Kolkata High Court (Appellete Side)
Nava Nalanda High School & Anr vs Employees Provident Fund ... on 22 January, 2014
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IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction

Present :

The Hon'ble Justice Harish Tandon

W.P. 32587 (W) of 2013

Nava Nalanda High School & Anr
-vs-
Employees Provident Fund Organisation & Anr

For Petitioner:- Mr. Partha Sarathi Sengupta
Mr. Uddipan Banerjee

For Respondents :- Mr. S.C. Prasad

Heard on : 22nd January 2014

Judgment on : 22nd January 2014

A short but interesting point has evolved from the respective submissions made at the Bar as to whether Section 12 of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the said Act) can be pressed in the arena of the dispute and/or controversies between the parties.

Admittedly, the petitioner is covered under the aforesaid Act and is depositing contributions, as provided therein. It is also undisputed that the petitioner was depositing the amount towards Employees' Provident Fund in excess to the statutory liability but subsequently started depositing the amount, as specified under Para 29 of the Employees Provident Fund Scheme, 1952. The aforesaid action sprung up and assumes the character of a dispute between the employee and the employer. The said action was complained before the authority by the employees and, thereafter, a proceedings was initiated under Section 7A of the said Act. The said proceedings ended with the order which is impugned in this writ petition.

Since the facts are not disputed by either of the parties, this Court proceeds to decide the issue only on the question of law without calling for affidavits.

The bone of contention of the respondent authorities, which could be culled out from the impugned

order, is because of the provisions contained under Section 12 of the said Act any reduction, either on account of old age pension or the provident fund, is not permissible and, therefore, the action of the petitioner to reduce the amount which was being deposited earlier to a statutory amount, as provided under Para 29 of the said Scheme, is impermissible and not in consonance with the spirit of the said Act.

Mr. Sengupta, the learned advocate appearing for the petitioner, at the very outset, submits that the voluntary payment of excess amount over and above the statutory amount cannot act as a deter on the part of the petitioner to apply the statutory provisions and, therefore, the authorities cannot initiate any proceedings under Section 7A of the said Act which culminated into a direction upon the petitioner to pay the excess amount over the statutory quantification. In support of the aforesaid contention, reliance is placed upon the judgment of the Supreme Court, rendered in the case of Marathwada Gramin Bank Karamchari Sanghatana and Another -vs- Management of Marathwada Gramin Bank and Others, reported in 2011 (4) L.L.N. 422 (SC).

Mr. Sengupta submits that sub-para (6) of Para 26 of the Employees' Provident Fund Scheme, 1952 (hereinafter referred to as the said Scheme) provides for deposit of the contribution more than the statutory quantification provided an approach is made by both the employer and employee before the appropriate authority for enrolment and an undertaking in writing is given by the employer to pay the administrative charges.

Mr. Sengupta further submits that Para 26A of the said Scheme quantifies maximum contribution of Rs.6,500/- and, therefore, the authorities cannot insist the petitioner to pay an amount above the said statutory requirements and, therefore, the order, impugned in this writ petition, is liable to be quashed and set aside.

Mr. Prasad, appearing for the Provident Fund Authorities, submits that Section 12 of the said Act has full applicability in the present case inasmuch as no reduction is permissible on account of the provident fund which is prejudicial to the interest of an employee. Mr. Prasad heavily relies upon a judgment of the Supreme Court, delivered in the case of Som Prakash Rekhi -vs- Union of India and Another, reported in AIR 1981 SC 212, to submit that Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is a beneficial piece of legislation and if the provisions are capable of interpreting in two ways; the Court should adopt the way which enure to the benefit of the employee. He further submits that the Constitutional Bench, in the above noted judgment, has clearly held that Section 12 has its full applicability if the benefit, which was available to the employee, is sought to be reduced and/or curtailed by invocation of any statutory provisions.

Mr. Prasad further relies upon a judgment of the Bombay High Court, delivered in the case of Consolidated Crop Protection Private Limited -vs- Hema Chandra Rao, reported in (1977) 1 Lab LJ 114, in support of his contention that if the higher wages are available to some employees the establishment, by invocation of the Act, cannot reduce these benefits in any manner whatsoever. According to him, the Karnataka High Court, in the case of The Regional Provident Fund Commissioner, Karnataka, Bangalore -vs- M/s. Harihar Polifibres, reported in 1992 LAB. I.C. 202, accepted and applied the ratio in the case of Consolidated Crop Protection Private Limited (supra)

and held that any reduction of the benefit, under the umbrella of the statute by the employer, is not permissible.

Mr. Prasad, thus, says that the order, passed by an authority under Section 7A of the said Act, cannot be faulted with and prays for dismissal of this writ petition.

In reply, Mr. Sengupta relies upon another Constitutional Bench judgment of the Supreme Court, in the case of Committee for Protection of Rights of ONGC Employees & Others -vs- Oil and Natural Gas Commission, Dehradun & Others, reported in 1991 (II) LLJ 271, to submit that the Constitutional Bench judgment, relied upon by Mr. Prasad, was taken note of and a distinguishing feature has been highlighted therein.

