
(2014) 03 DEL CK 0051
In the Delhi High Court
Case No : Writ Petition (C) 6820 of 2010

Dsoi	Vs	APPELLANT
Employees" Provident Fund Organization		RESPONDENT

Date of Decision : 04-03-2014

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3)(a)
1(3)(b) 2(9) 2(f) 6

Citation : (2014) 142 FLR 503 : (2014) 3 LLJ 345 : (2014) 2 LLN 640 : (2014) LLR 702

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Santosh Kumar and Mr. R. Balasubramanian, for the Appellant;
Sagari Dhanda, for the Respondent

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J.—The challenge in this writ petition is to the order dated March 10, 2010 passed by the Employees" Provident Fund Appellate Tribunal, New Delhi in ATA No. 164(4)2002 filed by the petitioner herein whereby the appeal filed by the petitioner was dismissed. The facts are that the petitioner, Defence Services Officers" Institute, Dhaula Kuan, New Delhi has been established with a view to provide social and recreational facilities to the officers of the Defence Services both serving and retired and their families in the union territory of Delhi and further for combined officers mess facilities to them. In the year 1969, although not covered under the provisions of the Provident Fund and Miscellaneous Provisions Act, 1952 (Act in short) but out of desire to extend the benefit of the provident fund to its employees sought voluntary coverage of the Act for its permanent employees. The petitioner has been engaging casual labours for working with it from time to time.

2. In the year 2000 the respondent pursuant to a visit by the Enforcement Officer issued a letter dated October 12, 2000 to the petitioner for compliance of

the provisions of the Act with regard to 156 casual employees from October, 1994. It was the stand of the petitioner in response to the letter dated October 12, 2000 of the respondent that the petitioner does not fall within the definition of industry and the word "employee" as defined in the Act would not include casual labour. The proceedings were also initiated u/s 7A of the Act vide notice dated May 17, 2001. The petitioner contested those proceedings and had taken a similar stand as has been taken by it in response to letter dated October 12, 2000 of the respondent inasmuch as the establishment does not fall within the provisions of Section 1(3)(a) or 1(3)(b) of the Act. The petitioner had also stated that the voluntary coverage in the year 1969 is only with respect to its permanent employees and all other categories were excluded for the purpose. The proceedings u/s 7A of the Act culminated in order dated February 25, 2002 which it appears was decided without calling for comments from the department or without summoning official records of the respondent department.

3. Being aggrieved by the order dated February 25, 2002 a review was filed by the petitioner u/s 7B(1) of the Act. The petitioner had also filed an appeal u/s 7(I) of the Act. The Appellate Tribunal acknowledging the fact that the order does not correspond with the facts of this case or to the grounds taken reviewed the order u/s 7(1)(2) of the Act and reviewed the order which was supplied to the parties.

4. In the appeal the Appellate Tribunal was of the following view:

7. The employment of the casual labourer is not question. Section 2(f) defines the employee as follows:

2(f) "employees" 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];

The dominant feature of the definition is that the person must be employed in or in connection with the work of the establishment and he was paid the wages. In the case in hand it is not disputed that the casual employees were employed to discharge the work of the establishment. In the case of Railway Employees Cooperative Bank Society Ltd. Vs. Union of India reported in 1980 LIC 1212, the Hon'ble High Court of Rajasthan held that, "this wider definition of employee in our opinion embraces the part time employee as also the employee

5. Learned counsel for the petitioner would urge that the casual labours have been granted the benefits of the provisions of the Act with effect from 2001.

According to him the casual labours are not covered within the definition of the employee and the benefits of the Act would not be applicable to such employees automatically.

6. On the other hand, it is the case of the respondents that vide notification dated November 19, 1990 para 26(2) of the Employees Provident Fund Scheme, 1952 was amended and the period of 3 months as was fixed by notification dated January 16, 1981 for the purpose of period of employment has been totally deleted.

26(2). After this paragraph comes into force in a factory or other establishment, every employee employed in or in connection with the work or that factory or establishment, other than an excluded employee, who has not become a member already shall also be entitled and required to become a member of the Fund from the date of joining the factory or establishment.

