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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.10.2021

CORAM

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

W.P. NO. 34555 OF 2012
AND
M.P. NO. 1 OF 2012

The Commissioner,
Gopichettipalayam Municipality,
Gopichettipalayam,
Erode District.

... Petitioner

-vs-

1. The Assistant Provident Commissioner,
   Employees Provident Fund Organization,
   Sub Regional Office,
   Anna Salai, Swarnapuri,
   Salem – 636 004.

2. Union of India,
   represented by the Joint Secretary to Government,
   Labour and Employment Department,
   Shram Shakti Bhawan, Rafi Marg,
   New Delhi – 110 001.

3. The Commissioner of Municipal Administration,
   Ezhilagam, Annexe VI Floor,
   Chepauk,
   Chennai - 600 005.

4. State of Tamil Nadu,
   represented by the Additional Chief Secretary to Government,
   Municipal Administration and Water Supply Department,
   Secretariat,
   Fort St. George,
   Chennai - 600 009.

... Respondents

(R2 to R4 suo motu impleaded vide order dated 07.10.2021 made in WP 34555/2012)

Prayer:-

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the

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records relating to the proceedings of the Respondent Municipality issued in TN/SRO/SLM/COMP-II/90013/E2/2012, dated 31.01.2012 and the subsequent orders passed on the Review Petition in TN/SRO/SLM/COMP-II/90013/E2/2012, dated 20.06.2012, quash the same.

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For Petitioner: Mr. Mahesh Nath
for Mr.G.Sankaran

For Respondents: Ms. R.Meenakchi (for R1)

Mr. R.Rajesh Vivakananthan,
Assistant Solicitor General of India (for R2)

Mr. C.Harsha Raj,
Government Counsel (for R3 & R4)

O R D E R
(through video conference)

Heard Mahesh Nath, Learned Counsel for the Petitioner, Ms. R.Meenakchi, Learned Counsel for the First Respondent, Mr. R.Rajesh Vivekananthan, Learned Assistant Solicitor General of India appearing for the Second Respondent and Mr. C.Harsha Raj, Learned Government Counsel appearing for the Third and Fourth Respondents and perused the materials placed on record, apart from the pleadings of the parties.

2. The Petitioner is a Municipal Council in terms of Article 243-Q(1)(b) of the Constitution of India. 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 to 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 the EPF Act shall apply with effect from the date of its publication in the Official Gazette. The First Respondent by Order No. TN/ SRO/SLM/COMP-II/90013/E2/2012 dated 31.01.2012 had determined the liability of the Petitioner towards provident fund contribution as Rs. 2,31,922/- in respect of its establishment for the period from March 2011 to December 2011 under Section 7-A of the EPF Act. The Petitioner thereafter made an application for review dated 21.03.2012 invoking Section 7-B of EPF Act, but the First Respondent by an order No. TN/SRO/SLM/COMP-II/90013/E2/2012 dated 20.06.2012 rejected the same. Aggrieved thereby, the Petitioner has assailed the aforesaid orders dated 31.01.2012 and 20.06.2012 in this Writ Petition.

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3. Before proceeding further, it requires to be noticed that Section 7-B(5) of the EPF Act reads as follows:-

> "7B. Review of orders passed under section 7A:-
> ....
> (5) No appeal shall lie against the order of the officer rejecting an application for review, but an appeal under this Act shall lie against an order passed under review as if the order passed under review were the original order passed by him under section 7A."

Any appeal preferred under that provision would have to be filed within a period of 60 days from the date of receipt of the order appeal against as per Section 7-I of the EPF Act read with Rule 7(2) of the Employees' Provident Fund Appellate Tribunal (Procedure) Rules, 1997, before the Appellate Authority, who has been empowered to condone the delay in filing such appeal for an extended period of 60 days, if sufficient cause for not preferring appeal within that period is made out. However, the Petitioner, who had on 06.07.2012 received the copy of the said order dated 20.06.2012, did not prefer any such appeal before the Appellate Authority, but has instead filed this Writ Petition on 19.12.2012 challenging that order passed by the First Respondent beyond the maximum period of 120 days from the date of its receipt. The Hon'ble Supreme Court of India in Assistant Commissioner (CT) LTU, Kakinada -vs- Glaxo Smith Kline Consumer Health Care Limited (Order dated 06.05.2020 in Civil Appeal No. 2413 of 2020) has emphatically laid down that the High Court in the exercise of powers under Article 226 of the Constitution of India ought not to entertain Writ Petition assailing the order passed by a Statutory Authority which was not appealed against within the maximum period of limitation before the concerned Appellate Authority. In view of that legal position, it is not possible to entertain this Writ Petition challenging the orders of the First Respondent.

