(2015) 07 KL CK 0005

High Court Of Kerala

Case No: W.A. No. 57 of 2010

Administrator, Cosmopolitan Hospitals (P) Ltd.		APPELLANT
	Vs	
Regional Provident Fund Commissioner, Tvm. and Others		RESPONDENT

Date of Decision: July 27, 2015

Citation: (2016) 148 FLR 933 : (2016) 1 ILR (Ker) 49 : (2015) 5 KHC 16 : (2015) 4 LLJ 552 : (2016) 1 LLN 139 : (2016) LLR 148

Hon'ble Judges: P.R. Ramachandra Menon and Babu Mathew P. Joseph, JJ.

Bench: Division Bench

Advocate: B.S. Krishnan, Senior Advocate and M.N. Radhakrishna Menon, for the Appellant; N.N. SugunapalanAdvocateCounsel and T.N. Girija, Standing Counsel, for the Respondent

Final Decision: Allowed

Judgement

P.R. Ramachandra Menon, J.

This appeal is preferred by the assessee of the 1st respondent, challenging the course of proceedings leading to the fixation of liability under the relevant provisions of the EPF Act/scheme with reference to "interim relief of Rs. 300/- per month and "special allowance" of Rs. 50/- per month, agreed to be paid to the workers concerned on the basis of a ''conciliation settlement'' entered into between the Management and the Unions, with the clear understanding that, the said amounts will not be reckoned for the purpose of any contribution under the EPF Act/scheme and that the same will continue only till implementation of the minimum wages as per the minimum wages notification to be issued by the Government. The factual position disclosed from the proceedings shows that the appellant is running a hospital at Trivandrum, engaging several employees. The demands submitted by Union representing the Workers with regard to the service conditions came to be negotiated in between, and finally with the intervention of the

Conciliation Authority, it ended up in Annexure-1, Memorandum of Settlement dated 08/02/1999, whereby the earlier industrial settlement dated 06/04/1996 was replaced, agreeing to the terms and conditions stipulated therein. As per ''Clause 2'' of the said settlement, it was agreed to pay ''interim relief'' of Rs. 300/- per month and a ''special allowance'' of Rs. 50/- per month subject to the condition that the same shall not constitute as ''wages/salary'' for the purpose of EPF, Bonus etc. as mentioned above. There is no dispute that there was any failure on the part of the Management in satisfying the said amounts or that the Workers concerned did not receive the same.

2. While so, the 1st respondent herein, on coming across the terms of understanding between the appellant Management and the Union representing the workers, issued notice to the appellant, to the effect that the amounts paid by the Management to the workers under Clause 2 of Annexure-1 settlement were liable to be treated as part of ''wages'', as stated in Section 2(b) of the Employees'' Provident Fund and Miscellaneous Provisions Act, 1952 (for short, the EPF & MP Act) and that contribution was liable to be made to the requisite extent. This was sought to be resisted by the appellant Management, but finally, the liability was mulcted upon the appellant as per Ext. P1 order dated 21/12/1999 passed by the 1st respondent herein. Being aggrieved by the turn of events, the matter was sought to be challenged by approaching the Employee''s Provident Fund Appellate Tribunal, New Delhi by way of Ext. P2 appeal. An affidavit was also filed before the 2nd respondent as borne by Ext. P3. After considering the facts and figures and relevant provisions of law, the second respondent/Tribunal held that the amounts paid by the Management as "interim relief" and "special allowance" vide Clause 2 of Annexure-1 settlement were not liable to be treated as part of basic wages coming within the purview of Section 2(b) of the EPF and MP Act, and hence the impugned order passed by the first respondent herein, was set aside.

3. The first respondent, stated as being aggrieved of Ext. P4 order passed by the second respondent/Appellate Tribunal, sought to challenge the same by filing OP No. 21636/2001. The matter came up for hearing before a learned Single Judge of this Court on 07/09/2009, and after hearing both the sides, the version put forth from the part of the appellant (who was the first respondent in the writ petition), that the amount was paid pursuant to the "agreement" was held as not sustainable. It was also held that, by virtue of "agreement" executed between the Management and the Employees, the liability to satisfy contribution in terms of the EPF & MP Act, could not have been avoided under any circumstance. The reliance sought to be placed on the decision rendered by the Madras High Court in E.I.D. Parry''s case was not approved to be followed. Accordingly, after analyzing the scope of Section 2(b) and the amounts liable to be reckoned as basic wages, the writ petition was allowed; setting aside Ext. P4 order passed by the second respondent Tribunal, virtually restoring Ext. P1 order passed by the 1st respondent. This in turn is sought to be challenged by the appellant Management by way of this appeal.

4. Heard Sri. M.N. Radhakrishna Menon, learned Counsel appearing on behalf of the appellant as well as Sri. N.N. Sugunapalan, learned Senior Counsel appearing on behalf of the Provident Fund Department.

