IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 01.10.2020
CORAM

THE HON'BLE MR. JUSTICE P.D. AUDIKESAVALU

W.P. No. 23105 of 2018
and
W.M.P. No. 26988 of 2018

The Commissioner,
Puducherry Municipality,
Lal Bahadur Sastri Street,
Puducherry - 605 001. ... Petitioner

-vs-

1. Union of India,
Rep by the Under Secretary to Government,
Ministry of Labour & Employment,
Government of India,
Shram Shakthi Bhawan,
Rafimarg,
New Delhi - 110 001.

2. The Regional Provident Fund Commissioner,
Employees Provident Fund Organisation,
Sub-Regional Office,
No.101, 100 ft, Road,
Cholan Nagar,
Olandaikeerapalayam,
Puducherry - 605 004.

3. The Assistant Provident Fund Commissioner (Comp),
Employees Provident Fund Organisation,
Sub-Regional Office,
No.101, 100 ft, Road,
Cholan Nagar,
Olandaikeerapalayam,
Puducherry - 605 004.

4. The Enforcement Officer,
Employees Provident Fund Organisation,
Sub-Regional Office,
No.101, 100 ft, Road,
Cholan Nagar,
Olandaikeerapalayam,
Puducherry - 605 004.

5. The Secretary (Local Administration),
Government of Puducherry,
Goubert Avenue,
Beach Road,

White Town,
Puducherry - 605 001. ... Respondents
(R5 suo motu impleaded vide separate order dated 01.10.2020)

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Declaration, declaring that the Notification Gazette No. 29 issued by the First Respondent in S.O. No. 30 dated 08.01.2011 has no application to the Petitioner Municipality and consequentially forebear the Respondents from initiating any further action for recovery from the Petitioner.

For Petitioner : Mr. R.Udayakumar

For Respondents : Mr. J.Madhanagopal Rao,
Central Government Standing Counsel (for R1)

Mrs. V.J. Latha,
Standing Counsel (for R2 to R4)

Mr. D.Ravichander,
Additional Government Pleader (Puducherry)
(for R5)

O R D E R
(through video conference)

Heard Mr. R.Udayakumar, Learned Counsel for the Petitioner, Mr. J. Madhanagopal Rao, Learned Central Government Standing Counsel appearing for the First Respondent, Mrs. V.J.Latha, Learned Standing Counsel appearing for the Second to Fourth Respondents and Mr. D.Ravichander, Learned Additional Government Pleader (Puducherry) appearing for the Fifth Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. The Central Government by Notification No. S.O. 30(E) dated 08.01.2011 in exercise of the powers conferred by Section 1(3)(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred as the 'EPF Act' for short) specified the Municipal Councils and Municipal Corporations constituted under Article 243-Q(1)(b) and (c) of the Constitution of India employing 20 or more persons as a class of establishments to which that Act shall apply with effect from the date of its publication in the Official Gazette. In furtherance thereto, the Third Respondent by notice in proceedings No. TN/ RO-PDY/PC/2153/Comp/Div III/2017 dated 08.06.2018 called upon the Petitioner, viz., Pondicherry Municipality, which is a Municipal Council in terms of Article 243-Q(1)(b) of the Constitution of India to submit the relevant

records for the purpose of assessment under the provisions of the EPF Act. At that stage, the Petitioner has filed this Writ Petition challenging the aforesaid notification dated 08.01.2011 issued by the First Respondent contending that there are separate provisions for payment of provident fund to its employees under the provisions of the Pondicherry Municipalities Act, 1973, governing it, which are still in force.

3. In this context, reference must be made to Section 1(3) of the EPF Act which itself provides that it is subject to the provisions of Section 16 of the EPF Act. The relevant portions of Section 16(1)(b) and (c) of the EPF Act are extracted below:-

> "16. Act not to apply to certain establishments-
> (1) This Act shall not apply-
> ....
> (b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any Scheme or rule framed by the Central Government or the State Government governing such benefits; or
>
> (c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits."

It would be evident on a reading of the aforesaid statutory provision that an establishment stands automatically exempted from the provisions of the EPF Act, if the following twin conditions are satisfied:-

(i) The establishment must be either 'belonging to' or 'under the control of ' the Central or the State Government, or must have been 'set up' under any Central, Provincial or State Act; and

(ii) The employees of such an establishment should be entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government or under the Act under which the establishment has been created governing such benefits.

This position of law has been highlighted by the Hon'ble Supreme Court of India in the decision in Yeshwant Gramin Shikshan Sanstha -vs- Assistant Provident Fund Commissioner [(2017) 5 SCC 579] and Pawan Hans Limited -vs- Aviation Karmachari Sanghatana (Judgment dated 17.01.2020 in Civil Appeal No. 353 of 2020).

