, by order dated 07.06.2011, the Hon'ble Mr.Justice K.Chandru has held that these allowances should be included into basic wages. As against the same, an appeal has been filed in W.A.No.1087 of 2011 wherein, a Division Bench of this Court has granted an interim order of stay of the said order [vide order dated 11.07.2011]. Subsequently, a number of interim orders have been passed by the learned single judges in a similar fashion.

8. In my considered opinion, the above issue now needs to be resolved by the Hon'ble Supreme Court. While granting interim order of stay, the Hon'ble Supreme Court has, however, permitted the Provident Fund Organisation to proceed with the assessment and to pass a final order. However, the Hon'ble Supreme Court has directed that there shall be no demand raised based on such assessment. In the case on hand also, in my considered opinion, the respondents may be permitted to go ahead with the assessment, but, as directed by the Hon'ble Supreme Court, there shall be no demand on such assessment until final order

is passed by the Hon'ble Supreme Court in SLP (C) No.8781-8782/12. However, it is made clear that this order will not in any manner preclude the respondents from making demand based on the basic wages not including the above allowances."

6. What is challenged in the writ petition is only a summon issued to the writ petitioner to appear for an enquiry. It is duty mandatory on the part of the writ petitioner to appear before the authorities and defend their cases in accordance with the procedures as contemplated under the Act and Rules. Contrarily, they have moved this writ petition challenging the very notice issued by the competent authorities and therefore, this writ petition is not maintainable and should be rejected in limine.

7. The Supreme Court has not granted stay in respect of enquiry and the demand. Therefore, the competent authorities must be permitted to exercise their power provided under the Act. The Statutory powers conferred under the Act cannot be taken away at the stage of conducting enquiry and in the event of preventing the competent authority from exercising such powers and then the very purpose and object of the welfare legislation of the Provident Fund will be defeated. What is disputed before the Hon'ble Supreme Court is that certain allowances can be included for the purpose of determining the subscription to be paid by the employer. It is one area where the quantum of contributions are to be arrived. However, the same will not preclude the authority from determining the contributions to be paid otherwise in accordance with the provisions of the Act and Rules. Therefore, total prohibition is impermissible, that will hamper the entire proceedings and also will defeat the very object of the Act.

8. Considering the arguments as advanced by the learned Senior Counsel for the writ petitioner and the learned counsel for the respondent, this court is of an opinion that the present writ petition is moved challenging the summons issued by the competent authority to appear in person for the purpose of defending the case of the writ petitioner. Thus, the proceedings are preliminary in nature and the authorities must be allowed to conduct the enquiry in all respects in accordance with the procedures as contemplated and by providing opportunity to the writ petitioner to defend their case. The process of enquiry cannot be stalled and in such an event it would be difficult for the authority to assess the quantum of contributions to be paid by the employer after a lapse of many years.

9. This court is of an opinion that no writ proceedings can

be entertained against such notice issued for the purpose of participating in the enquiry proceedings in a routine manner. Judicial review in respect of such notices are certainly limited. A writ petition can be entertained against a show cause notice or a summon to appear in person for the purpose of submitting an explanation can be entertained, if the same is issued by an authority having no jurisdiction or competency or an allegation of malafide is raised or if the same is in violation of the statutory rules in force. Even, in the case of, raising the plea of malafides, the said authority has to be impleaded as a party in his personal capacity. In the absence of any of these grounds, no writ petition can be entertained by this Court, under Article 226 of the Constitution of India.

10. In respect of the notices issued by the competent authorities, the authorities must be allowed to proceed with the enquiry and conclude the same in all respects, in accordance with the procedures contemplated under law and by providing reasonable opportunity to all the parties concerned. The powers conferred under the Act is quasi judicial in nature. The competent authorities under the provisions of the Act are functioning as quasi judicial authorities. Thus, they shall be permitted to conduct the enquiries in a fair and reasonable manner and by following the procedures contemplated. This Court is of an undoubted opinion that the institutional respects and responsibilities are to be maintained in all circumstances. The Constitutional Courts cannot usurp the powers of the competent authorities in the absence of any legally acceptable reason, so as to paralyze the quasi judicial functions of the competent authorities under the statute. Once, the proceedings are instituted by setting the law in motion, the intermittent interventions are to be avoided and such interferences cannot be in a routine manner. The provident fund Act is a welfare statute. If the quasi judicial functions are hampered in a routine manner, then it would cause not only inconvenience to the quasi judicial authorities, but also defeat the very purpose of recovery of contributions in accordance with law from the employers. There cannot be any undue delay in implementing such welfare schemes in favour of the employees. Such welfare schemes are enacted to achieve the constitutional principles of social status amongst the workmen/ labourer. Thus, the Courts are to be cautious and keep in mind such constitutional mandates and perspectives in respect of such important welfare legislations.

11. Admittedly, the challenge in the present writ petition is the summons issued to the writ petitioner to appear in person for the purpose of submissions of their documents and records enabling the competent authorities to conduct enquiry and arrive a conclusion in respect of all the contributions to be made.

However, in view of the pendency of the writ petition the exercise is not done for the past three years.

12. Under these circumstances, this court is of an opinion that the writ petitioner is at liberty to appear before the competent authorities as per the notice issued to them and place their records and documents and their statements so as to defend their case in accordance with law. The respondents are also at liberty to proceed with the enquiry proceedings conclude the same in all respects and pass orders.

13. It is made clear that the competent authorities are bound to follow the Act and Rules scrupulously, while undertaking the process in such matters. However, in respect of the disputed allowances shall not be demanded or effected till the final disposal of the cases pending before the Hon'ble Supreme Court of India. The final decision in respect of the disputed allowances shall be kept in abeyance till such time.

14. With these observations, the writ petition stands disposed of. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

Svn

To

The Regional Provident Fund Commissioner,
Employees Provident Fund Organization,
Regional Office,
37, Royapettah High Road,
Chennai-600 014.

+1cc to Mr.T.S.Gopalan And Co, Advocate SR.No.43448

WP 16106 of 2013

GJII(CO)
GN(17/07/2018)