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W.P.No.20975 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2023

CORAM :

The HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P.No.20975 of 2021
and W.M.P.No.22237 of 2021

Richard Musa

.. Petitioner

VS

The Provident Fund Commissioner,
37, Royapettah High Road,
Opposite Hotel Swagath,
Azad Nagar, Royapettah,
Chennai – 14.

.. Respondent

Petition filed under Article 226 of the Constitution of India praying to issue a writ of certiorarified mandamus to call for the records connected with the impugned order in Ref.No.RO/CHN/NORTH/Accts/50285/GR.32/2021 dated 27.08.2021 and quash the same and to direct the respondent to pay the petitioner the balance amount with accrued interest against the petitioner's employee code PF. A/c No.50285/5204 and UAN.100014604973 into the petitioner's bank account.

For Petitioner : Mr.John Zachariah
for M/s.Fox Mandal and Associates

For Respondent : Mr.V.Sundareswaran



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ORDER

1. The petitioner is aggrieved by the non-release of the balance employee provident fund contributions made by him to the respondent. The petitioner claims to be an International Worker as defined under the Employees' Provident Funds Scheme 1952. He had worked in Chennai with M/s. SPI Cinemas Private Limited. He is a citizen of England. While in employment with M/s.SPI Cinemas Private Limited, he was regularly making employee provident fund contributions.

2. On his contract period getting over with M/s.SPI Cinemas Private Limited, he had sought for release of his employee provident fund contributions. Instead of releasing the entire amount, the respondent had released only part of the said amount. Therefore, he made a representation to the respondent requesting for release of the balance amount, which has been rejected under the impugned order dated 27.08.2021 on the ground that as per the Circular of the respondent dated 27.11.2012, regarding settlement of claims in respect of International Workers, (i.e., who is not covered under Social Security Agreement), the same can be done only if the member satisfies the conditions prescribed under para 69 and para 83 of the



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Employees' Provident Funds Scheme. According to the petitioner, by total non-application of mind to para 69 and para 83 of the Employees' Provident Funds Scheme, the respondent has passed the impugned order. According to him, he has satisfied all the conditions and being an international worker, he is entitled for the balance employee provident fund contributions made by him under the Scheme.

3. A counter affidavit has also been filed by the respondent reiterating the contentions of the impugned order dated 27.08.2021. Apart from that, learned counsel for the respondent drew the attention of the Court to certain provisions of the Employees' Pension Scheme which is not reflected in the impugned order. Para 69 of the Employees' Provident Funds Scheme, 1952 reads as follows :-

"69. Circumstances in which accumulations in the Fund are payable to a member

(1) A member may withdraw the full amount standing to his credit in the Fund—

(a) On retirement from service after attaining of the age of 55 years: Provided that a member, who has not attained the age of 55 years at the time of termination of his service, shall also be entitled to withdraw



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the full amount standing to his credit in the Fund if he attains the age of 55 years before the payment is authorized;

(b) on retirement on account of permanent and total incapacity for work due to bodily or mental infirmity duly certified by the medical officer of the establishment, or where an establishment has no regular medical officer, by a registered medical practitioner designated by the establishment;

(c) immediately before migration from India for permanent settlement abroad [or for taking employment abroad];

(d) on termination of service in the case of mass or individual retrenchment; [***] (dd) on termination of service under a voluntary scheme of retirement framed by the employer and the employees under a mutual agreement specifying, inter alia, that notwithstanding the provisions contained in sub-clause (a) of clause (oo) of section 2 of the Industrial Disputes Act, 1947, (14 of 1947) excluding voluntary retirements from the scope of definition of "retrenchment" such voluntary retirements shall for the purpose be treated



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as retrenchments by mutual consent of the parties;

(e) in any of the following contingencies, provided the actual payment shall be made only after completing a continuous period of not less than [two months] immediately preceding the date on which a member makes the application for withdrawal:-

(i) where a factory or other establishment is closed but certain employees who are not retrenched, are transferred by the employer to other factory or establishment, not covered under the Act; (ii) where a member is transferred from a covered factory or other establishment to another factory or other establishment not covered under the Act, but is under the same employer; and

(iii) where a member is discharged and is given retrenchment compensation under the Industrial Disputes Act, 1947 (14 of 1947);] or;

(f) [***]

(1-A) For the purpose of clause (b) of subparagraph (1)-

(i) where an establishment has been closed,



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the certificate of any registered medical practitioner may be accepted;