4. In response to the query raised by this Court, Learned Counsel for the Petitioner, on instructions, submits that the

Pondicherry Municipal Subordinate Services (Provident Fund) Rules, 1979 (hereinafter referred to as the 'PMSSPF Rules' for short) made in the exercise of powers conferred by Section 114 (2) of the Pondicherry Municipalities Act, 1973, has been made applicable to regular employees in the services of the Petitioner. In this regard, reference may be made to Rule 2 of the PMSSPF Rules, which is extracted below:-

> “2. Categories of municipal servants to whom the rules apply:-
>
> (1) Save as otherwise provided by or under these rules, these rules shall apply to persons appointed Municipal services and posts in connection with the affairs of the municipality.
>
> (2) These rules shall not apply to:-
>
> (a) Government servants borne on provincialised common cadre;
> (b) persons not in whole-time employment;
> (c) persons paid out of contingencies;
> (d) persons paid otherwise than on a monthly basis including those paid only on a piece-rate basis;
> (e) persons employed on contract except where the contract provides otherwise;
> (f) persons re-employed in municipal services after retirement;
> (g) any other class or category of persons whom the Government may by order specifically exclude from the operation of all or any of the provisions contained in these rules.”

It has been pointed out that the benefits granted to those employees is contained in Rule 4 of the PMSSPF Rules, which reads as follows:-

> "7. Application of General Provident Fund (Central Services) Rules, 1960 to Municipal Servants:-
>
> Every Municipal servant of a Municipal Council shall, in respect of Provident Fund benefits, be governed by the provisions of General Provident Fund (Central Services) Rules, 1960 as are for the time being applicable to the Government servants of the Union Territory of Pondicherry subject to the rules hereinafter provided."

This leads to the question as to whether the exemption under Section 16 of the EPF Act would be available to the Petitioner on the facts of this case?

5. It is not disputed that the exemption under the EPF Act would be available in respect of those employees of the Petitioner to whom the PMSSPF Rules apply. At the same time, apart from the regular employees, the Petitioner has been entrusting civil works to contractors who have been engaging

labour in that regard. It is also not out of place to take judicial notice of the fact that Municipalities like the Petitioner have been engaging manpower through self-help groups and also out sourced their work through contractors who have engaged workers for the same. However, the workers, who have been engaged through these contractors employed by the Petitioner, are not entitled to any benefit under the PMSSPF Rules. It must, at once, be pointed out here that in terms of Section 2(f)(i) of the EPF Act, the employees of an establishment are those persons who satisfy the following conditions:-

(a) Those who have been employed for wages in any kind of work, manual or otherwise. It does not matter whether that person is employed by or through a contractor.

(b) Those whose employment is 'in or in connection with' the work of the establishment.

This would obviously mean that on publication of Notification No. S.O. 30(E) dated 08.01.2011 by the Central Government, any person employed by or through a contractor in connection with the work of the establishment of the Petitioner would be an 'employee' falling within coverage under the EPF Act.

6. It would be necessary here to refer to the decision of the Hon'ble Supreme Court of India Yeshwant Gramin Shikshan Sanstha -vs- Assistant Provident Fund Commissioner [(2017) 5 SCC 579], where it has been observed as follows:-

> "38. As we have held that the establishment of the appellant fulfills the twin conditions specified in Section 16(1)(b), it must follow that the same is exempted from the application of the provisions of the Central Act. In the present case, however, it has been found by the authority concerned and the Tribunal, that the 16 part-time employees working in the establishment of the appellant were not covered by the State CPF Scheme applicable to the other permanent employees of the establishment inasmuch as Rule 20 does not cover the part-time employees working in the school, in case they are not doing full-time load of work. True it is that the said finding of fact cannot be overturned. Even so, is it possible to uphold the decision of the authority as confirmed by the Tribunal and the High Court — that the appellant is liable to pay towards the provident fund under the Central Act in respect of its part-time employees? Intrinsic in that direction, is that the provisions of the Central Act are invoked against the establishment of the appellant. That is impermissible. As aforesaid, Section 16 of the Central Act makes it abundantly clear that the provisions of the Central Act will have

> no application to the establishment, if covered by one of the excepted category provided therein. Notably, the exemption is for the establishment as a whole and for all purposes, from the application of the Central Act. Once the establishment is covered by the excepted category specified in Section 16, to get exemption, it is incomprehensible that the provisions of the Central Act can be invoked against such establishment on the specious reasoning that few (16 in this case) part-time employees working thereat were not covered by the CPF Scheme of the State Government, as applicable to rest of its employees.
>
> 39. It is not possible to countenance a situation that although the establishment enjoys exemption from application of the provisions of the Central Act, it is still liable to be proceeded in respect of its few (16) part-time employees. That would lead to an incongruous approach, not envisaged by the Central Act. Taking any other view would result in rewriting of the provisions of the Central Act to mean that although the establishment is exempted from the application of the provisions of the Central Act, yet it would be open to the Central authorities to proceed against such establishment in certain situations. In our opinion, once the establishment qualifies for exemption of application of the provisions of the Central Act, there is no way that the authorities under the Central Act can exercise authority over it or call upon the establishment to comply with the provisions of the Central Act, unless the exemption of the establishment is withdrawn or lifted de jure. Section 16 of the Central Act does not envisage a concept of partial exemption of application of the provisions of the Central Act in respect of employees, but the exemption operates qua the establishment for all purposes."