5. The learned Counsel for the appellant submits that the way in which the issue was approached by the learned Single Judge is not at all correct and that the payments effected by the Management as stipulated under Clause 2 of Annexure-1 settlement was pursuant to a conscious decision taken between the Management and the Workers represented by the Union in the presence of the Conciliation Authority, i.e., the District Labour Officer. In the case of a ''conciliation settlement'', bringing out industrial peace in the sector, it is not a sham agreement so as to contract out from the liability under the Act/scheme. It is also stated that, there was no other option for the Management but to have given effect to Clause 2 of Annexure-1 ''conciliation settlement'' and no contribution was liable to be deducted from the wages of the employees, for the reason that it would nullify the effect of industrial peace secured, bringing in unrest, which is totally alien to industrial jurisprudence. The Management also would be liable for prosecution, if at all any violation of the settlement was done, detrimental to the rights and interests of the employees. The nature of payment as agreed to be effected by virtue of Clause 2 of Annexure-1 does not come within the purview of the term ''basic wages'' defined under Section 2(b) of the Act, submits the learned Counsel. Reliance is sought to be placed on various decisions rendered by the Apex Court particularly, by a Constitution Bench of the Apex Court reported in 1962 (II) LLJ 490 (Andhra Handloom Weavers'' Co-operative Society v. State of Andhra Pradesh and Others) and by a Larger Bench in Jay Engineering Works Ltd. and Others Vs. The Union of India (UOI) and Others, In both the cases, the issue was more with reference to the granting of ''Production Bonus''. In the latter case, the payments for production, between the ''quota'' and the ''norm'' set separately, was held as not amounting to other similar elements as given under Section 2(b) of the Act and that payments effected for production beyond the ''norm'', would be ''Production Bonus'', which was held as excludable from the purview of the term ''wages''. Coming to the former case, it was held by the Constitution Bench that the word "bonus" under Section 2(b) of the Act, not only included ''Production Bonus'', but also other kinds of Bonus as well and as such, the amount paid by way of ''Bonus'' under the relevant scheme in the said case was held as outside the purview of the definition of basic wages under Section 2(b) . The verdict passed by the Supreme Court reported in National Engineering Industries Ltd. Vs. State of Rajasthan and Others, is sought to be pressed into service by the learned Counsel for the appellant, asserting that the sanctity of ''industrial settlements'', particularly conciliation settlements, is always preferred over ''adjudication'' and that there is an underlying assumption that the settlement reached with the help of the Conciliation Officer must be fair and reasonable.

6. After hearing both the sides, this Court finds that, the learned Single Judge has unfortunately omitted to consider the specific nature of Annexure-1 settlement.

What has been referred to in paragraph 5, 6, 7 and elsewhere in the judgment is just about an ''agreement'' between the Management and the Employees. It is not discernible as to whether, the issue was addressed with reference to the sanctity of ''conciliation settlement'' like Annexure-1. Even though there is a reference to the word ''settlement'' in the second paragraph of Ext. P4 order passed by the Appellate Tribunal, the learned Counsel for the Provident Fund Department submits that copy of the Annexure-1 Conciliation Settlement now produced before this Court in the appeal, was never available before the learned Single Judge. The fact remains that the nature of the ''settlement'' was never adverted to by the learned Single Judge when the matter was finalised, leading to the verdict passed in the original petition.

7. The scope of industrial settlement and the necessity to give effect to such settlement has been spoken to by a Larger Bench of this Court as per the decision reported in K.L. Francis Vs. The Kerala State Road Transport Corporation and Others holding that, by virtue of such settlement, the decision rendered by the Apex Court in Uma Devi''s case [Secretary, State of Karnataka and Others Vs. Umadevi and Others,] was liable to be distinguished. This is more so, in view of the law declared by the Apex Court in National Engineering Industries Ltd. Vs. State of Rajasthan and Others, ; relevant portion of which, as contained in para 25 is extracted below:

"A settlement of dispute between the parties themselves is to be preferred, where it could be arrived at, to industrial adjudication, as the settlement is likely to lead to more lasting peace than an award. Settlement is arrived at by the free will of the parties and is a pointer to there being goodwill between them. When there is a dispute that the settlement is not a bona fide in nature or that it has been arrived at on account of fraud, misrepresentation or concealment of facts or even corruption and other inducements it could be subject-matter of yet another industrial dispute which an appropriate Government may refer for adjudication after examining the allegations as there is an underlying assumption that the settlement reached with the help of the Conciliation Officer must be fair and reasonable.