According to Mr. Sengupta, the earlier Constitutional Bench decision has no manner of applicability in the facts of the present case as the matter in the said decision relates to reduction of pension because of coming into force of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 subsequently and in such perspective it was held that the benefits, which were available either under the contract or under the earlier scheme, cannot act detrimental to the interest of the employer.

Having heard and considered the respective submissions made at the Bar, as indicated above, the facts, involved in the present case, are not disputed. Admittedly, the petitioner was depositing contributions over and above the statutory quantification enshrined under the said Act. Subsequently, it was sought to be contended by the petitioner that they are statutorily bound to adhere to the provisions of the said Scheme and started depositing the contributions as per Clause 26A of the said Scheme.

Let me now see whether Section 12 of the said Act can stand in the way of the aforesaid action of the petitioner.

In the arena of controversy that have arisen in the instant proceedings it would be apt and relevant to quote the aforesaid provision :

"12. Employer not to reduce wages, etc. - No employer in relation to [an establishment] to which any [Scheme or the Insurance Scheme] applies shall, by reason only of his liability for the payment of any contribution to [the Fund or the Insurance Fund] or any charges under this Act or the [Scheme or the Insurance Scheme], reduce, whether directly or indirectly, the wages of any employee to whom the [Scheme or the Insurance Scheme] applies or the total quantum of benefits in the nature of old age pension, gratuity [provident fund or life insurance] to which the employee is entitled under the terms of his employment, express or implied.]"

A meaningful reading of the aforesaid provision leads to an inevitable conclusion that no employer shall by reason of his inability for payment of the contribution to the Provident Fund reduce the wages of any employee to which such Scheme apply either directly or indirectly. The said provision not only applies to the Provident Fund Scheme or the Insurance Scheme but also is extended to the

benefits in the nature of old age pension, gratuity or life insurance to which the employee is entitled under the terms of his employment. The Employees' Provident Fund Scheme, 1952, is framed in exercise of powers conferred under Section 5 of the said Act. Apart from other, the provision relates to the entitlement of an employee, retention as well as exemption from the purview of the said Scheme. Para 26A of the said Scheme relates to retention of the membership wherein proviso to sub-para 2 makes obligatory where monthly pay of a member exceeds Rs.6,500/-, the contribution payable by him and in respect of him by the employer shall be limited to the amounts payable on a monthly pay of Rs.6,500/-, including dearness allowance, retaining allowance and cash value of food concession. At least it has not been disputed before this Court that the maximum limit of Rs.6,500/- is applicable in the facts of the present case and, therefore, this Court can safely proceed to decide the issue involved herein on such basis.

As I have already indicated that the sheet anchor of the argument advanced on behalf of the respondents is that once a higher contribution is deposited by the employer, i.e. the petitioner herein, any reduction, to the maximum limit of Rs.6,500/-, is impermissible because of introduction of Section 12 of the said Act. For relevant purpose, this Court must record that it is not the case of the respondent that the maximum contribution, as provided under the aforesaid provision, has not been deposited by the petitioner. The answer to the said issue can directly be had from the judgment of the Supreme Court rendered in the case of Marathwada Gramin Bank Karamchari Sanghatana (supra) where an identical and similar question was raised on the part of the authorities; Section 12 was sought to be applied and the Supreme Court, upon consideration of the respective submissions, held :

"27. The respondent bank is under an obligation to pay provident fund to its employees in accordance with the provisions of statutory Scheme. The respondent bank cannot be compelled to pay the amount in excess of its statutory liability for all times to come just because the respondent bank formed its own trust and started paying provident fund in excess of its statutory liability for some time. The appellants are certainly entitled to provident fund according to statutory liability of the respondent bank. The respondent bank never discontinued its contribution towards provident fund according to the provisions of the statutory Scheme." (emphasis supplied) The ratio, laid down by the Supreme Court in the above noted decision, leads to an inevitable conclusion that the employer is statutorily bound to discharge its statutory liability towards provident fund and if any amount was paid in excess to the statutory liability, the authorities cannot compel the employer to pay the said amount by invoking the provisions contained under Section 12 of the said Act.

Though the Supreme Court, in a recent judgment, did not take notice of the earlier Constitutional Bench decision, rendered in the case of Som Prakash Rekhi (supra), let me now examine whether the Constitutional Bench decision has its fullest applicability in the facts of the present case.

The Constitutional Bench, in the case of Som Prakash Rekhi (supra), was considering an application under Article 32 of the Constitution of India at the instance of an employee who was availing pensionary benefit under the retiral scheme. Subsequently, the statutory successor of an employer sought to invoke the provisions of the Provident Fund Act which results into reduction of the pension from Rs.165.99 to Rs.40/-. The writ petition was filed through the legal aid challenging the

applicability of the Act which appears to have acted in detrimental to the interest of the said employee. Various points, including the point of maintainability of the writ petition as the employer does not come within the definition of 'authority' as enshrined under Article 12 of the Constitution of India, were taken before the Constitutional Bench. The other point, which was sought before the Bench, was that once the provident fund and the gratuity having been withdrawn further deduction on such account is not permissible. In the backdrop of the aforesaid facts, it is held :

