

(2004) 04 DEL CK 0110
In the Delhi High Court
Case No : C.W. No. 165 of 1978

Autocrat Tours

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 15-04-2004

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 7A

Citation : (2005) 1 SLJ 146

Hon'ble Judges : Madan B. Lokur, J

Bench : Single Bench

Advocate : S.N. Bhandari, Rakesh Kumar Garg and Amit Seth, for the Appellant;
R.C. Chawla, for the Respondent

Final Decision : Dismissed

Judgement

Madan B. Lokur, J.—The petitioner is aggrieved by an order dated 21st January, 1978 passed by the Regional Provident Fund Commissioner (RPFC) under the provisions of Section 7A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (the Act) and the consequent demand dated 31st January, 1978.

2. The controversy in the case is rather narrow. The petitioner is carrying on a transport business. It owns a fleet of cars and utilizes the services of drivers, cleaners, etc. According to the petitioner it has an employee strength of less than 20 and so the provisions of the Act are not at all applicable to it. As is obvious, this is essentially a question of fact.

3. On 2nd September, 1977 a Provident Fund Inspector visited the premises of the petitioner and noted its business as "tourism car hire operators". The number of employees was as follows :

January 1977 24 Employees February 1977 24 Employees March 1977 24 Employees April 1977 22 Employees

4. A list of these employees was made out and the statement so prepared was duly confirmed and signed by its Managing Partner.

5. Thereafter on 3rd October, 1977 the RPFC issued a notice to the petitioner to show cause why its establishment be not brought under the purview of the Act provisionally from 1st January, 1977. The petitioner was advised to pay its provident fund contributions for the period January 1977 to September 1977. The petitioner replied on 19th October, 1977 that it had only 14 employees on its rolls and so the provisions of the Act were not applicable to it. The RPFC then conducted an inquiry, heard the petitioner through its Advocate and passed the impugned order on 21st January, 1978.

6. Learned Counsels for the parties were heard on 18th and 25th March, 2004 when judgment was reserved.

7. The principal contention of learned Counsel for the petitioner was that the petitioner regularly employed only 14 persons. Two registers were maintained by the petitioner: one was the attendance register containing a list of regular employees while the other was a ledger containing "a list of the employees whose services were utilised off and on subject to the exigencies of business and as and when some regular employee had proceeded on leave or was otherwise not available." It was submitted that the Inspector had wrongly totaled to the number of employees from both the registers and had, on that basis, submitted his report. Learned Counsel, strongly relied on The Regional Provident Fund Commissioner, Andhra Pradesh Vs. Sri. T.S. Hariharan, , to contend that casual or badli workers could not be included in the employee strength.

8. In Hariharan the Supreme Court had confined itself to the scope of Clauses (a) and (b) of Section 1(3) of the Act. These clauses read as follows:

"1. Short title, extent and application-

(1)& (2) xx xx xx (3) Subject to the provisions contained in Section 16, it applies-

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf :

Provided that the Central Government may, after giving not less than two months" notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification."

(4)& (5) xx xx xx"

Section 2(f) of the Act defines "employee" as follows :

"2. Definitions-In this Act, unless the context otherwise requires,-

(a)to(e) xx xx xx (f) "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets, his wages directly or indirectly from the employer, and includes any person,-

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment;

(ff)to(m) xx xx xx"

9. Section 16 of the Act provides that the Act shall not apply to certain establishments.

This Section reads as follows :

"16. Act not to apply to certain establishments.-(1)This act shall not apply-

(a) to any establishment registered under the Co-operative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State relating to co-operative societies, employing less than fifty persons and working without the aid of power; or

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees arc entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits; or

(c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits;

(2) If the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt whether prospectively or retrospectively that class of establishments from the operation of this Act for such period as may be specified in the notification."

10. The question that the Supreme Court posed for its consideration was, whether Clause (b) of Sub-section (3) of Section 1 when it speaks of the establishment employing 20 or more persons means that the person so employed may be employed by the establishment for any purpose whatsoever and for however short a duration or that the employment must be for some minimum period in the establishment."

11. While answering the question raised, the Supreme Court held that the employment must be dictated by the normal regular requirement of the establishment reflecting its financial capacity and stability. The Supreme Court said in Paragraph 8 of the report as under:

"this Act is intended to apply only where an establishment has attained sufficient financial stability and is prosperous enough to be able to afford regular contribution provided by the Act. Contribution by the employer is an essential part of the statutory scheme for effectuating the object of inducing the workmen to save something regularly. The establishment, Therefore, must possess stable financial capacity to bear the burden of regular contribution to the Fund under the Act. In this connection it may be recalled that by virtue of Section 1(5) an establishment to which the Act is applied continues to be governed by the Act notwithstanding that the number of persons employed by it at anytime falls below the required number. This liability to be governed by the Act ceases only if the terms of the proviso to Section 1(5) are complied with. The financial capacity of the establishment to bear the burden must, Therefore, have some semblance of a reasonably long-term stability. In other words, the employment of requisite number of persons must be dictated by the normal regular requirement of the establishment reflecting its financial capacity and stability. It, Therefore, follows from this that the number of persons to be considered to have been employed by an establishment for the purpose of this Act has to be determined by taking into account the general requirements of the establishment for its regular work which should also have a commercial nexus with its general financial capacity and stability. This seems to us to be the correct approach under the statutory scheme."

