* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 28.02.2018*
Date of Judgment: 08.05.2018

\+ **WP (C) 1390/2018 & CM No. 5799/2018 (stay)**

G4S FACILITY SERVICES INDIA PVT LTD..... Petitioner

Through: Mr.Amit Sibal, Sr.Advocate with Mr.Amitabh Chaturvedi and Mr.Sumit Kumar Shukla, Advocates.

versus

REGIONAL PROVIDENT FUND COMMISSIONER-1

...Respondent

Through: Mr.Rajesh Kumar and Mr.Nikhil Kumar, Advocates.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. Feeling aggrieved by the impugned order dated 19.01.2018 of the learned Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court No.1, Delhi (hereinafter referred to as 'Tribunal') under Section 7-O of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (in short 'the EPF Act') in appeal bearing ATA No. D-1/03/2018 directing stay of order passed by the Employees Provident Fund Commission (in brief 'EPFC') dated 06.01.2018 under Section 7-A of the EPF

Act subject to the petitioner depositing 50% of the amount due from it as determined by EPFC within six weeks, the petitioner has invoked the jurisdiction of this Court under Article 226 & 227 of the Constitution of India to quash the said order and direct it to hear the appeal by giving complete waiver of the pre-deposit amount.

2. The respondent, after affording an opportunity of hearing to the petitioner, by an order dated 06.01.2018, had assessed the provident fund amount payable by the petitioner for the period from April 2007 to March 2012 for Rs.15,40,26,052/-.

3. The petitioner preferred an appeal before the Tribunal under Section 7-I of the EPF Act. The petitioner also moved an application under Section 7-O of the EPF Act for waiver of the pre-deposit amount of 75% of the determined amount by the respondent under Section 7-A of the EPF Act. After hearing both the parties on application under Section 7-O of the EPF Act and having regard to the facts and circumstances of the case, the Tribunal vide impugned order dated 19.01.2018 has directed to admit the appeal subject to petitioner depositing 50% of the amount assessed in the impugned order within six weeks, failing which the appeal shall stand dismissed.

4. Learned senior counsel for the petitioner argued that the Tribunal has mechanically directed the petitioner to deposit 50% of the demanded amount without even considering the basic principles of prima facie case, balance of convenience and

irreparable injury. He submitted that under Section 6 of the EPF Act the contribution to the provident fund is to be computed on basic wages, dearness allowances and retaining allowances, if any, subject to the maximum ceiling of Rs.6,500/- at the relevant period as provided under paragraph 26A (2) of the Employees Provident Fund Scheme, 1952. He urged that the EPFC has not considered the ceiling limit of Rs.6,500/- as provided in Paragraph 26A(2) of the EPF Scheme beyond which the provident fund is not to be contributed. He referred the definition of "basic wages" as defined under Section 2(b) of the EPF Act and it does not include the dearness allowance, house rent allowance, overtime allowance, Bonus, Commission or any other similar allowances payable to the employee. He emphasized that the contribution of the provident fund is not to be computed on the minimum wages as fixed by the appropriate Government under Minimum Wages Act, 1948. He urged that under the EPF Act, the legislature has not used the word "minimum wages" under the Minimum Wages Act, 1948 for the purpose of provident fund and under Section 6 read with section 2 (b) of the EPF Act, 1952, the contribution to PF is to be computed on the basic wage, dearness allowance and retaining allowance. He submitted that the basic wage can be lesser than the minimum wages and this is the prerogative of the management to fix the basic wage in accordance with the terms and conditions of the employment of the concerned employee.

He submitted that the provident fund is not to be computed on the gross wages, which means basic wage, dearness allowance, retaining allowance, house rent allowance, overtime allowance, bonus and commission, etc. He argued that the EPFC by impugned order dated 06.01.2018 has only considered a letter dated 30.11.2012 issued by its client National Highways Authority of India, which relates to the period beyond the scope of the inquiry. He submitted that this letter is with regard to the contract with the National Highways Authority of India for the financial year 2012-13 whereas the scope of inquiry pertained to the period from April, 2007 to March, 2012 and therefore the order dated 06.01.2018 impugned before the Tribunal has no leg to stand and for that reason the petitioner should have been given the benefit of 100% waiver of pre-deposit under Section 7-O of the EPF Act.

