

(2017) 11 BOM CK 0173
In the Bombay High Court
Case No : 155 of 2011

Colgate-Palmolive (INDIA) LTD., & Anr.	APPELLANT
Vs	
The Assistant Provident Fund Commissioner, & Anr.	RESPONDENT

Date of Decision : 13-11-2017

Acts Referred:

Citation : (2017) 11 BOM CK 0173

Hon'ble Judges : C. V. Bhadang

Bench : SINGLE BENCH

Advocate : M.S. Bandodkar, P. S. Bandodkar, C. A. Ferreira, Shane Gomes Pereira

Judgement

1. The challenge in this petition is to the impugned orders dated 23/5/2001, 29/10/2003 and 30/8/2010 passed by the authorities under the Employees' Provident Funds and Miscellaneous Provisions Act, 1972 (Act, for short), where under, a total amount of Rs.7,36,394/- has been levied and demanded from the petitioners towards the provident fund contribution. The said amount comprises of two parts. The first part is in respect of dues of 27 employees on the amount paid as miscellaneous allowances. The total amount under this head is Rs.81,131/-. The second head consists of dues in respect of the transport contractors which amount stands at Rs.6,55,263/-. The order passed by the Provident Fund Commissioner has been confirmed in appeal by the appellate authority.

2. I have heard Shri Bandodkar the learned counsel for the petitioners and Shri Ferreira, the learned counsel for the respondents. With the assistance of the learned counsel for the parties I have gone through the record.

3. It is submitted by Shri Bandodkar, the learned counsel for the petitioners that the petitioners had engaged independent transport contractors, as and when required, for transport of the finished goods and on some occasions for procuring the raw material. It is submitted that the employees of the said transport contractors do not come within the ambit of section 2(f) of the Act. It is

submitted that the said employees cannot be said to be employed by the petitioners or through a contractor. The learned counsel has placed reliance on the decision of the Supreme Court in the case of Managing Director, Hassan Co-operative Milk Producer's Society Union, Ltd. Vs. Assistant Regional Director, Employees' State Insurance Corporation (2010) 11 SCC 537 and the decision of the Delhi High Court in the case of Springdales School and Others Vs. Regional Provident Fund Commissioner and anr. (2006) LLR 47. It is submitted that thus the claim under the second head is totally misconceived. The learned counsel has pointed out that the only ground on which the employees of the transport contractors have been held to be the employees within the meaning of section 2(f) of the Act is that the petitioners have deducted tax at source while making payment to the transport contractors which in the opinion of the learned counsel is not permissible.

4. In so far as the amount in respect of the dues of 27 employees towards miscellaneous allowances is concerned, it is submitted that it was in lieu of the over time allowances which is excluded from the definition of basic wages as contained in section 2(b) of the Act.

5. On the contrary it is submitted by Shri Ferreira, the learned counsel for the respondents that the employees employed through or by a contractor are clearly covered under section 2(f) (i) of the Act and therefore, the employees of the transport contractors would have to be reckoned as employees in respect of whom the provident fund contribution would be payable.

6. In so far as the dues in respect of the miscellaneous allowances are concerned, it is contended that the amount of Rs.500/- per month is paid uniformly to all the employees which cannot be in lieu of the over time allowance. This is because the actual overtime work put by each of the employees would vary and the consequential payment of overtime allowance would also vary. He, therefore, submits that by way of a camouflage the petitioners cannot evade the payment of the provident fund contribution and it is here where the Court should lift the veil and ascertain the real nature of the payment.

7. I have carefully considered the rival circumstances and the submissions made.

8. In so far as the dues in respect of the transport contractors, is concerned, I do not find that the claim made by the respondent is justified. The Supreme Court in the case of Managing Director, Hassan Cooperative Milk Producer's Society (supra) has inter alia held that the expression "on the premises of the factory or establishment" comprehends presence of the persons in the premises of the factory or establishment for execution of the principal activity of the industrial establishment and not casual or occasional presence. In that case, the question was whether the employees doing loading and unloading of the milk cans and the truck drivers and loaders, who entered the premises of the appellants could be treated as persons employed on the premises of the factory or establishment.

The Supreme Court has clearly held that the expression does not comprehend every person who enters the factory for whatever purpose and this can never be said to be the purpose of the section. It is further held that the persons employed by the contractor, for loading and unloading of milk cans are not persons employed by the appellant co-operative society. In my considered view the factual situation obtaining in the present case would be similar and the ratio laid down in the case of Managing Director, Hassan Co-operative Society (supra) would be clearly applicable.

9. In the case of Springdales School and others (supra) before the Delhi High Court, the school had engaged the services of contractors for the conveyance of the students and staff of the school and the contractors were paid on a trip basis at rates as agreed between the management of the school and the transport contractors. The Delhi High Court held that the school management had no casual connection with the employees of contractors, drivers and conductors and as such, the authorities under the Act could not have asked for coverage of such employees under the Act.

10. A perusal of the impugned order shows that merely because the petitioners had deducted the TDS on the payment made to the transport contractors, the authority has come to the conclusion that it is sufficiently proved that the establishment had engaged contract employees, although may not have entered into daily, monthly or yearly contracts. Such a reasoning and conclusion in my considered view cannot be accepted and would be against the weight of the material on record. The deduction of TDS towards payment of the transport contractors would not be sufficient to infer that the employees of the contractor have been employed by the petitioners. In that view of the matter the demand on account of the dues in respect of the transport contractors has to be set aside.

11. Coming to the dues in respect of miscellaneous allowances paid to 27 employees is concerned, the learned counsel for the petitioners has raised a contention that the said amount has been recovered from September 1998 when the appointment of these employees is from February 1999. In other words, it is submitted that the recovery of the contribution from September 1998 and January 1999 is not competent. The learned counsel for the petitioners submit that the amount payable from February 1999 to September 2002 works out to Rs.64,072/-, as against the amount of Rs.81,131/- claimed by the respondents.

12. It is not disputed on behalf of the respondent that the concerned employees were appointed from February 1999 and as such, there is no question of recovery of the contribution prior thereto. The learned counsel for the respondents is however, right in contending that a fixed amount cannot be paid styling it as it being paid in lieu of overtime allowance just to extricate itself from liability to pay the provident fund contribution. Overtime allowance would necessarily be a variable allowance depending upon the hours put by way of overtime work by the individual employees.

13. In the circumstances the petition is disposed of in the following terms:

(i) The demand in respect of the transport contractors is hereby set aside.

(ii) The respondents shall recompute/recalculate the amount payable in respect of the 27 employees as regards miscellaneous allowances, after considering the computation sheet of the petitioners, (copy of which is furnished to the learned counsel for the respondents).

(iii) In the event the respondent finds the amount payable under said head to be in excess of Rs.64,072/-, the respondents shall be entitled to recover the same along with interest in accordance with law.

(iv) Out of the total amount deposited before this Court, the office shall pay an amount of Rs.64,072/-, along with proportionate interest, to the respondents and the remaining amount along with interest, shall be refunded to the petitioners.

(v) Rule is made partly absolute in the aforesaid terms with no order as to costs.