A settlement which is sought to be impugned has to be scanned and scrutinized. Sub-sections (1) and (3) of Section 18 divide settlements into two categories, namely, (1) those arrived at two categories, namely, (1) those arrived at outside the conciliation proceedings and (2) those arrived at in the course of conciliation proceedings. A settlement which belongs to the first category has limited application in that it merely binds the parties to the agreement but the settlement belonging to the second category has extended application since it is binding on all the parties to the industrial disputes, to all others who were summoned to appear in the conciliation proceedings and to all persons employed in the establishment or part of the establishment, as the case may be, to which the dispute related on the date or part of the establishment, as the case may be, to which the dispute related on the date of the dispute and to all others who joined the establishment thereafter. A settlement arrived at in the course of conciliation proceedings with a recognised

majority union will be binding on all workmen of the establishment, even those who belong to the minority union which has objected to the same. Recognized union having majority of members is expected to protect the legitimate interest of labour and enter into a settlement in the best interest of labour. This is with the object to uphold the sanctity of settlement reached with the active assistance of the Conciliation Officer and to discourage an individual employee or minority union from scuttling the settlement. When a settlement is arrived at during the conciliation proceedings it is binding on the members of the Workers'' Union as laid down by Section 18(3)(d) of the Act. It would ipso facto bind all the existing workmen who are all parties to the industrial dispute and who may not be members of unions that are signatories to such settlement under Section 12(3) of the Act. Act is based on the principle of collective bargaining for resolving industrial disputes and for maintaining industrial peace.

"The principle of industrial democracy is the bedrock of the Act", as pointed out in the case of P. Virudhachalam and Others Vs. Management of Lotus Mills and Another, . In all these negotiations based on collective bargaining individual workman necessarily recedes to the background. Settlements will encompass all the disputes existing at the time of the settlement except those specifically left out."

8. Another important aspect, which has come to the notice of this Court is that, there is an inherent defect on the part of the 1st respondent in having preferred the original petition before this Court, challenging Ext. P4 order passed by the second respondent Tribunal. This is for the reason that, the 1st respondent happened to be the ''adjudicating authority'', who passed Ext. P1 order mulcting the liability upon the appellant herein. The said order passed by the 1st respondent was subjected to challenge by the appellant, by filing a statutory appeal before the second respondent/Tribunal. After considering the facts and figures and the relevant provisions of law, the second respondent/Appellate Tribunal found that, the order passed by the 1st respondent was not liable to be sustained and accordingly, the said order was set aside as per Ext. P4. The question to be considered is whether the 1st respondent, who happened to be the ''adjudicating authority'', could have moved the original petition before this Court, challenging the order passed by the higher authority/Appellate Tribunal. The position can be answered only in the ''negative'' as discussed below.

9. A similar order involving the Provident Fund Department (when the original order passed by the Assistant Provident Fund Commissioner, was subsequently intercepted by the Appellate Tribunal) came to challenged before this Court by the Regional Provident Fund Commissioner. A preliminary objection was raised from the part of assessee/Employer of the establishment as to the maintainability of the original petition. Various judgments rendered by the Apex Court were cited across the bar; particularly the ruling rendered by the Apex Court in The Bhopal Sugar Industries Ltd. Vs. The Income Tax Officer, Bhopal, , Union of India Vs. K. M.

Shankarappa, and Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Another, , wherein it has been categorically laid down that the ''adjudicating authority'' cannot challenge the order passed by the ''higher authority'' under any circumstance; which otherwise would undermine the principles of ''judicial discipline''. Following the law declared by the Apex Court, the question was answered by a learned Judge of this Court, as per the decision reported in The Assistant Provident Fund Commissioner Vs. West Coast Petroleum Agency and Others, , holding that the Departmental authority who passed the order in adjudication, could not have challenged the order passed by the Appellate Tribunal. We affirm the position as above.

10. Coming to the case in hand, as discussed above, Ext. P1 order was passed by none other than the 1st respondent herein, whose order was set aside by the second respondent Appellate Tribunal, as per Ext. P4. Going by the law declared by the Apex Court as mentioned above, it was never correct or proper for the 1st respondent to have attempted to defend his own order, by challenging Ext. P4 order passed by the higher authority/Appellate Tribunal. Since there is no dispute regarding the factual sequence, this Court finds that the original petition preferred by the 1st respondent herein, challenging Ext. P4 order passed by the Appellate Tribunal was not liable to be entertained. The question to be considered is whether this aspect can be considered by this Court, at the appellate stage. It is true, that no case was raised by the appellant in this regard before the learned Single Judge. But the fact remains that the issue to be considered is a ''question of law''; which need not be pleaded at all and can be raised at any stage, even before the Apex Court. In the said circumstance, this Court finds that the original petition preferred by the 1st respondent herein, was not maintainable. The verdict passed by the learned Single Judge is set aside and the original petition stands dismissed. We make it clear that this will not bar the way of the Department in causing to challenge Ext. P4 order, if such course is otherwise sustainable in accordance with the relevant provisions of the law, by way of appropriate means and measures. Since Annexure-1 settlement was not produced before the learned Single Judge, we leave open the scope of the said settlement as well. The writ appeal stands allowed. No cost.