"68. We must realise that the pension scheme came into existence prior to the two beneficial statues and Parliament when enacting these legislations must have clearly intended extra benefits being conferred on employees. Such a consequence will follow only if over and above the normal pension, the benefits of provident fund and gratuity are enjoyed. On the other hand, if consequent on the receipt of these benefits there is a proportionate reduction in the pension, there is no real benefit to the employee because the Management takes away by the left hand what it seems to confer by the right, making the legislation itself lefthanded. To hold that on receipt of gratuity and provident fund the pension of the employee may be reduced protanto is to frustrate the supplementary character of the benefits. Indeed, that is why by Ss. 12 and 14 overriding effect is imparted and reduction in the retiral benefits on account of provident fund and gratuity derived by the employee is frowned upon. We, accordingly, hold that it is not open to the second respondent to deduct from the full pension any sum based upon reg. 16 read with reg. 13. If reg. 16 which now has acquired statutory flavour, having been adapted and continued by statutory rules, operates contrary to the provisions of the P.F. Act and the Gratuity Act, it must fail as invalid. We uphold the contention of the petitioner."

The Constitutional Bench judgment was noticed by another Constitutional Bench in the case of Committee for Protection of Rights of ONGC Employees & Others (supra), and the said judgment is distinguished in the following manner :

"13. This indicates that the scheme of Contributory Provident Fund, by way of retiral benefit, envisaged by the Provident Fund Act, is in the nature of a substitute for old age pension because it was felt that in the prevailing conditions in India, the institution of pension scheme could not be visualised in the near future. It was not the intention of Parliament that Provident Fund benefit envisaged by the said Act would be in addition to pensionary benefits. Section 12 of the Provident Fund Act seeks to protect the wages of an employee to whom the scheme framed under the said Act applies as well as the total quantum of certain specified benefits to which he is entitled under the terms of his employment. With that end in view, Section 12 prohibits an employer from reducing whether directly or indirectly, the wages of an employee to whom the Scheme applies or the total quantum of benefits in the nature of old age pension, gratuity, provident fund or life insurance to which the employee is entitled under the terms of his employment, express or implied. The said Section proceeds on the basis that if an employee is entitled to any benefit in the nature of old age pension under the terms of his employment the said benefit would not be denied to him on the application of the Scheme. It is not the case of the petitioners that on June 30, 1961, when the Provident Fund Scheme was made applicable to the Commission, the petitioners had become permanent and were entitled to pension. It cannot, therefore, be said that on the date of the application of the Provident Fund Scheme to the Commission, the petitioners were entitled to pension. They cannot, therefore, invoke the provisions of Section 12 of the Provident Fund Act.

14. In Som Prakash Rekhi v. Union of India & Another (supra), on which reliance has been placed by Shri Ramamurthi, the petitioner before this Court was employed as a Clerk in Burmah Shell Oil Storage Ltd. The undertaking of that company was statutorily acquired by the Government of India under the Burmah Shell (Acquisition of Undertakings in India) Act, 1976, and subsequently the said undertaking was vested by the Central Government in the Bharat Petroleum Corporation Limited, a Government Company. In the Burmah Shell there was a voluntary retirement scheme in force which was governed by the terms of a trust deed of 1950. The said petitioner was receiving pension under the said scheme. Certain deductions were made from the pension paid to the petitioner on account of Employees' Provident and Gratuity paid to him. This Court held that in view of Section 12 of the Provident Fund Act, such deductions were not permissible and that the entire amount of pension should be paid to the petitioner without deduction. This decision has no application to the instant case because in that case the petitioner before this Court was entitled to receive pension under the voluntary retirement scheme at the time when the provisions of the Provident Fund Act became applicable to Burmah Shell and the right to receive pension was part of the terms of employment of the said petitioner. In the present case it cannot be said that on the date of the application of the Provident Fund Scheme to the Commission on June 30, 1961, the pensioners were entitled to receive pension and the benefit of pension was a part of the terms of employment of the petitioners on that date."

The judgment rendered by the Bombay High Court is somewhat on the similar facts as involved in this case. The Bombay High Court held that Section 12 stands as an embargo on the employer's action for discontinuing the benefit being given to the employee by taking shelter under the statutory provisions. The said judgment, in my considered opinion, runs contrary to the ratio laid down in a recent judgment, rendered by the Supreme Court, in the case of Marathwada Gramin Bank Karamchari Sanghatana and Another (supra). Any judgment which runs contrary to the judgment of the Supreme Court cannot be said to be a good law and loses its binding efficacy. Since the Apex Court, in the case of Marathwada Gramin Bank Karamchari Sanghatana and Another (supra), has equally laid down that the authorities cannot compel the employer to pay any amount in excess to the statutory liability, any decision of the High Court, which runs counter to the aforesaid proposition of law, cannot operate in the field.

In view of the clear mandate, given by the Supreme Court in the above judgment, this Court has no hesitation to arrive at the conclusion that the order, passed by the authority under Section 7A of the said Act, is not sustainable. The same is hereby quashed and set aside.

As a result, the writ petition succeeds.

There shall, however, be no order as to costs.

ac (Harish Tandon, J.)