7. It is also the stand of the respondent that the High Court of Madhya Pradesh, which rejected the challenge to the amendment has been upheld by the Supreme Court vide its order dated April 17, 1995. It is also their stand that the Act does not recognize any difference between a regular employee and a casual labour.

8. Having heard the counsel for the parties, the issue covered by the para 26(2) of the Scheme which inter-alia stipulate that every employee employed in or in connection with the work of the establishment (other than excluded employee) which has not already become member shall also be entitled and required to become a member of the firm from the date of joining the establishment. Meaningfully read, that the benefits of the Act would flow from the date of joining itself. In view of this provision, it is immaterial whether a person joins the employment of an establishment for one day or for more than one day.

9. I note for benefit the observations of the High Court of Madhya Pradesh reported as Khemchand Motilal Tobacco Products Ltd. and Others Vs. Union of India (UOI) and Another, . wherein the High Court while considering the vires of the amendment effected to para 26(2) of the Scheme had held as under:

Among the petitioners, manufacturers of bidis, soya products and cement claim to have contractors who engage labourers on daily wages. Manufacturers of paper and lime claim that they are required to employ casual, badli or ad hoc labourers who do not work for three months or 60 days in three months as required under the Scheme before the impugned amendment. The petitioners claim that a part of work force is casual labour engaged for short duration and sometimes they work only for a day or two. Besides the vague averments in the petitions, they have not placed any material before the Court in support of these pleas. It is well known that in bidi and soya product industries, contract labour is engaged. But there is no material before the Court to show that there is a practice prevalent of engaging temporary employees for a few days as alleged or that there are employees who work for a day or two and disappear.

The question of employees employed through the contractors is not res integra. The direct decision on the point is in the case of P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others, "Employee", as defined under the Act, means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of a factory or an establishment and who gets his wages directly or indirectly from the employer. Definition of the "employee" is wide enough to include persons employed through contractors in or in connection with the work of the factory or establishment. A home worker, it has been held, by virtue of the fact that he does the job in connection with the work of an establishment, attracts the definition of "employee." The work which the petitioners extract from these employees is not stated to be of a sophisticated nature requiring control and supervision at the time when the work is done.

The question posed by the petitioners is answered by the Supreme Court in The Regional Provident Fund Commissioner, Andhra Pradesh Vs. Sri. T.S. Hariharan, which considered the scope of expression "employment". Employment of requisite number of persons must be dictated by the normal regular requirement of the establishment reflecting its financial capacity and stability. Number of persons to be considered to have been employed by an establishment for the purpose of the 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. It was not the intention of the legislature, the Supreme Court observed, to exclude from the application of the Act an establishment which requires employees for its general business the required number of persons for major part of the year. The Supreme Court observed 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 establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can be inferred 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 the Act. "Employment" must be construed as employment in the regular course of business of establishment. Such employment would not include employment of a few persons for a short period on account of some passing necessity or on account of some temporary emergency beyond the control of the Company. By way of illustration, the Court referred to employment of a few persons for a few hours to extinguish accidental fire in an establishment. Whether the Act would be attracted in a case of particular employee is a matter for decision in the particular facts and circumstances adopting above test.

Learned counsel for the petitioners contended that the purpose of this Act is to provide retirement benefits to the employees and the Scheme of the amended provision which does not require a minimum qualifying service of an employee for becoming a member of the fund is contrary to the above purpose. According to the amended impugned provision, an employee becomes eligible for becoming

a member of the fund with effect from the date of joining the factory or establishment. It is contended, even if he leaves employment in a few days, the Scheme would apply. This, it is alleged, is not only ultra vires the Act, but also unworkable and impracticable. As we have already indicated, necessary material to support the particular allegation about the state of affairs in the establishments of the petitioners is not before the Court. Therefore, the contention loses force.

