

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 31.05.2018

+ **LPA 302/2018, C.M. APPL.22069/2018 & 22070/2018**
M/S. G4S FACILITY SERVICES INDIA PVT. LTD.

.....Appellant

Through: Mr. Amit Sibal, Sr. Advocate with Mr.
Amitabh Chaturvedi and Mr. Himesh Thakur,
Advocates.

versus

REGIONAL PROVIDENT FUND COMMISSIONER-I

.....Respondent

Through: Mr. Rajesh Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The appellant is aggrieved by the order of a learned single judge, declining to interfere with the decision of the Central Government Industrial Tribunal-cum-Labour Court No.1, Delhi (hereafter "Tribunal") under Section 7-O of the Employees Provident Fund & Miscellaneous Provisions Act 1952 (in short "the EPF Act") in its appeal. The appellant had sought stay of order passed by the Employees Provident Fund Commission (in brief "EPFC"), dated 06.01.2018 under Section 7-A of the EPF Act. Such interim stay was given subject to the appellant depositing 50% of the amount determined to be due from it; it sought an order, of complete waiver, in its writ petition.

2. The facts of the case are that the appellant provides security and other related services, through contracts it enters into with institutions and commercial organizations.

The EPFC after affording an opportunity of hearing to the petitioner, by an order dated 06.01.2018, issued notice requiring it to show cause why contributions for the period from April 2007 to March 2012 should not be assessed and recovered from it; after considering its response and affording it hearing, the final order under Section 7A was that the appellant was liable to pay ₹ 15,40,26,052/-. An appeal against that decision was preferred to the tribunal, under Section 7I of the EPF Act; an order of suspension of the requirement (of depositing the amount determined as a condition precedent for hearing the appeal) was sought through an application under Section 7-0 of the EPF Act. After hearing the parties the Tribunal by its dated 19.01.2018 directed admission of the appeal subject to predeposit of 50% of the amount assessed within six weeks.

3. The appellant's writ petition urged that the requirement of 50% pre-deposit was unreasonable and legally untenable; a plea that the entire amount had to be waived, was urged. In support of its argument, the appellant relied on two judgments of the Punjab and Haryana High Court, be arguing that the amount determined by the EPFC was in fact unprincipled and arbitrary, contrary to the EPFC Act. It was highlighted that under Section 6 of the EPF Act contribution to the provident fund is to be computed on basic wages, dearness allowances and retaining allowances, if any, subject to the maximum ceiling of ₹ 6,500/- at the relevant period as provided under paragraph 26A (2) of the EPF Scheme, 1952. It was submitted that the EPFC did not consider the ceiling limit of ₹ 6,500/- in Paragraph 26A(2) of the EPF Scheme beyond which there is no provident fund contribution obligation. Reliance was placed on the definition of "basic wages" as defined under Section 2 (b) of the EPF Act and it does not include the dearness allowance, house rent allowance, overtime allowance, bonus, Commission or any other similar allowances payable to the employee. The other argument was that provident fund was not to be calculated on *gross wages*, (which includes not only basic wage, but also dearness allowance, retaining allowance, house rent allowance, overtime allowance, bonus and commission, etc). The appellant also had relied on a Division Bench Judgment of this Court in *Eicher Motors Ltd. Vs. Union of India & Ors* 48 (1992) DLT 102 (DB) and

further on the judgment in *JCT Ltd. Vs. Income-Tax Appellate Tribunal, Delhi Bench & Ors* 2002 ITR 291.

4. By the impugned order, the learned single judge noticed the submission of parties and also extracted Section 7-O of the EPF Act. It was thereafter stated as follows:

“13. A perusal of the aforesaid provision would make it clear that the Tribunal shall not entertain an appeal unless the appellant makes a pre-deposit of 75% of the amount due and determined as referred to under Section 7A of the EPF Act. However, the proviso to Section 7-O of the EPF Act which is an exception empowers the Tribunal to waive off or reduce the amount to be deposited for the reasons recorded in writing.