4. Learned Counsel for the Petitioner seeks to justify the resort to the equitable jurisdiction of this Court under Article 226 of the Constitution by contending that liability has been fastened on the Petitioner in violation of the principles of natural justice by relying upon the Report dated 25.05.2011 of the Enforcement Officer, which had not been furnished to the Petitioner before passing the impugned order dated 31.01.2012. It must, at once, be noticed here that no such plea had been raised in the application for review dated 21.03.2012 filed by the Petitioner before the First Respondent. However, Learned Counsel for the First Respondent has produced the copy of that Report of the Enforcement Officer before this Court after supplying its copy to Learned Counsel for the Petitioner. It is

seen from the said Report that the Enforcement Officer has ascertained and given details of the persons who had been engaged by the Petitioner through contract with self-help groups, but no dispute has been raised by the Petitioner as to the persons employed and the period for which they had worked or their wages which relevant factors have been duly taken into account for determining the liability of the Petitioner towards contribution of provident fund dues for the relevant period. In other words, it has not been shown as to how any prejudice has been caused to the Petitioner by non-furnishing of the said Report before the passing of the impugned orders.

5. On the other hand, it is seen from the application for review filed by the Petitioner before the First Respondent that the only proposition canvassed was that the persons employed were contract labour engaged through contractors by the Petitioner in respect of whom the Petitioner cannot be required to make contribution towards provident fund under the EPF Act. Such claim is patently misconceived inasmuch as Section 2(f)(1) of the EPF Act defines 'employees' as those who have been employed for wages in any kind of work, manual or otherwise and it does not matter whether that person is employed by or through a contractor, as in this case.

6. It is, no doubt, true that exemption under the EPF Act would be available in respect of those employees of the Petitioner to whom the Tamil Nadu Municipal Services Pension Rules, 1970 (hereinafter referred to as the 'TNMSP Rules' for short) applies. At the same, 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 TNMSP Rules. In this context, it must be recalled here that the Hon'ble Supreme Court of India in Pawan Hans Limited -vs- Aviation Karmachari Sanghatana [(2020) 13 SCC 506] has held that the exemption under Section 16(1)(b) and (c) of EPF Act cannot be availed when the establishment does not cover all its employees under any other provident fund scheme. The Government of Tamil Nadu realized this anamoly prevailing in the Municipalities across the State and issued directions to the concerned authorities in the correspondence in that regard, as stated below:-

(i) The Commissioner of Municipal Administration by Letter No. 57084/ 2011/L3 dated 21.10.2014 addressed to all

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Commissioners of Municipal Councils has communicated the decision of the State Government that though the Municipalities/Corporations take up works through private Contractors, the authorities concerned should ensure that the Contractors pay the PF subscription of their employees duly to the PF organization, otherwise, the responsibility for the same will be fixed on the concerned Municipalities/Corporations, which is the principal employer, if the Contractors default in this regard.

(ii) The Government of Tamil Nadu by Letter No.18823/MC5/2016-1, dated 19.08.2016, sent to the Commissioner of Municipal Administration required all the Municipal Councils in the State to comply with the provisions of the EPF Act, to withdraw the Court cases, in addition to share the details of Contractors/contracts awarded by them in the principal employer portal available in the website of Employees Provident Fund Organization to facilitate the extension of social security benefits to all eligible persons.

(iii) Letter ROC No.1819/2016/L3, dated 19.10.2016, was sent by the Commissioner of Municipal Administration to all Municipal Commissioners to take necessary action in connection with implementation of the EPF Act and the schemes framed thereunder in respect of employees of Municipalities and Corporations and send the report directly to the Employees Provident Fund Organization concerned.