It would not be correct to say that the Act is intended only to provide retirement benefits to employees. The Act is to provide for institution of the Provident Fund for the employees and conferment of certain other benefits on them. In *The Regional Provident Fund Commissioner, Andhra Pradesh Vs. Sri. T.S. Hariharan*, , the Court observed:

The Act was brought on the statute book for providing for the institution of Provident Fund for the employees in factories and other establishments. The basic purpose of providing for Provident Funds appears to be to make provision for the future of the industrial worker after his retirement or for his dependents in case of his early death. To achieve this ultimate object, the Act is designed to cultivate among the workers a spirit of saving something regularly and also to encourage stabilisation of a steady labour force in the industrial centres.

The Scheme of the Act provides for bodies and officers to administer schemes. It provides for contribution by the employer and the employee, determination of money due from employers, determination of escaped amounts, interest payable by employer, mode of recovery of money due from employer, protection against attachment, penal consequences for failure to perform obligations under the Act and other ancillary matters. The details are worked out in the Scheme. The Scheme casts obligation on the employer to co-operate in the formation and administration of the fund by collecting the employees' contribution and paying the same as well as the employers' contribution to the fund, submission of declarations, preparation of contribution cards, furnishing particulars of ownership, submission of returns and the like. We fail to see how the purpose of the Scheme of the Act can be said to spell out the requirement of minimum qualifying service of eligibility for becoming a member of the Fund. We find nothing inequitable or unfair in the requirement that "employee", as defined, should be required to become member of the fund with effect from the date of joining the factory or establishment. It may be that employers may have some difficulty, but the same is not avoidable in the implementation of the social security measure like the present one.

It is contended that there are employees who work for a few days and then disappear. We have indicated that there is no material before us in support of this allegation. Even assuming the allegation to be true, if the employee falls within the definition of the word "employee" in the Act, the contribution will be credited to his account and the fund will stand to his benefit. It is contended that even before the impugned amendment, hundreds of crores of rupees were lying

in the Fund unclaimed. This may be due to inefficiency in the implementation of the Scheme or the lack of awareness on the part of employees of their rights. Such shortcoming, if any, can certainly be rectified by the Board and the Commissioners by taking appropriate steps.

Reference is made in the course of arguments to Annexure R-5 which is an extract of the minutes of the 124th Meeting of the Central Board of Trustees of the Fund. The minutes refer to the opinion of the Estimates Committee of the Lok Sabha in its 78th Report on the working of the Organisation. The Estimates Committee commented that the eligibility criterion of completion of three months' continuous service or of 60 days' actual work has given room for evasion of membership of the fund by unscrupulous employers who resort to unfair labour practice of changing the names of the employees frequently and manipulating their service particulars. The Committee was of the opinion that there should be no period of eligibility for membership to the Fund and every employee should be enrolled as member as soon as he or she joins the service "on a regular basis." The Board of Trustees noticed that the use of the expression "regular basis" by the Estimates Committee is not appropriate, since it is well known that employees are not appointed normally on regular or long term basis. The Board reiterated its earlier recommendation at the 74th Meeting that the requirement of qualifying service should be dispensed and this was reiterated also in 1985. The Regional Commissioners also favoured the removal of the qualifying period of service with a view to ensure extension of benefits to the employees from the date they join service. This recommendation was based on the experience of the Commissioners in the field where some unscrupulous employers, especially those in unorganised sectors, terminated services of their workers just before they complete the qualifying period of service, re-engage them after giving break in service or change their names at the time of re-employment, thereby preventing them from completing the qualifying period of service. The Board indicated that total removal of the qualifying period of service may create some problems in establishment which are purely seasonal in nature and in case where the workers are highly mobile as in construction industry, but this cannot be avoided if the objective of the organisation to ensure universal coverage under the Employees' Provident Fund, especially for those who are the most exploited, is to be ensured. All these aspects were referred to in the agenda of the Meeting. The Board accepted the proposal in the agenda. The Government also agreed that the term "regular basis" is not generally used in relation to employment in the private sector and evasions of the type mentioned by the Committee generally take place in employments which are on casual or short term contract basis. It was on the basis of these exercises that the impugned amendment was made.