14. The EPF Act is a social welfare legislation for the benefit of labour class. Financial hardship cannot be criterion for giving any concession to the employer for non-compliance of any provision of the Act since the contribution to provident fund is hard earned money of the work force. Actually mandate of Section 7-O for pre-deposit of 75% of the amount due from the establishment as determined u/s 7-A is the rule and waiver is an exception. In the light of the facts and circumstances, "Eicher Motors" or "Escorts Limited" does not help the petitioner at all as basic principle is not to interfere in interlocutory matters under Article 226 of the Constitution. "JCT" is under Income Tax Act where one of the criterion is to safeguard the public interest apart from prima facie, balance of convenience and irreparable loss. However, in EPF matters, the interest of work force has also to be taken care of. The Tribunal has taken a balanced approach by the impugned order dated 19.01.2018 asking the petitioner to deposit 50% of the amount determined by the respondent after hearing the parties and once such discretion has been exercised by the Tribunal, this court in the writ jurisdiction is not to sit as a court of appeal to provide complete waiver to the petitioner and substitute its own view or discretion. This court is not to decide the merits of case which is subject matter of appeal before the Tribunal. If this court starts interfering in the interim orders passed by the Tribunal under Section 7-O of the EPF Act while considering the pre-deposit condition under Section 7-O of the EPF Act, it shall give rise to unnecessary challenge to every such order in the writ jurisdiction. The impugned order is an interim one and in case the petitioner succeeds in the appeal before the Tribunal the refund shall automatically follow. Under the writ jurisdiction this court cannot give the findings on the merits of the case leaving nothing for the Tribunal to decide. The questions of merit are to be considered by the Tribunal while hearing and disposing the matter finally. The points raised challenging the

impugned order before the Tribunal in appeal are not to be examined in the writ jurisdiction.

15. For the reasons, I do not find any merit in the writ petition. The same is dismissed accordingly along with the application, being CM No. 5799/2018. Since the proceedings under Section 7A of EPF Act were initiated by the EPFC on the complaint of Sh. Raj Kumar Singh, Vice President, Bhartiya Janta Mazdoor Mahasangh, 11, Ashok Road, New Delhi-110001, it is directed that the said union shall also be impleaded as party before the Tribunal for proper adjudication of appeal.

16. Since the Tribunal by impugned order dated 19.01.2018 has granted six weeks" time to deposit 50% of the amount due which expired on 02.03.2018, the petitioner is granted further four weeks" time to deposit the amount in terms of the impugned order."

5. Mr. Amit Sibal learned senior counsel for the appellant argued that if the appellant were to deposit ₹ 7.70 crores approximately, being the 50% of the amount determined by order dated 06.01.2018 of the EPFC, it would be left with no working capital and its business will come to a complete standstill and it may not be able to pay the minimum wages to its employees and to meet out the statutory and tax obligations. He argued that there were 107 contracts with different clients for deputing work force but not even a single such agreement has been considered by the EPFC while determining its liability under Section 7A of EPF Act.

6. Learned senior counsel also stated that the single judge fell into error in noticing that calculation of provident fund liability had to be only on the basic wage, minus dearness allowance and overtime; furthermore, the liability ceiling (for computational purposes) was in accordance with the EPF Scheme, for which there was a specified cap. By ignoring these salient provisions of law, the EPFC committed manifest illegality and fastened extraordinary liability that could not have been a valid basis for determining liability in accordance with provisions of EPF Act. It was also argued that the single judge completely ignored the fact that liability was computed on the basis of materials and having regard to evidence which related to a period later than the one for which show cause notice was issued. Here, the learned senior counsel submitted that the EPFC (as well as the tribunal) committed a fundamental error in law in seeing that materials which

could not be the basis of a valid determination was considered, thus rendering the decision illegal. As such the orders of the EPFC and the tribunal were *prima facie* unsustainable in law; the appellant being not in possession of adequate means, could not be deprived the right to appeal such fundamentally erroneous orders, by requiring compliance with unreasonable and onerous conditions.