(ii) where there is no medical officer in the establishment, the employer shall designate a registered medical practitioner stationed in the vicinity of the establishment; or

(iii) where the establishment is covered by the Employees' State Insurance Scheme, medical certificate from a medical officer of the Employees' State Insurance Dispensary with which, or from the Insurance Medical Practitioner with whom, the employee is registered under that Scheme, shall be produced:

Provided that where by mutual agreement of employers and employees, a Medical Board exists for any establishment or a group of establishments, certificate issued by such Medical Board may also be accepted for the purpose of this paragraph:

Provided further that it shall be open to the Regional Commissioner to demand from the member a fresh certificate from a Civil Surgeon or any doctor acting on his behalf where the original certificate, produced by



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him gives rise to suspicion regarding its genuineness:

Provided further the entire fee of the Civil Surgeon or any doctor acting in his behalf shall be paid from the Fund in case the findings of the Civil Surgeon or any doctor acting on his behalf agree with the original certificate and that where such findings do not agree with the original certificate, only half of the fee shall be paid from the Fund and the remaining half shall be debited to the member's account; (iv) A member suffering from tuberculosis or leprosy [or cancer] even if contracted after leaving the service of an establishment on grounds of illness but before payment has been authorised, shall be deemed to have been permanently and totally incapacitated for work. (2) In cases other than those specified in sub-paragraph (1), the Central Board, or where so authorised by the Central Board, the Commissioner, or where so authorised by the Commissioner, any officer subordinate to him, may permit a member to withdraw the full amount standing to his credit in the fund on ceasing to be an



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employee in any establishment to which the Act applies provided that he has not been employed in any factory or other establishment to which the Act applies for a continuous period of not less than two months immediately preceding the date on which he makes an application for withdrawal. The requirement of two months waiting period shall not, however, apply in cases of female members resigning from the services of the establishment for the purpose of getting married.

(3) [***]

(4) [***]

(5) Any member who withdraws the amount due to him under subparagraph (2) shall, on obtaining re-employment in a [factory or other establishment] to which the Scheme applies, be required to qualify again for the membership of the Fund and on qualifying for membership shall be treated as a fresh member thereof.

(6) [***] "

4. Learned counsel for the petitioner after referring to the aforementioned Section would submit that the petitioner who is



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presently aged 62 years has satisfied all the conditions of para 69 of the Employees' Provident Fund Scheme, 1952 and being an international worker, he is entitled for full withdrawal of his contributions made under the Employees' Provident Fund Scheme.

5. Para : 83 of the EPF Scheme, reads as follows:-

"83, Special provision in respect of International Workers. - The Scheme, Shall, in its application to international Workers as defined in this paragraph, be subject to the following modifications, namely:-

(1) For clause (f) of paragraph 2, the following clause shall be substituted, namely :-

(f) "excluded employee " means, -

(i) an International Worker, who is contributing to a social security programme of his country of origin, either as a citizen or resident, with whom India has entered into a social security agreement on reciprocity basis and enjoying the status of detached worker for the period and terms, as specified in such an agreement ; or

(ii) an International Worker, who is contributing to a social security programme of his country of origin, either as a citizen or resident, with whom India has entered into a bilateral comprehensive economic agreement containing a clause on social security prior to 1st October, 2008, which specifically exempts natural persons of either country to contribute to the social security fund of the host country;]

(2) After clause (j) of paragraph 2, the following clause shall be substituted, namely:-

(ja) "International Worker" means,- (a) an Indian employee having worked or going to work



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in a foreign country with which India has entered into a social security agreement and being eligible to avail the benefits under a social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement;

(b) an employee other than an Indian employee, holding other than an Indian Passport, working for an establishment in India to which the Act applies:

Provided that the worker who is a Nepalese national on account of Treaty of Peace and Friendship of 1950 and the worker who is a Bhutanese national on account of India-Bhutan Friendship Treaty of 2007, shall be deemed to be an Indian worker"

6. Learned counsel for the petitioner would submit that as per the definition of international worker as found in para : 83(2)(jb), the petitioner being a foreign citizen, there is no requirement for Social Security Agreement as claimed by the respondent in the impugned order.

