IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3918 OF 2022

CUMMINS TECHNOLOGIES INDIA)
PVT. LTD. THROUGH ITS)
AUTHORIZED REPRESENTATIVE)...PETITIONER

Versus

UNION OF INDIA THROUGH THE)
EMPLOYEES PROVIDENT FUND)
ORGANIZATION AND OTHERS)...RESPONDENTS

Mr. J.P. Cama, Senior Advocate a/w. Mr. Varun Joshi i/b. Mr. Chetan Alai, Advocate for the Petitioner.

Smt. Shehnaz V. Bharucha, Advocate for Respondent Nos.2 to 4.

Mr. Abhijeet Joshi a/w. Mr. Namit Loya a/w. Mr. Swapnil Jadhav a/w. Ms. Varsha Sawant, Advocate for Respondent No.5.

CORAM: DIPANKAR DATTA, CJ &
V. G. BISHT, J.

DATE: APRIL 26, 2022

P.C.:

1. By instituting this writ petition dated 13th January 2022, the petitioning company, inter alia, takes exception to a summons dated 1st October 2019 issued under section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereafter "PF Act", for short).

2. A preliminary objection to the maintainability of the writ petition has been raised by Ms. Bharucha, learned counsel appearing for the respondents 2 to 4. It is submitted that the writ petition laying a challenge to a summons under section 7A of the PF Act, which does not affect any legal right of the petitioning company, ought to dismissed as premature.

3. Mr. Cama, learned senior counsel appearing for the petitioning company submits that the provisions of the PF Act are not applicable to the petitioning company; therefore, the summons ought not to have been issued. He submits that in view of enactment of the All India Council for Technical Education Act, 1987 (hereafter "AICTE Act", for short), which is an enactment subsequent to the PF Act and excludes application thereof to institutions covered by the AICTE Act, it would be harassing for the petitioning company and a complete redundant exercise to respond to the impugned summons, submit to the jurisdiction of the Provident Fund Commissioner and contend that the provisions of the PF Act do not have any applicability and, therefore, no summons thereunder should have been issued. He urges the Court to examine the point as to whether the PF Act applies to the petitioning company as a jurisdictional issue, without relegating it to the Provident Fund Commissioner.

4. In course of hearing, we have been invited to take note of a letter dated 4th September 2018 issued by the Regional Provident Fund Commissioner–1 (Compliance-1) addressed to the Secretary, Ministry of Labour & Employment on the topic of "exemption of benefit of PF & and ESI to NEEM Trainees at par with Apprenticeship Act". Referring to paragraphs 5 and 6 of such letter, Mr. Cama submits that the issue stands closed at the end of the Provident Fund Commissioner and it would only amount to an exercise in futility for the petitioning company to appear before the relevant Provident Fund Commissioner and to impress upon him that the PF Act has no applicability to it in the facts and circumstances.

5. It is also submitted that various writ petitions have been entertained by this Court on similar issue and interim orders have been passed restraining the respondents from taking coercive steps. Accordingly, he prays for similar order.

6. We have heard Mr. Cama and Ms. Bharucha on the preliminary objection.

7. We preface our discussion by referring to an observation in a decision of the Supreme Court in **Martin Burn Ltd. vs. Corporation of Calcutta**, reported in AIR 1966 SC 529. The relevant observation reads thus:

> "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether the Court likes its result or not."

8. Let us now reflect on what section 7A of the PF Act ordains. It reads as follows:

> "**7A. Determination of moneys due from employers**—[(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,—
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> (a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary;

(2) The officer conducting the inquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely: —

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses; and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).

(3) No order shall be made under sub-section (1), unless the employer concerned is given a reasonable opportunity of representing his case.

(3A) Where the employer, employee or any other person required to attend the inquiry under sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.