5. He referred to a judgment of the learned Single Judge of the Punjab and Haryana High Court in CWP No. 15443 of 2009 decided on 01.02.2011 wherein the Assistant Provident Fund Commissioner has challenged the order of the Tribunal dated 15.06.2009 and the grievance of the APFC was that the management was splitting the wage structure of the employees as a subterfuge so as to dilute its liability and that the rates of the minimum wages ought to have been taken into consideration and the learned Single Judge after referring to the definition of "basic wage" under Section 2(b) of the EPF Act and the

definition of "wage" as defined in Section 2 (h) of the Minimum Wages Act, 1948, has held that the APFC has rightly excluded house rent allowance, washing allowance and conveyance allowance while determining the liability of establishment towards the provident fund. Learned Single Judge has further held that the exclusion clause under Section 2(b) is fairly large and the exclusions made while determining the "basic wages" cannot be said to be unjustified unless they are totally at variance and in complete deviation of the concept of the allowances sought under the exclusion clause. L.P.A. No. 1139/2011 against the judgment of the learned Single Judge was dismissed by the Division Bench of the Punjab & Haryana High Court on 20.07.2011. He, however, submitted that the SLP (C) No. 32774/2011 filed by the APFC against the order of the Division Bench is pending before the Apex Court.

6. He has relied upon a Division Bench Judgment of this Court in the case of **Eicher Motors Ltd. Vs. Union of India & Ors.,** ***48 (1992) Delhi Law Times 102 (DB).*** This was a case under the Central Excise & Salt Act, 1944 (now renamed as 'Central Excise Act, 1944). It was held that when an order on stay application is passed by the Appellate Tribunal, the same should not be lightly interfered with by the court under Article 226 of the Constitution. It was further held that even though this court has jurisdiction to hear petition against interlocutory orders, it must be on rare occasions. The Division Bench by relying upon

a previous Division Bench judgment of this court in **Escorts Limited Vs. Union of India,** ***1991 (52) E.L.T. 27,*** held that hardship alone should not be a criterion for interfering under Article 226 of the Constitution. The Division Bench further held that while exercising the jurisdiction under Article 226, the petitioner should make out a good prima facie case. However, the Division Bench, after noting that the revenue authorities have admittedly realized the entire excise duty which would have been payable, found little justification in asking the petitioner to deposit Rs.8,00,000/- by way of pre-deposit.

7. He also relied upon another Division Bench judgment of this court in **JCT Ltd. Vs. Income-Tax Appellate Tribunal, Delhi Bench & Others,** ***2002 Income Tax Reports 291.*** The court noted that the power of the Tribunal to grant stay of recovery has been recognized under sub-section (7) of Section 253 of the Income Tax Act, 1961. The court has culled out the principles to consider the application for waiver of pre-deposit for entertainment of an appeal under the Income Tax Act as (a) whether there is a prima facie case in favour of the assessee; (b) the balance of convenience qua deposit or otherwise; (c) irreparable loss, if any, to be caused in case stay is not granted; and (d) safeguarding the public interest. The Division Bench having noted that the petitioner has already deposited Rs.40,00,000/- out of Rs.1.15 crore and considering the peculiar facts and circumstances of the case, directed the Tribunal to

hear the appeal without insisting upon any further deposit as a condition precedent.

8. He argued that if the petitioner was made to deposit Rs.7.70 crores approximately, being the 50% of the amount determined by order dated 06.01.2018 of the EPFC, the petitioner would be left with no working capital and its business will come to a complete standstill as it may not even be left with sufficient resources to pay the minimum wages to its employees and to meet out the statutory and tax obligations. He argued that there were 107 contracts with different clients for deputing work force but not even a single such agreement has been considered by the EPFC while determining its liability under Section 7-A of EPF Act.

9. Per contra, it is argued by the learned counsel for the respondent that it is a case of evasion in deposit of provident fund dues by the petitioner management by splitting the wages even though the provident fund contribution was charged by the petitioner from its clients on gross wages. He argued that as per the inquiry, the petitioner management has charged from its clients the contribution of provident fund on actual gross wages, which was beyond even the statutory limit of Rs.6,500/- at the relevant time and to evade the contribution of provident fund, the petitioner has bifurcated the minimum wages into various components like basic wages, overtime allowance, etc. He submitted that the petitioner in order to cause unlawful gain to

itself made a self-determined figure as basic wages by making short payment for provident fund payable to workmen. He submitted that this is a case where the dispute is not of the "wages" as defined under the Minimum Wages Act and "basic wages" under EPF Act but the dispute is as to what amount has been collected by the petitioner from its various clients on account of provident fund and what has been actually credited in the accounts of the workers. He argued that the petitioner has enriched itself by evading, saving and keeping with it the major amount of the provident fund which is payable to its employees. He argued that the petitioner management has even collected the amount of overtime allowance and provident fund payable thereupon but did not deposit the provident fund in the account of its employees.