7. Per contra, learned counsel appearing for the respondent apart from relying upon para 69 and para 83 of the Employees' Provident Fund Scheme, 1952 also relied upon para 43-A of the Employees' Pension Scheme, 1995 which deals with international workers. Para : 43-A of the Scheme, reads as follows:-

"The Scheme shall, in its application to International Workers as defined in this paragraph, be subject to the following modifications, namely-



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(1) After clause (vii) of Paragraph 2, the following clause shall be inserted, namely:

(viiia) "International worker" means-

(a) an Indian employee having worked or going to work in a foreign country with which India has entered into a social security agreement and being eligible to avail the benefits under a social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement;

(b) an employee other than an Indian employee, holding other than an Indian passport, working for an establishment in India to which the Act applies.

[Provided that the worker who is a Nepalese national on account of Treaty of Peace and Friendship of 1950 and the worker who is a Bhutanese national on account of India-Bhutan Friendship Treaty of 2007, shall be deemed to be an Indian Worker.]

(2) For clause (xv) of Paragraph 2, the following clause shall be substituted, namely-

(3) Sub-paragraphs (2), (3) and (4) of paragraph 3 shall be omitted.

(4) Provisio to sub-paragraph (2) of Paragraph 4 shall be omitted.

[(4-A) For paragraph 9 of the principal Scheme, the following paragraph shall be substituted, namely:-

"9. Determination of eligible service in respect of International Workers. - The eligible service shall be determined as follows:-

(i) in the case of the "existing member" or the "new entrant", the "actual service" shall be treated as eligible service;

(ii) in the case of the member covered by a social security agreement, the period of coverage under relevant social security



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programme in another country shall be added to actual service and the aggregate thereof shall be treated as eligible service as may be provided in the social security agreement.]

(5) For sub-paragraph (1) of Paragraph 10, the following sub-paragraph shall be substituted,

(6) For paragraph 11, the following paragraph shall be substituted, namely-

"11. Determination of pensionable salary - The pensionable salary shall be the average monthly pay drawn in any manner including on piece rate basis during the contributory period of service of the membership of the Employees Pension Fund."

(7) For paragraph 14, the following paragraph shall be substituted, namely-

"14. Benefits on leaving service before being eligible for monthly members pension - An International Worker covered under a social security agreement entered into between India and another country who has not rendered the eligible service prescribed in Paragraph 9 on the date of exit, or on attaining the age of 58 years, whichever is earlier, shall be entitled to a totalisation benefit as may be provided in the said social security agreement;

Provided that if the International Worker covered under the provisions of the said agreement has not rendered the eligible service even after including the totalisation benefit as may be provided in the said agreement, then, such international worker shall be entitled to a withdrawal benefit as kaid down under Table D."

(8) After paragraph 33, the following provisio shall be inserted, namely -

"Provided that if the beneficiary under the Scheme is covered under a social security agreement between India and another country, the pension and other benefits under the Scheme shall be disbursed in the manner and as per the terms and conditions specified in the said agreement."



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(9) After paragraph 35, the following paragraph shall be inserted, namely -
"35-A. Performing certain functions under the social security agreement. - The Commissioner shall perform all such functions as are assigned to the Employees' Provident Fund Organisation under a social security agreement entered into between the Government of India and any other country, in a manner and as per the terms and conditions specified therein. "

8. However, as seen from the impugned order, the contentions of the petitioner as raised in this writ petition has not been considered by the respondent. It is a non-speaking order with regard to the contentions raised by the petitioner in this writ petition which have been referred to supra. The Employees' Pension Scheme, 1995 has been relied upon by the respondent Corporation before this Court for the first time through its Standing counsel. Such a new stand, at this stage, cannot be taken by the respondent. Being a non-speaking order with regard to the contentions raised by the petitioner in this writ petition, the impugned order has to be necessarily quashed and the matter has to be remanded back to the respondent for fresh consideration on merits and in accordance with law within a time frame to be fixed by this Court.



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9. For the foregoing reasons, the impugned order dated 27.08.2021 is hereby quashed and the same is remanded back to the respondent for fresh consideration on merits and in accordance with law. The respondent is directed to pass final orders within a period of four weeks from the date of receipt of a copy of this order. Since the petitioner is a permanent resident of England, any notice required to be served by the respondent to the petitioner, will have to be sent to Mr. John Zachariah, learned counsel representing the petitioner whose address for service is M/s.Fox Mandal and Associates, No.302, F.M.House, Anna Salai, Teynampet, Chennai - 6. No costs. Connected miscellaneous petition is closed.

04.01.2023

Index:Yes/No
Neutral Citation:Yes/No
ssm

To

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ABDUL QUDDHOSE,J.

ssm

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