BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.10.2022

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THE HONOURABLE MRS.JUSTICE **S.SRIMATHY**

W.P.(MD)No.5875 of 2012
and
M.P.(MD)Nos.1 & 2 of 2012

M/s.Sun Tamil Nadu Security Management,
Services Private Limited. ... Petitioner

vs.

The Commissioner,
Employees Provident Fund Organization,
Regional Provident Fund Office,
Lady Doak College Road, Chokkikulam,
Madurai – 625 002. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of ***Certiorari,*** calling for the records relating to the impugned order passed by the respondent in No.M-7/TN/MD/42662 Enf-C/RO/2012 dated 12.04.2012.

For Petitioner : M/s.M.Tamil Mani

For Respondent : Mr.A.John Xavier

O R D E R

This Writ Petition has been filed for issuance of Writ of ***Certiorari*** to quash the impugned order passed by the respondent in No.M-7/TN/MD/42662 Enf-C/RO/2012, dated 12.04.2012.

2. The brief facts as stated in the affidavit is that the business of providing security services to various commercial establishments and other industrial concerns belonging to the proprietary concern namely, M/s. Sun Security Services was taken over by the petitioner company namely M/s. Sun (Tamil Nadu) Security Management Services Private Limited only from 01.09.2011. The petitioner company was registered under the Employees Provident Fund and the petitioner company took over the assets & liabilities and also the employees from the earlier proprietary concern.

3. M/s. Sun Security Services duly filed returns of income declaring the profit derived from the proprietary concern for the assessment years 2002-2003 to 2011-2012 and the income tax assessments were completed. The proprietary concern was registered under the Employees Provident Fund Act with registered number TN:MD/42662 Enf-C/RO/2012. After the takeover of the employees of the said proprietary concern, the petitioner company continued the business and the number which was originally allotted to the proprietorship firm was transferred to the private limited company. The petitioner company is duly paying the provident dues to the statutory authorities in time. The respondent has passed the impugned order, dated 12.04.2012, under Section 7A(i)(b) of the Employees Provident Fund Act, has made an assessment and determined a due of Rs.1,53,05,829/- without adverting to the facts, materials and circumstances of the case and without proper application of mind has made a biased manner, which is wholly illegal.

4. The petitioner further contended that the respondent had arrived at the amount based on surmises and conjectures without adverting to the fact that the petitioner company was formed only on 06.05.2011 and the business of proprietary concern was taken over only from 01.09.2011. The respondent has taken the balance sheet submitted before the Income Tax authorities and has erroneously come to the conclusion that 2,500 employees are under employment in the petitioner company. The petitioner company is not having 2,500 employees and the employers are below 500 only. In such circumstances, the impugned order is liable to be set aside, for want of proper evidence to come to such conclusion and has prayed to allow the writ petition.

5. The respondents have filed counter affidavit along with vacate stay petition. The respondents submitted that the petitioner have not approached this Court with the clean hands. The petitioner company is an establishment covered under the Provisions of Employees Provident Fund and Miscellaneous Provisions Act, 1952 with Code No.TN/42662. Since there was partial default in the remittance from April 2009 to 2011, a notice, dated 31.11.2011 was issued to the petitioner company to appear before the concerned authorities with all relevant records. The petitioner company appeared through its Managing Director on 20.12.2011 and he had produced all the copies of the income tax returns, balance sheet, profit and loss account and ledger for the year 2009-2010, 2010-2011 and other relevant documents. Tr.V.Vijimon, who is Managing Director of the said company sought time to produce the other relevant documents. On careful perusal of the documents, the respondent had come to the conclusion that the petitioner company has submitted income-tax returns for the year 2009-2010 stating that the salary and wages were shown as Rs.2,95,26,926/- and for the assessment year 2010-2011 it was shown as Rs.4,59,68,607/-, whereas the said company has declared only profit to the tune of Rs.60,01,166/- and Rs.1,14,05,135/- for the year 2009-2010 and 2010-2011, respectively. Since there was huge difference, the EPF organisation had come to the conclusion that the petitioner company has not produced proper records and otherwise produced fake documents only. Moreover, the respondent establishment submitted that there is an alternative remedy is available before the Tribunal and the petitioner has not filed any such petition before the Tribunal. Therefore, the EPF has passed the impugned order and prays that the same may be confirmed and the writ petition may be dismissed.