It appears that a different note has been struck by the Hon'ble Supreme Court of India in Pawan Hans Limited -vs- Aviation Karmachari Sanghatana (Order dated 17.01.2020 in Civil Appeal No. 353 of 2020) by applying the same twin test as follows:-

> "7.2 ....In our view, the Company does not satisfy the second test, since the members of the Respondent-Union and other similarly situated contractual workers were not getting the benefits of contributory provident fund under the PF Trust Regulations framed by the Company, or under any Scheme or any rule framed by the Central Government or the State Government. Consequentially, the exemption under Section 16 of EPF Act would not be applicable to the Appellant-Company."

It is, however, significant to note here that ultimately the employer in that case was required to extend provident fund benefits to the contractual workers not covered under the provident scheme that was applicable to the regular employees so that there is uniformity in the conditions of service of all employees in that establishment.

7. In the present case, the regular employees of the Petitioner have been receiving benefits under the PMSSPF Rules even before the impugned notification dated 08.01.2011 came into force, and if it is construed that the aforesaid notification would have the effect of depriving them of those vested rights, it would lead to unintended adverse consequences of disrupting the pre-existing arrangement of financial affairs. On the other hand, if it is held that the employees of the Petitioner who are not entitled to the benefits under the PMSSPF Rules, cannot be covered by the EPF Act as well despite the said notification which has come into force on 08.01.2011, it would defeat the avowed objects of the beneficial social welfare legislation made for the protection of weaker sections of society, viz., workmen who had to eke out their livelihood from the meagre wages they received after toiling hard for the same, as highlighted by the Hon'ble Supreme Court of India in Daily Partap -vs- Regional Provident Fund Commissioner, Punjab [(1998) 8 SCC 90]. At this juncture, it must be taken cognizance that the Government of Puducherry has realized this anamoly prevailing in the Municipalities of the Union Territory of Puducherry and the Secretary (Local Administration) has issued directions to the concerned authorities by I.D. Note dated 16.02.2017, which are as follow:-

(i) All the Municipal Commissioners shall attend the hearings through a legal practitioner well versed in labour matters without fail and produce records to enable the EPF Office to assess the arrears that are due to the contract workers since 2011.

(ii) All the Municipal Commissioners shall establish an EPF Cell in their respective Municipalities and assign a trained personnel to regularly update the EPF payments of contract staff in the Municipalities and contract workers employed by the contractors of Municipalities.

(iii) From March 15, 2017 all the Municipalities shall comply with all extant instructions of EPF Office in the interest of the contract workers of the Municipalities as a principal employer.

(iv) Director of Local Administration shall monitor the progress of implementation of this direction on a day to day basis till it is implemented and later may conduct a periodical review as deemed fit, once the EPF payment system is streamlined.

It also requires to be placed on record that the Ministry of Labour and Employment, Government of India by Letter No. S-

35025/15-88-SS-II dated 08.01.1989 sent to the Central Provident Fund Commissioner has issued instructions on similar lines, which is extracted below:-

> "(iv) There may be establishments which employ large number of casual/contingent staff who are not entitled to the benefit of provident fund or pension. The casual/contingent staff of such establishment will continue to be covered under the Act, but their regular employees who are entitled to the benefit of provident fund pension should be excluded from the purview of the Act."

It would be useful here to extract from the authoritative pronouncement of the Constitution Bench of the Hon'ble Supreme Court of India in Sant Ram Sharma -vs- State of Rajasthan (AIR 1967 SC 1910), which reads as follows:-

> "7. ....It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

Viewed from this perspective, the authorities of the Employees' Provident Fund Organization cannot be found fault for having initiating proceeding under the EPF Act relying on the instructions from the Government for determining the liability of provident fund dues under the EPF Act in respect of the workers and employees in the establishment of the Petitioner for the relevant period, who are not entitled to the benefits under the PMSSPF Rules.