(4) Where an order under sub-section (1) is passed against an employer ex parte, he may, within three months from the date of communication of such order,

apply to the officer for setting aside such order and if he satisfies the officer that the show cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation.—Where an appeal has been preferred under this Act against an order passed ex parte and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the ex parte order.

(5) No order passed under this section shall be set aside on any application under sub-section (4) unless notice thereof has been served on the opposite party.

9. The statutory intent appearing from section 7A(1)(a & b) read with sub-section (3) as well as the other provisions is clear. Section 7A is a complete code in itself which begins with the procedure for a determination of the points covered by clauses (a) and (b) as to whether the provisions of the PF Act is applicable to an establishment and if so, any amount is due from any employer thereunder. If any dispute arises regarding the applicability of the PF Act to any establishment, such a point has to be raised at the first instance before the relevant Provident Fund Commissioner and it is the statutory duty of such Commissioner to decide the dispute as to applicability of the PF Act to an establishment. While determining such point, the Commissioner has powers akin to a civil court as encapsulated in clauses (a) to (d) of clause (2). In course of proceedings, the right of the employer is amply protected. The statutory mandate of sub-section (3) is that the employer has to be given a reasonable opportunity of representing his case. Sub-sections (3A) and (4) provide how the proceedings are to be carried forward once there is, inter alia, a determination that the provisions of the PF Act apply to an establishment.

10. This being the statutory scheme, what we find in the present case is that without even raising the point before the relevant Provident Fund Commissioner who has issued the summons dated 1st October 2019 that a decision ought to be given by him on the applicability of the PF Act to the establishment, the petitioning company has rushed to this Court. At this stage, no legal right of the petitioning company can be said to have been affected. Unless there is a legally protected right which is judicially enforceable and such right is shown to have been clearly abrogated, the writ courts do not interfere. The Supreme Court in its decision in **Union of India vs. Kunisetty Satyanarayana**, reported in AIR 2007 SC 906*,* has held that ordinarily no writ lies at the stage of show-cause or charge-sheet, because a mere show-cause or charge-sheet does not infringe the right of the noticee or the person charged. Although such decision arose out of a service matter, the observations in paragraphs 14 and 15 thereof have relevance to any matter concerning a challenge to a summons by which a party is invited to participate in proceedings drawn up against it. Pertinently, the jurisdiction of the relevant Provident Fund Commissioner to issue the summons is not challenged; hence, it is not a case of an action initiated without jurisdiction.

11. It is true that this Court has received similar writ petitions and has passed interim orders on it. However, none of the orders brought to our notice records any reason. Hence, we do not feel bound by such orders.

12. It is always open to the petitioning company to appear before the relevant Provident Fund Commissioner and to impress upon him by raising all contentions that are available to it in law for returning a finding in its favour that the PF Act does not apply to it. One never knows, the relevant Provident Fund Commissioner may even rule in favour of the petitioner. However, in view of the statutory mandate, the relevant Provident Fund Commissioner has to decide the dispute regrading applicability of the PF Act at the first instance whereafter any other remedy provided by law may be pursued. We see no reason to entertain this writ petition, and uphold the objection raised by Ms. Bharucha that the writ petition is premature.

13. We grant the petitioning company a fortnight's time to raise a dispute before the relevant Provident Fund Commissioner with regard to the applicability of the PF Act to it. It is, however, made abundantly clear that if, at all, the petitioning company raises such a dispute, the relevant Provident Fund Commissioner shall proceed to decide such dispute, as raised by the petitioner, without in any way being influenced by the letter dated 4th September 2018 referred to above. An appropriate determination may be made in accordance with law.

14. All contentions on merits are left open for the petitioning company to urge before the relevant Provident Fund Commissioner.

15. The writ petition stands dismissed, with the aforesaid observations.

16. No costs.

(V. G. BISHT, J.) **(CHIEF JUSTICE)**

ARTI VILAS KHATATE
Digitally signed by ARTI VILAS KHATATE
Date: 2022.04.27 18:43:58 +0530