

Madras High Court

In The High Court Of Judicature At ... vs The Employees Provident Fund ... on 6 February, 2015

RESERVED ON: 29.01.2015

DELIVERED ON: 06.02.2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06-02-2015

CORAM

THE Hon'ble Mr.JUSTICE M. DURAISWAMY

W.P.No.391 of 2014 and M.P.No.1 of 2014

M/s Brakes India Ltd.,

(Brakes Division),

Sholinghur - 631 102

rep by its Vice-President (Pers & HRD)

... Petitioner

vs

The Employees Provident Fund Organisation

Sub Regional Office,

31,Filter Bed Road,vellore

rep by its Regional Provident Fund Commissioner

...Respondent

Writ Petition filed under Article 226 of the Constitution of India praying this court to issue

For petitioner :Mr.Sanjay Mohan for

M/s S. Ramasubramanian Associates

For respondent :Mrs.V.J. Latha

ORDER

The petitioner Company has filed the above writ petition to issue a Writ of Certiorarified Mandamus to call for the records connected with impugned order ref No.TN/VLR/38789/SDC/2013 dated 26.12.2013 on the file of the respondent and quash the same and direct that the respondent shall not have a right to proceed against the petitioner under section 14B of the PF Act.

2. The brief case of the petitioner is as follows:

(a) According to the petitioner Company, in the course of its business, it engages various Contractors to carry out non-perennial work, who, in turn, employed various persons to carry out the work. The petitioner Company is a Principal Employer and the Contractors, wherever required, have obtained licences and are Licensed Contractors under the Contract Labour (Regulation and

Abolition) Act, 1970. The petitioner Company is registered with the Provident Fund Authorities and has a separate "exempted trust" under P.F. Code No.TN/4725.

(b) One A. Govindaraj, a Licenced Contractor has been doing certain contract work for the petitioner Company, as and when required since 1995. Insofar as the Petitioner Company is concerned, the Contractor would supply labour, as was required by the Petitioner Company. The Contractor was given certain civil works to be done inside the Factory. The said Contractor employed 15 to 20 contract workmen inside the petitioner's factory and the Petitioner Company never employed the Contractor continuously.

(c) The contractor applied for a separate P.F. Code number under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, and the same was allotted to him on 10.1.2003 with the Code No.TN/VL/38789 with retrospective coverage from 25.9.1995.

(d) The Contractor had been deducting the employees share from December 2002 onwards and has been remitting it along with employer's share of contribution to the P.F authorities.

(e) The Petitioner Company learnt that based on the report of the Enforcement Squad, Regional Assistant Provident Fund Commissioner, the Sub Regional Office, Vellore, initiated proceedings under Sec.7-A against the Contractor and the Contractor was directed to produce all the records pertaining to wage payment relating to workmen from April 1995 to November 2002 and the petitioner Company was informed that the said Contractor had given a statement that an amount of Rs.9,66,333/- was payable as contributions and that an amount of Rs.1,00,000/- was also deposited by the said Contractor during March 2004 and the balance of Rs.8,66,333/- on 22nd July 2004.

(f) The petitioner Company also learnt that a letter dated 16.8.2004 was received by the Contractor from the P.F. Authorities, wherein, it has been stated that the coverage for the establishment of the Contractor was advanced from 25.9.1995 to 1.6.1994 and a Show Cause Notice dated 30.8.2004 was issued under Sec.14 of the Act for prosecuting the Contractor. Further, the PF Authorities granted 15 days time to the contractor to pay the amount or on his default, had directed the petitioner Company to pay the amount.

(g) On 31.8.2004 the petitioner Company received a letter calling upon them to pay the amount within three days as against the period of 15 days granted under the letter dated 30.8.2004. As no amount was payable by the Petitioner Company to the contractor, a letter was also sent to the Authorities dated 6.9.2004, informing them that there was no dues payable by the petitioner Company to the Contractor as per the books of the petitioner. Subsequently, the contract with that Contractor, came to an end in October 2004 and was not renewed thereafter.

(h) The petitioner Company was never a party to the proceedings nor was aware of the same. The respondent had thereafter assessed the amount payable under Section 14B and Section 7-Q at Rs.28,61,326/-. In none of the proceedings, the petitioner Company was made as a party and it was not aware of the proceedings except when the Contractor had approached the Petitioner Company for an advance after having suffered an order under Sec.7-A. The petitioner Company received a

Notice under Section 8-F dated 23.2.2005, calling upon the petitioner to withhold any amount that may be payable to the said Contractor and pay over the same to the respondent.

(i) By letter dated 25.2.2005, the respondent informed the petitioner that under Sec.8-A, the petitioner would also be liable for payment of the amounts as damages and interest and non-payment would amount to "default" and directing the petitioner Company to pay the amount immediately to the respondent,

(j) Challenging the impugned order passed by the respondent, the petitioner approached this Court, by filing two writ petitions in W.P.Nos.7776 and 7777 of 2005 and this Court, while admitting those Writ Petitions, granted an order of Interim Stay. On 25.2.2010, this Court allowed the Writ Petitions and set aside the impugned order.