Ever since the introduction of Labour Laws, there have been attempts to circumvent the same. The Courts have repeatedly commented on this tendency. Supreme Court, on the basis of a letter, registered Writ Petition (Civil) No. 1262/87 in relation to complaints about violation of provisions of Factories Act in

a bidi industry. The Court requested the Society for Community Organisation Trust, Madurai, to enquire into the allegations and make a report to the Court. The report is referred to the decision in *Rajangam, Secretary Distt. Beedi Workers Union Vs. State of Tamil Nadu and others*, . The report betrays the sad absence of effective implementation of the Labour Laws. Court directed the Union of India, State Government and others to suggest remedial measures. These measures came up for consideration in the decision reported in *Rajangam, Rajangam, Secretary, District Beedi Workers" Union Vs. State of Tamil Nadu and Others*, The Supreme Court gave appropriate directions for implementation of the Labour Laws. One of the directions is for establishment of Regional Provident Fund Commissioner with full equipment for the purposes of implementation of the statute to be located within the area. We have referred to above materials to indicate that there may not be substance in the grievance projected by the employers and the crux is the non-implementation of these laws.

10. I find that this issue is also covered by the opinion of the learned Single Judge of this Court reported in *Jaggi and Co. Vs. Presiding Officer, Employees Provident Fund Appellate Tribunal and Another*, wherein this Court in para No. 14 has held as under:

14. The last contention raised on behalf of the petitioner establishment to the effect that casual workers could not have been included in the strength of employees of the petitioner establishment for taking the same up to 20 in number and making the Act applicable to it, is also devoid of merits for the reason that Section 6 of the Act does not distinguish between employees engaged by the employer and those engaged through a contractor and instead refers to both, i.e., employees employed by an establishment directly or by or through a contractor. Even the definition of "employee" does not distinguish between a casual employee or a regularly engaged employee and instead includes employees employed by or through a contrary in connection with the work of the petitioner establishment. Similarly, paragraphs 30 and 36B of the Scheme also do not make any such distinction. In fact both the provisions require an employer in the first instance to pay contribution payable by him as also on behalf of the member employed by him directly or by or through a contractor. Para 36B of the Scheme also enjoins every contractor to submit to the principal employer, a statement showing recoveries of contributions in respect of the employees employed by or through him. Therefore, the claim of the petitioner establishment that the 12 piece rate casual workers working under the contractor ought to have been excluded by the RPFC while considering the case of applicability of the Act to the petitioner establishment is contrary to the intendment of the Act and is rejected.

11. I find that even the Karnataka High Court in the judgment reported as 1998 LIC 157 dealing with the casual employees observed as under:

This view of the Full Bench holding that a casual employee also comes within the purview of the Act and the definition of the term "employee" as per S. 2(9) of

the Act stand supported by the decision of the Supreme Court in the case of Regional Director, Employees' State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd., is equal to Regional Director, Employees' State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd., Regional Director, Employees' State Insurance Corpn., Madras Vs. South India Flour Mills (P) Ltd., . Therefore, the employees those have been employed by the appellant/applicant even if they be said to be casual employees, are covered by the definition of the term "employee". The learned counsel submitted that such employees might have ceased to work and they are not identifiable and therefore with respect to them, there is no liability to deposit or to make contribution. Such a contention is also based on mis-conception. Such a contention has been rejected by Their Lordship of the Supreme Court in the case of Regional Director, E.S.I. Corporation Vs. Kerala State Drugs and Pharmaceuticals Ltd. and Others, , by observing as under:

As regards the finding that the workmen were unidentifiable, what is forgotten is that under the Act, once an establishment comes to be covered by the Act, the employer becomes liable to pay the contribution in respect of the employees in his employment directly or indirectly. The contribution which had become payable for the relevant period has to be paid even if the employees concerned are no longer in employment. Whether the employees are unidentifiable today or not is, therefore, irrelevant so long as the contribution was liable to be paid on their behalf, when they were in employment.

In view of the aforesaid conclusion, I do not see any merit in the writ petition. The same is accordingly dismissed without any order as to costs.

C.M. No. 13490/2010

Dismissed as infructuous.