10. He argued that despite opportunities the petitioner has not placed on record copies of the agreements with wage structure agreed upon by which the petitioner has deputed various classes of employees with its clients in order to show as to what amount it had received from its various clients on account of the wages and provident fund for the employees. He submitted that nowhere in the writ petition it is mentioned that the petitioner has deposited the provident fund of its employees which has been collected by it from its various clients and has not retained even a single penny during the relevant period in the light of the order dated 06.01.2018 of the EPFC. He argued that the

petitioner has charged the amount of the provident fund for its employees from its clients during the relevant period, which is calculated on the gross wages and as such the petitioner cannot be allowed to evade the provident fund by its whimsically self determining the amount in the name of the "basic wage".

11. I have heard the learned counsel for the parties.

12. It would be profitable to refer to Section 7-O of the EPF Act which reads as under:-

> "**7-O Deposit of amount due, on filing appeal.**– No appeal by the employer shall be entertained by a Tribunal unless he has deposited with it seventy-five per cent of the amount due from him as determined by an officer referred to in section 7A:
>
> Provided that the Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this Section."

13. A perusal of the aforesaid provision would make it clear that the Tribunal shall not entertain an appeal unless the appellant makes a pre-deposit of 75% of the amount due and determined as referred to under Section 7A of the EPF Act. However, the proviso to Section 7-O of the EPF Act which is an exception empowers the Tribunal to waive off or reduce the amount to be deposited for the reasons recorded in writing.

14. The EPF Act is a social welfare legislation for the benefit of labour class. Financial hardship cannot be criterion for giving any concession to the employer for non-compliance of any provision of the Act since the contribution to provident fund is

hard earned money of the work force. Actually mandate of Section 7-O for pre-deposit of 75% of the amount due from the establishment as determined u/s 7-A is the rule and waiver is an exception. In the light of the facts and circumstances, "Eicher Motors" or "Escorts Limited" does not help the petitioner at all as basic principle is not to interfere in interlocutory matters under Article 226 of the Constitution. "JCT" is under Income Tax Act where one of the criterion is to safeguard the public interest apart from prima facie, balance of convenience and irreparable loss. However, in EPF matters, the interest of work force has also to be taken care of. The Tribunal has taken a balanced approach by the impugned order dated 19.01.2018 asking the petitioner to deposit 50% of the amount determined by the respondent after hearing the parties and once such discretion has been exercised by the Tribunal, this court in the writ jurisdiction is not to sit as a court of appeal to provide complete waiver to the petitioner and substitute its own view or discretion. This court is not to decide the merits of case which is subject matter of appeal before the Tribunal. If this court starts interfering in the interim orders passed by the Tribunal under Section 7-O of the EPF Act while considering the pre-deposit condition under Section 7-O of the EPF Act, it shall give rise to unnecessary challenge to every such order in the writ jurisdiction. The impugned order is an interim one and in case the petitioner succeeds in the appeal before the Tribunal the

refund shall automatically follow. Under the writ jurisdiction this court cannot give the findings on the merits of the case leaving nothing for the Tribunal to decide. The questions of merit are to be considered by the Tribunal while hearing and disposing the matter finally. The points raised challenging the impugned order before the Tribunal in appeal are not to be examined in the writ jurisdiction.

15. For the reasons, I do not find any merit in the writ petition. The same is dismissed accordingly along with the application, being CM No. 5799/2018. Since the proceedings under Section 7-A of EPF Act were initiated by the EPFC on the complaint of Sh.Raj Kumar Singh, Vice President, Bhartiya Janta Mazdoor Mahasangh, 11, Ashok Road, New Delhi-110001, it is directed that the said union shall also be impleaded as party before the Tribunal for proper adjudication of appeal.

16. Since the Tribunal by impugned order dated 19.01.2018 has granted six weeks' time to deposit 50% of the amount due which expired on 02.03.2018, the petitioner is granted further four weeks' time to deposit the amount in terms of the impugned order.

(VINOD GOEL)
JUDGE

MAY 08, 2018
"shailendra"