(k) On 28.10.2011, the respondent issued a Show Cause Notice under Sec.14 B of the PF Act calling upon the petitioner to show cause why damages should not be imposed upon the petitioner. This was followed by a Notice cum levy order dated 31.10.2011. The petitioner, in their reply dated 12.6.2012, has stated that the proceedings under Sec.14 B of the Act is not maintainable and this Court had already quashed the proceedings and had given liberty to the respondent to proceed against the legal heirs of the Contractor. It was also stated in the reply that the said Contractor is an independent employer, having separate PF Code and the petitioner is not liable for any default by the Contractor. In these circumstances, the petitioner Company has filed the above writ petition to quash the order dated 26.12.2013.

3. The brief case of the respondent is as follows:

(a) According to the respondent, as per the definition of Section 2(f) of the Act, any person employed directly or through a contractor falls within the meaning of 'employee' and both the Principal employer and the Contractor are jointly and severally legally responsible for non-compliance of the Scheme provisions.

(b) Therefore, an employee, even if engaged through or by a contractor explicitly falls under the meaning of 'employee' for the purpose of the EPF and allied Schemes and the statutory contributions / administrative charges in respect of such employees ought to be remitted in time by the employer/contractor.

(c) The allotment of code numbers to the contractors is meant for administrative convenience only for facilitating remittance and accounting of the contributions etc., and in case of any default by the Contractor, the principal employer is also liable for action and he cannot absolve himself of his responsibilities under the Act.

(d) As per paragraph 30 of Clause (2) of the EPF Scheme shows that in respect of employees employed, by or through a contractor, "the contractor shall recover the contribution payable by such employee in this Scheme referred to as the member's contribution so deducted together with an equal amount of contribution in this Scheme referred to as the employer's contribution and also

administrative charges".

(e) In terms of Clause (3) of paragraph 30, it is the responsibility of the principal employer to pay both the contributions payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.

(f) According to the respondent, the proceedings under Sec.7(A) of the Act is meant for assessment of dues payable in respect of workers. It is a quasi-judicial inquiry and the officer, who is conducting such enquiry, is the sole authority to decide upon whom to be summoned. The mere fact that the principal employer viz., the petitioner was not summoned for Sec.7A inquiry cannot have the effect of nullifying the statutory responsibilities casted upon the petitioner Company.

4. In these circumstances, the respondent prayed for dismissal of the writ petition.

5. Mr.Sanjay Mohan, learned counsel for the petitioner submitted that since the contractor was allotted a separate PF Code number, the petitioner Company is not liable to pay any amount to the respondent. Further, the learned counsel for the petitioner submitted that since this Court had already allowed the writ petitions in WP Nos.7776 and 7777/2005, giving liberty to the respondent to initiate appropriate recovery proceedings as against the legal heirs of the contractor, the respondent cannot initiate proceedings against the petitioner Company. The learned counsel further submitted that the present proceedings, which was initiated against the petitioner Company after a lapse of several years, is liable to be set aside.

6. In support of his contention, the learned counsel for the petitioner relied on the following judgments:

(i) CDJ 1992 BHC 198 (K.T. Rolling Mills Pvt Ltd vs R.M. Gandhi and Others), wherein the Bombay High Court has held as follows:

19. In the instant case, the delay is 8 to 17 years. There is no explanation whatsoever for this delay from the Regional Provident Fund Commissioner. There is nothing to show how this case remained unattended for such a long time and how it suddenly came to surface except the plea that no period of limitation being provided in the law, action may be taken at any time".

(ii) (2012) LLR 22 (Group 4 Securitas Guarding Ltd vs Employees Provident Fund Appellate Tribunal & ors), wherein the High Court of Delhi held that " a separate PF Code number is for direct compliance of the provisions of the Act and it is allotted only to the employees and not to the contractors. Therefore, the clients cannot be termed as principal employer as security guards provided by Company".

(iii) 2012 LLR 702 (The Madurai District Central Co-operative Bank Ltd rep by its Special Officer vs Employees' Provident Fund Organisation), wherein this court has held in the case of a separate code number was allotted, the employees of the contractor, by no stretch of imagination can be treated to

be employees of the principal employer, but as rightly conceded by the learned counsel for the petitioner, the liability of unregistered contractors, would fall on the petitioner, in view of clause 30 of the Employees' Provident Fund Scheme, 1952.

Further this Court has held that "

with respect to the contractors, who are registered with the Provident Fund Department, having independent code number, they are to be treated as "independent employer. The petitioner, therefore, cannot be treated to be "principal employer"for the purposes of those contractors".

7. Countering the submissions made by the learned counsel for the petitioner, Ms.V.J. Latha, learned counsel for the respondent submitted that earlier writ petitions were allowed on the ground that the petitioner herein was not a party before the respondent and therefore, the order passed by the respondent was set aside. According to the learned counsel for the respondent, the order passed by this Court in WP Nos.7776 and 7777 of 2005 shall not have any binding on the present order passed by the respondent.