(iv) The Government of Tamil Nadu in Letter No. 14070/ME.3/2016-4, dated 20.12.2016 sent to the Commissioner of Municipal Administration that the Notification No. S.O. 30(E) dated 08.11.2011 issued by the Central Government shall cover all employees of establishments as per definition of 'employee' under Section 2(f) of EPF Act excluding the employees who are getting benefits of provident fund and pension according to TNMSP Rules of the State Government or municipal laws, etc., and that the benefits under the EPF Act have to be extended to all eligible employees.

(v) The Commissioner, Municipal Administration had further sent a Letter Na. Ka. No. 23701/2020/L-1 dated 05.02.2021 to all the Municipal Commissioners reiterating the requirements to comply with the provisions of the EPF Act, including the timely remittance of the contribution deducted from the bills of the contractors as failure to do so, would entail penal consequences.

(vi) The Additional Central Provident Fund Commissioner, Coimbatore was informed by the Commissioner of Municipal Administration by Letter Roc No. 23701/2020/L-1 dated 12.03.2021 of the action taken in that regard.

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 also be useful 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."

It would be relevant here 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

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as a debt payable by the contractor."

That apart, Rules 25(2)(iv), 71, 72 and 73 of the Tamil Nadu Contract Labour Rules, 1975, provides as follows:-

"25. ....

(2) Every licence granted under sub-rule (1) or renewed under rule 29 shall be subject to the following conditions, namely:-

....

(iv) the rates of wages payable to the workmen by the contractor shall not be less than the rates prescribed under the Minimum Wages Act, 1948 (11 of 1948), for such employment where applicable and where the rates have been fixed by agreement, settlement or award, not less than the rates so fixed;

....

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.

73. The authorised representative of the principal employer shall record under his signature a certificate at the end of the entries in the Register of Wages or the 1Register of Wages-cumMuster Roll] as the case may be, in the following form:-

"Certified that the amount shown in column No. ... has been paid to the workman concerned in my presence on ..... at ....." "

It is imperative from these statutory provisions that the Petitioner, as Principal Employer, who ought to verify that the contract labour engaged through contractors are paid eligible amount of wages in time, cannot shirk responsibility to find out the employees and workers concerned for remitting dues under EPF Act for the relevant period. As a corollary, it would follow that the Petitioner has to ensure that those of its employees, who are not covered by the TNMSP Rules, are extended the benefits under EPF Act with effect from 08.01.2011 when the 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.

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7. The result of the foregoing discussion is that the authorities of the Employees' Provident Fund Organization cannot be found fault for having commenced proceeding under the EPF Act relying on the instructions from the Government for determining the liability of provident fund dues 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 TNMSP Rules. Viewed from that perspective, the Petitioner who has failed to carry out its statutory obligation by producing relevant records summoned in the enquiry cannot take advantage of its own wrong to wriggle out of liability. There does not appear to be any infirmity in the impugned orders passed by the First Respondent warranting interference by this Court in the exercise of discretionary powers of judicial review of the decision-making process. It is needless to clarify here that the Petitioner is not precluded from working out its remedies against the respective contractors for reimbursement of the amount of contribution paid towards provident fund before the proper forum in the manner recognized by law.

In the upshot, the Writ Petition, which is devoid of merits, is dismissed. Consequently, the connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

dm/vjt

To

1. The Commissioner,
   Gopichettipalayam Municipality,
   Gopichettipalayam,
   Erode District.

2. The Assistant Provident Commissioner,
   Employees Provident Fund Organization,
   Sub Regional Office,
   Anna Salai, Swarnapuri,
   Salem - 636 004.

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3. The Joint Secretary to the Government of India,
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New Delhi – 110 001.

4. The Commissioner of Municipal Administration,
Ezhilagam,
Annexe VI Floor,
Chepauk,
Chennai - 600 005.

5. The Additional Chief Secretary to the Government of Tamil Nadu,
Municipal Administration and Water Supply Department,
Secretariat,
Fort St. George,
Chennai - 600 009.

+1cc to M/S.G.Sankaran, Advocate, S.R.No.52934
+1cc to M/S.R.Meenakshi, Advocate, S.R.No.52656

W.P. No. 34555 of 2012

EV(CO)
PM/21/10/2021

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