6. Heard M/s.M.Tamil Mani, learned counsel appearing for the petitioner and Mr.A.John Xavier, learned counsel appearing for the respondent. Perused the material documents available on record.

7. When the case was admitted this Court has granted interim injunction on 25.04.2012. When the writ petition was taken up for hearing on

26.09.2022, there was no representation on the side of the petitioner company. Therefore, this Court passed an order directing the petitioner company to deposit 75% of the amount, within a period of four weeks from the date of receipt of a copy of the order. And also vacated by the interim injunction vide order dated 26.09.2022.

8. Today, when the matter is taken up for hearing, the learned counsel appearing for the petitioner submitted that he has entered an appearance through change of vakalat and sought one more adjournment to explain the case and prayed to recall the earlier order, dated 26.09.2022. Therefore, in order to grant an opportunity, the earlier order is recalled.

9. The contention of the petitioner company is that the proprietorship concern was functioning from the year 2002 to 2011. Subsequently, the firm was converted into a private limited company from the year 2011 onwards. The "Proprietor" had become the "Managing Director" of the private limited. Therefore, the petitioner company took a plea that the notice and other proceedings were initiated against the “private limited company” which has a separate legal entity is not sustainable in law. The notice ought to be issued to the proprietorship concern and prayed to quashed the impugned order. The learned counsel appearing for the respondent submitted that the “Managing Director” is a “Proprietor of the proprietorship concern”, hence the company should be made liable and the Managing Director should be made responsible. This Court is of the considered opinion that this plea is not legally sustainable, since the company has a separate legal entity and the Managing Director has limited liability under Company Law. But as “Proprietor” in the proprietorship concern, the liability is fixed on the “Proprietor” and also he is individually liable. Therefore, this Court directing the proprietorship concern to face the enquiry before the EPF organisation, for the period from 2002-2011. The EPF organisation shall issue notice in the name of M/s. Sun Security Services, proprietorship concern and conduct enquiry as per law.

10. The next plea that was raised by the petitioner company is that the EPF has taken the evidence which was submitted before the Income Tax authorities, which is erroneous since the EPF is payable only to employees who is earning salary below Rs.15,000/-. On perusal of the impugned order, it is seen that the respondent has taken the balance sheet and profit and loss account for the year 2009-2010 which was received from the Income Tax Department. Admittedly, this includes the salary payable to the Managing Director as well as the employees who were receiving salary above Rs.15,000/-. The Employees Provident Fund is mandatorily applicable only to the certain categories and not to all the employees. Therefore, the entire amount stated under the head "salary" in the profit and loss account, balance sheet cannot be taken for calculating for Employees Provident Fund contribution. Therefore, the EPF organisation ought to take the aforesaid relevant facts into consideration and fix the appropriate amount as per Rules. Therefore, this Court deems it fit to remand back the matter to the respondent EPF authorities for conducting a detailed enquiry.

11. For the reasons stated above the following order is passed:

a. The impugned order, passed by the respondent in No.M-7/TN/MD/42662 Enf-C/RO/2012, dated 12.04.2012, is hereby set aside and the Writ Petition is allowed.

b. The respondent shall not take the entire amount stated under the head "salary" in the profit and loss account, balance sheet before the Income tax authorities.

c. The petitioner shall furnish the salary particulars of each and every employees, so that the persons who are above the limit prescribed are excluded from the purview of EPF.

d. The petitioner shall cooperate for the enquiry without delay, without taking any repeated adjournments.

e. The respondent EPF is directed to conduct enquiry, after granting opportunity to the petitioner and the said enquiry shall be completed within a period of 12 weeks, from the date of receipt of a copy of the order.

12. With the above directions, this Writ Petition is allowed. No Costs. Consequently, connected miscellaneous petitions are closed.

Index : Yes / No

Internet : Yes

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27.10.2022

S.SRIMATHY, J

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Order made in
W.P.(MD)No.5875 of 2012

27.10.2022