8. In this backdrop, it is represented by the Learned Counsel for the Petitioner that after receipt of the aforesaid directives from the Government of Puducherry, it has been ensured by the Petitioner to provide specific clauses in the contracts entered with third parties involving engagement of labour to get themselves registered with the Employees' Provident Fund Organization so that the contributions towards provident fund could be made in respect of workers and employees engaged through them. At the same time, it is also explained that for the period from 08.01.2011 till new contracts providing such clauses had been entered, there have been many cases where the Contractors had not subjected themselves to the EPF Act and it is in respect of those cases that the Petitioner is finding it difficult to provide necessary details to the authorities under the EPF Act.

9. Having due regard to the rival submissions made by the Learned Counsel for both sides, it would be relevant to extract Section 21 of the Contract Labour (Regulation and Abolition) Act, 1970, as follows:-

> "21. Responsibility for payment of wages.-
> (1) A contractor shall be responsible for payment of wages to each worker employed by him as contract labour and such wages shall be paid before the expiry of such period as may be prescribed.
> (2) Every principal employer shall nominate a representative duly authorized by him to be present at the time of disbursement of wages by the contractor and it shall be the duty of such representative to certify the amounts paid as wages in such manner as may be prescribed.
> (3) It shall be the duty of the contractor to ensure the disbursement of wages in the presence of the authorized representative of the principal employer.
> (4) In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor."

That apart, Rules 71 and 72 of the Contract Labour (Regulation and Abolition) Central Rules, 1971, provides as follows:-

> "71. A notice showing the wage period and the place and time of disbursement of wages shall be displayed at the place of work and a copy sent by the contractor to the principal employer under acknowledgement.
> 72. The principal employer shall ensure the presence of his authorised representative at the place and time of disbursement of wages by the contractor to workmen and it shall be the duty of the contractor to ensure the disbursement of wages in the presence of such authorised representative. "

It is imperative from these statutory provisions that the Petitioner has to ensure that those of its employees, who are not covered by the PMSSPF Rules, are extended the benefits under the EPF Act with effect from 08.01.2011 when the said Notification issued by the Central Government came into force and that the records maintained by the Contractors for the wages disbursed to the contract labour, when they were employed in the establishment of the Petitioner, would be the basis for determining the contribution of provident fund dues under the EPF Act. As a corollary, it would follow that the Petitioner as Principal Employer, who ought to have verified that the contract labour engaged through Contractors had been paid eligible amount of wages in time, cannot shirk responsibility to find out the employees and workers concerned for remitting dues under the EPF

Act for the relevant period, and the Petitioner would be entitled for this purpose to make an application under Section 7-A(2) of the EPF Act before the concerned authority in the Employees Provident Fund Organization to issue summons to the Contractors to produce evidence regarding the details of the employment of the contractual workers, and necessary orders would have to be passed in that regard taking into consideration the dictum laid down by the Hon'ble Supreme Court of India in Food Corporation of India -vs- Provident Fund Commissioner [(1990) 1 SCC 68], where it has been ruled as follows:-

> "9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person."

In short, the real focus has to be on identifying the contractual workers, who had been engaged through the Contractors, by relevant evidence and ascertain the exact amount towards contribution for provident fund in respect of each of them. There is no gainsaying that the enforcement machinery provided under the EPF Act should not be converted as a ploy just to fill up the coffers of the Employees Provident Fund Organization, where already several crores of rupees are reportedly lying unclaimed, loosing sight of the beneficent objects of that labour welfare enactment.

10. In view of the foregoing discussion, the proper recourse to be followed in this case is to require the Petitioner as well as the Contractors engaged by it to give details of the contract labour engaged from 08.01.2011 onwards with full particulars of their period of employment and actual amount of wages paid to them. After carrying out the aforesaid exercise of identifying the contractual workers engaged by the Petitioner through Contractors for the period from 08.01.2011 onwards, the concerned authority of Employees' Provident Fund Organization shall determine the contribution amount that would have to be paid in respect of each of the contractual workers engaged in the establishment of the Petitioner for the relevant period. It shall be ensured that full opportunity of personal hearing is afforded to the Petitioner and all other persons concerned and a reasoned order shall be passed on merits and in accordance with

law dealing with each of the contentions raised and the decision taken shall be communicated to the concerned parties under written acknowledgment.

In the result, the Writ Petition is disposed on the aforesaid terms. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(insp cell)

//True Copy//

Sub Assistant Registrar

vjt
To

1. The Under Secretary to the Government of India,
Ministry of Labour & Employment,
Shram Shakthi Bhawan,
Rafimarg,
New Delhi - 110 001.

2. The Regional Provident Fund Commissioner,
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Copy to

The Commissioner,
Puducherry Municipality,
Lal Bahadur Sastri Street,
Puducherry - 605 001.

+1cc to M/s.V.J.Latha , Advocate SR.No. 32692

W.P. No. 23105 of 2018

A.SK(19.01.2021)