BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.04.2022

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD).No.2243 of 2013
and
M.P.(MD).No.2 of 2013

The Regional Provident Fund Commissioner,
Employees Provident Fund Organization,
Regional Office,
No.1, Lady Doak College Road,
Chokkikulam,
Madurai - 625 002
... Petitioner

Vs.

1.The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
Scope Minaiar, Core II,
4th Floor, Lakshmi Nagar,
New Delhi - 110 092.

2.M/s.Krishna Security Bureau,
33, Kamaraj East West Street,
K.K.Nagar,
Madurai - 625 020,
Represented through its Proprietor,
O.P.Sundararajan ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, to call for the records relating to the order in ATA.No.275 (13) 2008 dated 28.01.2011 as well as the order dated 15.06.2011 passed by the first respondent tribunal and quash the same.

For Petitioner : Mr.K.Muralishankar

For R-1 : Tribunal

For R-2 : Mr.P.Chandrabose

ORDER

This Writ Petition is filed by the Assistant Provident Fund Commissioner to quash the order passed by the Employees Provident Fund Appellate Tribunal in ATA.No.275 (13) 2008 dated 28.01.2011 as well as the review order dated 15.06.2011 passed by the first respondent tribunal.

2. The brief facts of the case are that the second respondent herein is an "Establishment" covered voluntarily under the provisions of Section 1(4) of the Employees Provident Fund. The PF code assigned to the second respondent is PF Code.No.TN/MD/42613 with effect from 22.10.2001. Based on the same a Coverage Memorandum issued on 16.11.2001 and a subsequent Notification of the Central Provident Fund Commissioner, New Delhi dated 19.06.2002 published in the Official Gazette. The second respondent establishment was remitting the contribution regularly. However, it was found that the second respondent was not remitting the contribution on components of all allowances forming part of wages and attracting the PF liability. Therefore, the respondents were put on notice and an inquiry under Section 7A of the Act was initiated for determination of dues. Personal hearing was also granted on 02.05.2007 by way of issuing summons with directions to the employer to produce relevant records of the establishment. Adequate opportunities were granted to the second respondent. The Enforcement Officer conducted an enquiry and an inspection was carried out in the establishment. In his inspection report dated 24.01.2008 it is stated that as per the statement of the employer duly counter signed by the Notary Public, the second respondent should maintain any Day Book, Cash Book, Ledger, Payment Voucher and Profit and Loss Account, Income and Expenditure etc., and that they are paying service tax only. However, while verifying the PF remittance, the Enforcement Officer observed that the salary has been classified into five categories such as Basic Pay, Medical Allowances, T.A, H.R.A and Washing Allowance whereas Provident Fund were deducted on Basic Pay only and therefore dues payable by the employer in respect of all other allowances except H.R.A was duly reported to the 7A authority. As per Section 2(b) of the Act, the term "basic wages" has to be defined as all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of contract of employment and which are paid and payable in cash to him but does not include the cash value of food concession, Dearness Allowances and other components. However, the medical allowances, TA and washing allowances ought to be included along with the basic pay and PF ought to be determined. Thereafter, a well reasoned 7A order dated 11.02.2008 passed by the petitioner's organization and directed the second respondent to pay a sum of Rs.1,45,747.75 for the period from April 2006 to December 2007. Aggrieved over the same, the second respondent filed an appeal before the first respondent Tribunal in A.T.A.No.275(13)2008. The Tribunal vide order dated 28.01.2011 allowed the appeal on the

ground that the authority without issuing the relevant notification voluntarily covering the establishment in terms of Section 1(4) of the Act cannot apply the provisions of the Act. The Tribunal erred in holding that no such notification was issued, applying the provisions of the Act to the establishment. Further the Tribunal erred by stating the issues wrongly, as if the establishment was engaged in transport service and most of his employees are excluded, employees drawing the salary of more than Rs.6500/- per month whereas the facts remained otherwise. The second respondent by their own admission in their appeal before the Tribunal have stated that they are only engaged in the activity of providing Security Guards. Moreover, it is pertinent to state that the second respondent establishment have nowhere in their appeal, raised the issue of payment of wages of more than Rs.6500/- treating them to be excluded employees. The issue in fact revolved around the matter of splitting of wages artificially by the second respondent establishment, as a measure of subterfuge to reduce the PF liability under the Act. Aggrieved by the same, the petitioner Organization filed a review application before the Tribunal by an application dated 21.03.2011 and the same was dismissed vide order dated 15.06.2011. Aggrieved over the said order, the present Writ Petition has been filed.

3. The respondents have not filed any counter, but on instructions, submitted that the second respondent closed its unit from 01.03.2012 and has stated that the contribution upto and including 29.02.2012 is paid before the authority and requested to cancel the Code No.TN/MD/42613. Therefore, prayed to dismiss this Writ Petition stating that since the second respondent has closed its unit and it is not functioning and the Security Guards service is not provided from date mentioned in the letter dated 24.03.2012.

4. Heard Mr.K.Muralishankar, learned counsel for the petitioner and Mr.P.Chandrabose, learned counsel for the second respondent.

5. The statement of the second respondent is that the unit is closed from the year 2012 was denied by stating that the issue in this case is to pay the contribution for the period from April 2006 to December 2007. The second respondent was functioning during that period. Therefore, subsequent closure of the unit cannot be taken into account for not paying the settlement. The learned Counsel for the petitioner relied on the judgment rendered in Regional Provident Fund Commissioner Vs. Vivekananda Vidyamandir and others batch reported in 2020 17 SCC 643 wherein the Section 2(b) was interpreted and the basic wages would include all other emoluments such as medical allowances, dearness allowances, washing allowances and whatever the nomenclature. Therefore, if there is any contribution split that cannot be considered, then the entire amount shall be paid as salary except for certain others mentioned in the Act. In the present case, the second respondent has declared that the

payment of basic pay as 300 and if the other payments from other heads, the amount would be Rs.1200/-. The said amount ought to be taken into account while fixing the PF contribution. After taking all these factors into consideration, the petitioner's Organization has fixed and quantified the amount payable for the month from April 2006 to December 2007. Therefore, the second respondent is liable to pay the said amount.

6. This Court is taking into consideration the subsequent closure of the unit and as on date, the unit is not functioning and the learned counsel for the second respondent submitted that he is not able to get any instructions and whereabouts are not known. Moreover, the second respondent also submitted that the person who was running the second respondent unit was aged person and as on date it is not known whether he is alive or not. This Court is of the considered opinion that the claim of the second respondent ought to be considered. However, the persons who are entitled to PF also cannot be deprived their rights.

7. Therefore, to meet the ends of justice, this Court directing the second respondent to pay 50% of the amount. It is made clear that the petitioner shall not recover any interest, shall not impose any damages to the second respondent. After the payment of 50% of the amount as stated in supra, the entire file shall be closed. The petitioner is also directed to consider the closure letter circulated by the second respondent and also close the file by cancelling the code number assigned to the second respondent from the date stated in the said letter i.e. on 01.03.2012.

8. With the above direction, this Writ Petition is disposed of. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (P&A)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

Nsr

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

1.The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
Scope Minaiar, Core II,
4th Floor, Lakshmi Nagar,
New Delhi - 110 092.

+1 CC to M/s.K. MURALI SANKAR, Advocate (SR-20548[F] dated 22/04/2022)

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MGJ(10.06.2022) 5P 3C