7. Counsel for the EPFC argued that the present case is one of evasion in depositing of provident fund dues by splitting the wages. This was despite the fact that the appellant charged provident fund contributions from its clients on gross wages. It was argued that in terms of the inquiry, held and conclusions recorded, the appellant had charged from its clients provident fund contributions on *actual gross wages, which was beyond even the statutory limit of ₹ 6,500/- at the relevant time* and to escape responsibility of contribution of provident fund, and bifurcated the minimum wages into various components like basic wages, overtime allowance, etc. Counsel submitted that for gain to itself the appellant computed self-determined figures as basic wages and made short payment for provident fund payable to workmen. Counsel submitted that the issue is not what is wage, and whether it can include overtime, dearness allowance, etc. but rather what amounts were collected by the appellant from its clients as provident fund and what was actually credited in the workers' accounts. It was further highlighted that the appellant did not reveal the material, in the form of agreements with wage structure agreed upon by which the appellant deputed various classes of employees to work in the clients' premises, to prove amounts received from each of them.

8. Thus, it is evident that the appellant is aggrieved by the *interim* decision of a statutory tribunal, which exercised discretion to grant *some* waiver, reliving it of the obligation to deposit the entire amount, though it did not grant full waiver. That decision was made by a reasoned order. The impugned order has declined to interfere with *such interim relief*. The parameters of appellate review, therefore in the present proceedings are extremely circumscribed.

9. Section 7-O bars the hearing of any appeal by an employer unless its conditions are satisfied: “*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*”. The tribunal is however, authorized by the proviso to “*for reasons to be recorded in writing, waive or reduce the amount to be deposited.*” The court would not examine the niceties of what circumstances may warrant a tribunal, either generally or in a given case, to grant waiver. In the present case, undoubtedly, waiver was granted to the extent of 1/3rd of the extent of the statutory compulsion. Instead of 75%, the appellant was permitted to deposit 50%.

10. There is a determination, by the EPFC in the present case, that the appellant used to charge amounts *including sums on account of provident fund dues payable*, but artificially segregate wage calculations, to exclude portions of the wages paid to its workers. These are findings of fact. The appellant disputes them; it urges that the ceiling of ₹ 6500/- mandated by the EPF scheme was not taken into account; that the EPFC considered materials relating to a period other than the notice period and that “wage” is a restrictive statutory concept, under the EPF Act. Each of these appear to have been urged before the tribunal; they were also urged before the single judge. It is after taking note of this argument, that the tribunal granted limited waiver. What the appellant complains however, is that the relief should have been not confined to 50% waiver, but of the whole amount. Now, while it may be justified in so urging, there ought to be exceptional and compelling reasons for an appellate court (in a third guessing jurisdiction, so to speak) exercising appeal powers over a writ court’s order (in respect of an interim order of the tribunal) to hold that such determination is unreasonable. In other words, the threshold of interference in appeals over writ determinations of interim orders is necessarily very high.

11. Keeping in mind the limitations spelt out above, the court nevertheless scrutinized the order of the EPFC. That official not only considered these specific contentions in the light of the materials, but analyzed them in the light of the amounts charged from the appellant’s clients, by it. The EPFC found that separate accounts towards wages, HRA, overtime allowances, etc. were not maintained by the appellant and in fact of the total

wage, the segregation made was to the extent that house rent allowance (HRA) amounts were shown to be 25% of the total wage. The finding was that a lump-sum *figures, which included provident fund contributions, based on total amounts calculated,* were charged and recovered from the appellant's clients by it. Given all these factors, this court is of the opinion that the order of the tribunal cannot be characterized as unreasonable or erroneous to such extent as to be interfered with in judicial review.

12. For the foregoing reasons, this court is of opinion that there is no merit in the present appeal; it is accordingly dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

MAY 31, 2018

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