12. In Hariharan the respondent was running a hotel and usually employed 18 or 19 persons. In 1961, there was a total failure of rains and so the respondent had to employ 2 or 3 persons on contract basis for supplying water to the hotel. According to the appellant before the Supreme Court, these persons were also employees of the hotel. Rejecting this contention, the Supreme Court said in Paragraph 10 of the report:

"Considering the language of Section 1(3)(b) in the light of the foregoing discussion it appears to us that employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can reasonably be concluded that the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by this definition. The word "employment" must, Therefore, be construed as employment in the regular course of business of the establishment; such employment obviously would not include employment of a few persons for short period on account of some passing necessity or some temporary emergency beyond the control of the company. This must necessarily

require determination of the question in each case on its own peculiar facts. The approach pointed out by us must be kept in view when determining the question of employment in a given case."

13. Learned Counsel for the petitioner sought to bring his case within the four corners of Hariharan. Unfortunately, the petitioner has failed to show any temporary emergency or exigency as required by the decision of the Supreme Court. In reply to the show cause notice, the petitioner stated that :

"The concerned Inspector little realised that during the months for which he has prepared the statement, tourist groups from foreign countries visit India and in case some additional hands are engaged, they are on casual basis i.e. the moment the peak season is over, the emergent need also ceases to exist."

Later, it is stated that:

"Apart from this aspect of the matter, the concerned Inspector failed to appreciate that some permanent employees engaged in the transport business of this establishment absent themselves or go on leave and as a stop-gap arrangement, services of the substitutes are utilised and that too on a casual basis."

14. The theory set up by the petitioner is reiterated in a subsequent affidavit filed before the RPFC on 24th December, 1977. However, the reply to the show cause notice as also the affidavit are vague and give no verifiable particulars or any details to sustain the contention of the petitioner.

15. Before this Court the petitioner filed a supplementary affidavit dated 27th March, 1978. First of all I think this affidavit is a little too late and secondly it has been filed with a view to establish that the employees over and above the strength of 14 had not worked for 120 days or in any case had worked for short periods with the petitioner. The duration, for which the additional hands worked, as held in Hariharan is irrelevant; what has to be seen is the "normal regular requirement of the establishment reflecting its financial capacity and stability." The Petitioner has not been able to show anything, except a bald averment, that it faced a temporary requirement due to an influx of tourists. This is totally inadequate.

16. Learned Counsel for the petitioner cited some other judgments in support of his client's cause.

17. *Lakshmi Restaurant v. Regional Provident Fund Commissioner*, 47 (1975) FJR 186, was a case in which casual workers were occasionally engaged by a restaurant for outside parties. It was held that the establishment in the regular course of its business did not employ them. Additionally, it was also held that the Employees' Provident Funds Scheme, 1952 would not be applicable to such employees. For the purposes of this case, the question of applicability of the Scheme is not an issue.

18. In *Ratan Lal v. Regional Provident Fund Commissioner*, 1977 IC.1765, a sweeper, a municipal employee, was being given bakshish for doing work but no wages; a Chowkidar was working for the community and not for the establishment and a driver was the personal staff (though paid out of car expense account) of the proprietor of the establishment. They were held not to be employees of the establishment. This decision does not advance the case of the petitioner.

19. Similarly, in *Eastern Arts Corporation v. S.P. Mehrotra*, 1986 IC 1402, a driver was engaged for 16 days when the regular driver in the establishment was on leave. The badli driver was held not to be an employee of the establishment.

20. In *E.S.I. Corporation v. Western India Theaters Ltd.*, 1995 II CLR 459, sweepers, cleaners and liftmen whose services were used by all occupants of a multi-storeyed building were held not to be employees of an establishment that contributed for their wages.

21. In *ESIC v. M.M. Suri*, AIR 1999 SC 803, it was found as a fact that the employees in an establishment were less than 20. Since this decision turned on admitted facts, it is not at all applicable.

22. One significant fact that has arisen in this case is that, as mentioned above, the impugned demand for payment of provident fund was for the period January to September 1977. During the pendency of the writ petition, demands were made against the petitioner for the period October 1977 to February 1978 (by a letter dated 11th May, 1978), March to October, 1978 (on 15th October, 1978), November, 1978 to October, 1979 (on 24th September, 1980) and so on. In respect of all these demands, the petitioner was called for a hearing but was not able to prove that its employee strength had fallen below 20. In fact, on some of these occasions, the petitioner did not even attend the hearing, or if it did, it did not produce the relevant records. Regularly employing such "casual workers" month after month and year after year cannot be due to some abnormal contingency or emergency as explained by the Supreme Court in *Hariharan*. Consequently, it is not possible to hold that the provisions of the Act do not apply to the petitioner.

23. The writ petition deserves to be dismissed. It is ordered accordingly. The respondents will be entitled to costs of Rs. 5,000/-.