BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 28.07.2021
C O R A M
THE HONOURABLE MR.JUSTICE P.D.AUDIKESAVALU
W. P. (MD) No. 21694 of 2016
and
W.M.P. (MD) No. 15508 of 2016
and
W.M.P. (MD) No. 8432 of 2017

Rameswaram Municipality,
Through its Commissioner,
Rameswaram,
Ramanthapuram District. ... Petitioner

-vs-

1. The Assistant Provident Fund Commissioner,
Employees Provident Fund Organization,
Regional Office, Lady Doak College Road,
Chokkikulam, Madurai - 625 002.

2. The Enforcement Officer,
Compliance Circle/M-5 Dvn/Madurai,
Employees Provident Fund Organization,
Regional Office, Lady Doak College Road,
Chokkikulam, Madurai - 625 002.

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

(R3 and R4 are *suo motu* impleaded
vide order dated 28.07.2021)

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the impugned order of the First Respondent in File No. TN/MD/MDU/91185/Enfc'/M-5/15011/2016 dated 21.09.2016 and quash the same as illegal, devoid of merits and unlawful and consequently directing the First Respondent to conduct a proper enquiry by giving sufficient opportunity to the Petitioner.

For Petitioner	:	Mr. M.Kannan
For Respondents	:	Mr. V.Venkateshwaran (for R1 and R2)
		Mr. R.Ragavendran, Counsel for the Government (for R3 and R4)

O R D E R
(through video conference)

Heard Mr. M.Kannan, Learned Counsel for the Petitioner, Mr. V.Venkateshwaran, Learned Standing Counsel appearing for the First and Second Respondents and Mr. R.Ragavendran, Learned Counsel appearing for the Third and Fourth Respondents and perused the materials placed on record, apart from the pleadings of the parties.

2. The First Respondent by Order No. MD/MDU/91185/ENF'C'/M-5/ 15011/2016 dated 21.09.2016 determined the liability of the Petitioner towards contribution for provident fund dues for the contractual workers engaged for the period from March 2012 to May 2016, under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'the Act' for short). The Petitioner was entitled to prefer appeal against that order under Section 7-I of the Act within a period of 60 days from the date of its receipt in terms of Rule 7(2) of the Employees' Provident Fund Appellate Tribunal (Procedure) Rules, 1997, before the Appellate Authority, who has been empowered to condone 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 did not prefer any such appeal before the Appellate Authority, but has instead filed this Writ Petition on 09.11.2016 challenging the order passed by the First Respondent.

3. It must, at once, be highlighted here that the Hon'ble Supreme Court of India in ***Assistant Collector of Central Excise -vs- Dunlop India Limited*** [(1985) 1 SCC 260] has explained the legal position relating to the exercise of discretionary powers under writ jurisdiction, in the following words:-

> *"3. ....Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such*

matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

There is no acceptable explanation from the Petitioner for not having resorted to that alternative remedy provided under the statute.

4. The only proposition canvassed by the Petitioner in this Writ Petition impeaching the Order No. MD/MDU/91185/ENF'C'/M-5/ 15011/2016 dated 21.09.2016 passed by the First Respondent under Section 7-A of the Act is that it relates to contract labour engaged through contractors by the Petitioner, for whom the Petitioner cannot be fastened liability under the Act. Such contention of the Petitioner is patently misconceived inasmuch as Section 2(f)(1) of the 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. It is not in dispute that exemption under the 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 has to be noticed 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 the 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 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 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 the 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 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 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 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 that perspective, the authorities of the Employees' Provident Fund Organization cannot be found fault for having commenced proceeding under the Act relying on the instructions from the Government for determining the liability of provident fund dues under the 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 TNMSP Rules.

5. 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 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-cum-Muster 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 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 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 the 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 Act. There has been no effort taken by the concerned officials of the Petitioner to even perform their elementary obligation to verify the identity of the contract labour engaged through contractors and the correctness of the amount claimed by the First Respondent towards contribution of provident fund dues for them. A faint attempt has been made to portray as if the impugned order has been passed without affording any opportunity of personal hearing to the Petitioner and without assigning any reasons in determining its liability towards the contribution of provident fund dues. On a perusal of the impugned order, it reveals that despite issuance of notice, the Petitioner did not attend the enquiry and failed to utilize opportunity to dislodge the materials taken into account in the inspection reports based on which, the order had been ultimately passed. In that backdrop, during the previous hearing on 20.07.2021, this Court adjourned the matter to enable the Learned Counsel for the Petitioner to get instructions for withdrawal of the Writ Petition with liberty to file statutory appeal before the Appellate Authority under Section 7-I of the Act for agitating such factual disputes relating to the identification of the contract labour engaged through contractors and the amount of contribution required to be paid towards provident dues for them. When the matter is taken up for hearing today, it is informed by the Learned Counsel for the Petitioner that he has not received any instructions from the Petitioner for preferring such statutory appeal before the Appellate Authority in that regard, which would give rise to the inference that the Petitioner accepts the determination of the amount of contribution towards provident fund dues for the period from March 2012 to May 2016 in the impugned Order No. MD/MDU/91185/ENF'C'/M-5/15011/2016 dated 21.09.2016 passed by the First Respondent under Section 7-A of the Act and there is no dispute in that regard. It is, however, made clear that the Petitioner is not precluded from working out its rights against the respective contractors for reimbursement before the proper forum in the manner recognized by law.

6. The result of the foregoing discussion is that Order No. MD/MDU/91185/ENF'C'/M-5/15011/2016 dated 21.09.2016 passed by the First Respondent determining the liability of the Petitioner for contribution towards provident fund dues for the period from March 2012 to May 2016 under Section 7-A of the Act is confirmed.

7. In the upshot, the Writ Petition is dismissed. Consequently, the connected Miscellaneous Petitions are closed. No costs.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

sm/vjt

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

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   Employees Provident Fund Organization,
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4. The Additional Chief Secretary to Government,
   State of Tamil Nadu,
   Municipal Administration and Water Supply Department,
   Secretariat, Fort St. George,
   Chennai - 600 009.

Copy to

1. The Commissioner,
   Rameswaram Municipality,
   Rameswaram,
   Ramanthapuram District.

+1 CC to M/s.M.KANNAN, Advocate (SR-24338[F] dated 29/07/2021)

W.P. (MD) No. 21694 of 2016
28.07.2021

RD(15.09.2021) 8P 7C