8. Further, the learned counsel submitted that as per Sec.2(f) of the Act, an employee, even if engaged through or by a contractor explicitly falls under the meaning of 'employee' for the purpose of the EPF and allied Schemes and the statutory contributions/administrative charges in respect of such employees ought to be remitted in time by the employer/contractor.

9. The learned counsel relied on paragraph-30 of Clause-3 of the EPF Scheme and submitted that the responsibility of the Principal employer to pay both the contributions payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.

10. On a careful consideration of the materials, the submissions made by the learned counsel on either side and the judgment relied on by the learned counsel for the petitioner, it is not in dispute that one A. Govindaraj is a licenced Contractor and he employed about 15 to 20 contract workmen inside the petitioner factory for doing certain civil work.

11. Earlier, the petitioner Company was not made a party and in their absence, proceedings were initiated against the Contractor and the petitioner Company came to know about the proceedings only when the Contractor contacted for an advance after having suffered to an order under Sec.7-A. The petitioner Company received a Notice under Section 8-F dated 23.2.2005, calling upon the petitioner to withhold any amount that may be payable to the said Contractor and pay over the same to the respondent.

12. On 25.2.2005, the petitioner Company sent a reply stating that no amounts were payable to the contractor by them. After receiving the reply dated 25.2.2005 on 26.2.2005, the respondent informed the petitioner that under Sec.8-A, the petitioner would also be liable for payment of the amounts as damages and interest and non-payment would amount to "default" and directing the petitioner Company to pay the amount immediately to the respondent.

13. Challenging the order passed by the respondents, the petitioner Company filed two writ petitions in W.P.Nos 7778 and 7777 of 2005 before this Court and this Court, while admitting the writ petition, granted an order of interim stay and thereafter, on 25.2.2010, after hearing all the parties, this Court allowed the writ petition, giving liberty to the respondent to initiate appropriate recovery proceedings against the legal heirs of the Contractor in accordance with law.

14. After dismissal of those writ petitions, the respondent, by their letter dated 12.10.2010 requested the petitioner to inform the details of the legal heirs of the Contractor. On 24.11.2010, the petitioner Company informed the details of the legal heirs of the contractor.

15. On 28.10.2011, the respondent issued a Show Cause Notice under Sec.14 B of the PF Act, calling upon the petitioner to show cause why damages should not be imposed upon the petitioner Company. Such Notice was followed by a Notice cum levy order dated 31.10.2011. Thereafter also, the petitioner received some more notices from the Department.

16. The petitioner Company sent their reply on 12.6.2012 stating that the fresh proceedings under Sec.14 B of PF Act is not maintainable and also stated that the Contractor is an independent employer having separate PF Code and the petitioner is not liable for any default by the contractor.

17. This court in the judgment reported in 2012 LLR 702 (The Madurai District Central Co-operative Bank Ltd rep by its Special Officer vs Employees' Provident Fund Organisation), cited supra has clearly held that with respect to the contractors, who are registered with the Provident Fund Department, having independent code number, they are to be treated as "independent employer".

18. In the case on hand, the Contractor was allotted with EPF allotment number vide No.TN/VLR/38789/SDC/2013 in the year 2003 itself. As per the ratio laid down in the judgment of this Court, the Contractor viz., Mr.A. Govindaraj should be treated as an independent employer.

19. That apart, when this Court had already set aside the orders passed by the respondent in WP Nos.7776 and 7777 of 2005 and gave liberty to the respondent to initiate recovery proceedings against the legal heirs of the contractor viz., Mr.A. Govindaraj, the present proceedings initiated againsts the petitioner Company cannot stand.

20. That apart, the respondent has not challenged the order passed by this Court in those writ petitions. Therefore, the order passed by this Court in the writ petitions have become final.

21. In the absence of any appeal having been filed by the respondent against the observations made in those writ petitions, the proceedings initiated by the respondents against the petitioner Company under Sec.14 B of the Act cannot stand and it is liable to be set aside.

22. The reasoning of the respondent interpreting the order of this Court made in the writ petitions in W.P.Nos.7776 and 7777 of 2005 is erroneous and this Court has given liberty to the respondents only to proceed against the legal heirs of the contractor. If this Court was of the opinion that the proceedings can be initiated against the Petitioner Company also, this court would have given such

liberty to the respondent to proceed against the petitioner Company, which was not given in the writ petition. Therefore, the interpretation of the respondent with respect to the observation of the writ petitions cannot stand.

23. It is pertinent to note that this Court is not sitting on an appeal over the orders passed in WP Nos.7776 and 7777 of 2005 or on review of the orders passed in those writ petitions.

24. Following the ratio laid down and the judgments relied on by the learned counsel for the petitioner, I am of the considered view that the impugned order dated 26.12.2013 on the file of the respondent is liable to be set aside and accordingly, the same is set aside.

25. In the result, the writ petition is allowed. No costs. Consequently, connected Mp is closed.

06-02-2015 sr Index:yes/no website:yes/no To Regional Provident Fund Commissioner The Employees Provident Fund Organisation Sub Regional Office, 31,Filter Bed Road, Vellore M. DURAISWAMY,J., sr Pre-Delivery Order in W.P.No.391 of 2014 06-02-2015.