

(2011) 07 MAD CK 0317

In the Madras High Court

Case No : Writ Petition No. 10236 of 2010 and M.P. No. 1 of 2010

Focussed Corporate Services (India) Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 05-07-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 1(4), 2

Citation : (2011) 07 MAD CK 0317

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : S. Vaidyanathan, for C.S. Monica, for the Appellant; T.R. Sundaram, for R1 and R3, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner is a registered Company under the Companies Act, 1956. They have filed the present writ petition, challenging an order of the second Respondent Employees' Provident Fund Appellate Tribunal made in ATA. No. 380(13)/2006, inasmuch as by the said order, the appeal filed by the Petitioner was rejected and the order passed by the third Respondent viz., Assistant Provident Fund Commissioner, Coimbatore, dated 29.03.2004 was confirmed and after setting aside the same, they seek to forbear the PF Department from applying the notification of Government of India, Ministry of Labour and Employment made in GSR 346 dated 07.03.1962 with effect from 23.12.2002 under the Schedule "trading and commercial" as it is contrary to the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (for short PF Act) and run counter to Section 1(3)(a) and 1(3)(b) of the PF Act.

2. When the writ petition came up on 13.05.2010, this Court directed the learned Standing Counsel to take notice. Pending notice, an interim stay was granted. Thereafter on 05.08.2010, the writ petition was admitted. The interim order

already granted stood extended without specifying any outer time limit.

3. On behalf of Respondents 1 and 3, a counter affidavit dated Nil (September 2010) was filed.

The Petitioner had also filed a reply affidavit dated 01.06.2011.

4. Heard the arguments of Mr. S. Vaidyanathan, learned Counsel for the Petitioner and Mr. T.R. Sundaram, learned Standing Counsel appearing for Respondents 1 and 3.

5. It is seen from the records, that by an order dated 29.03.2004, the third Respondent informed the Petitioner that the Petitioner's establishment namely M/s. Focussed Corporate Services (I) Private Limited engaged in a "trading and commercial", which is included in the Schedule I/classes of establishment was covered by the provisions of the PF Act. They were also informed that they had engaged more than 33 persons as on 23.12.2002. They must cover their establishment in terms of the PF Act and also with reference to their application number, they were allotted a code number being TN/CB/56709. They were directed to make contributions in terms of the provisions of the Act.

6. In the meanwhile, the Petitioner filed a writ petition before this Court being W.P. No. 21205 of 2004, seeking for a declaration that the application of the PF Act with effect from 23.12.2002 under the Schedule "trading and commercial" is contrary to the provisions of the PF Act. However, this Court by an order dated 27.04.2006 disposed the writ petition with a direction to the Petitioner to file an appropriate appeal u/s 7I of the PF Act. It is pursuant to the said direction, the Petitioner filed an appeal before the second Respondent Tribunal.

7. It was the stand of the Petitioner that the third Respondent had unilaterally made application of the Act to the Petitioner establishment and they are not coming under the Entry "trading and commercial". The said appeal was taken on file as ATA No. 380(13)/2006 by the second Respondent Tribunal. After due notice to the third Respondent, the appeal was dismissed by the Tribunal by an order dated 12.04.2010. Challenging the same, the present writ petition came to be filed.

8. The contention raised before the Tribunal as reflected in the impugned order was that the company was providing financial service to various banks. They have engaged agents, who were paid commission on the basis of their work and there was no master and servant relationship. The company had not engaged more than 20 persons. But the Tribunal observed that the order of the authority reveals that the Petitioner had engaged 150 employees. Secondly, the contention that there is no employer and employee relationship was also rejected by referring to Section 2(f) of the PF Act, where the term #employee# is defined. By the said definition, even a person who is engaged gets his wages directly or indirectly is also an employee and it also includes any person employed by or through a contractor. The dominant feature of the term employee is that the

person must be working for the establishment.

9. The Tribunal found that the agents who are receiving commission are working for the Petitioner establishment. Therefore, they are covered by the provisions of the Act. With reference to non-application of the notification covering "trading and commercial" establishment, the Tribunal found that the Petitioner is a registered company and hence, they will come under the Schedule in a particular entry namely "trading and commercial".

10. Assailing the order of the Tribunal, Mr. S. Vaidyanathan, the learned Counsel for the Petitioner contended that the Entry under GSR 346 covering "trading and commercial establishment" will only related to establishment which are engaged in the purchase, sale or storage of any goods. The Petitioner's activity do not come within the said entry. He further submitted that for persons who were engaged by them, they were only paying commission. u/s 2(b) of the PF Act, the term #basic wages will not include commission. He further submitted that if the Government wants to include a particular establishment, they would have specifically mentioned the establishment rather than reading into some other entry which do not apply to the case of the Petitioner. In this context, he also referred to the notification of the Government of India in G.S.R.728, wherein a specific entry was made in relation to acrobatic association. He also submitted that the Commission agent cannot be brought within the definition of the term employee u/s 2(f) of the PF Act.

11. The learned Counsel for the Petitioner placed reliance upon a Division Bench judgment of this Court in Mrs. Geetha and Others Vs. Arunakumari, for contending that if a particular thing should be done in a particular way, it should be done only in that way and not in any other manner.

12. Per contra, the learned Counsel for the third Respondent submitted that originally M/s. Focussed Solutions was a proprietary concern. The establishment covered itself voluntarily under the provisions of the PF Act in terms of Section 1(4). Later the Management of the establishment was converted into a partnership firm. On the dissolution of the partnership firm, a Private Limited company was started in the name and style of M/s. Focussed Corporate Services India Private Limited. The Establishment had employed around 150 employees, whereas, provident fund was being deducted only for 20 employees. Hence, the Enforcement Officer of the PF Department recommended for coverage of the said establishment u/s 1(3)(b) of the Act with effect from 23.12.2002. The relevant entry made on 07.03.1962 will include stock exchange and other allied services and the said notification will have to be construed in broad perspective. Merely because the Petitioner is indulging in outsourcing work and such a work was not available at the time of notification, it does not mean that the Petitioner cannot be covered under the Act. u/s 1(3) of the PF Act, the coverage is made in respect of factories as well as for the notified establishment.

13. On the question of the term "Commission Agent", the learned Counsel for the

Respondents placed reliance upon a judgment made in Canbank Financial Services Limited v. Regional Provident Fund Commissioner reported in 1996 (3) LLJ (sppl) 1006, wherein it was held that the term "Commission agent" appearing in Entry 11 cannot be given a restrictive meaning.

14. Before proceeding to deal with the coverage under the Act, it is necessary to refer the relevant Entry under which the Petitioner is sought to be covered. The GSR notifying the establishment reads as follows:

24. Every trading and commercial establishment engaged in the purchase, sale or storage of any goods, including establishment of exporters, importers, advertisers, commission agents and brokers and commodity and stock exchanges but not including banks or warehouses established under any Central or State Act.

15. The Supreme Court in M/s. International Ore and Fertilizers (India) Pvt. Ltd. Vs. Employees' State Insurance Corporation, held that a welfare legislation should receive liberal construction in achieving the purpose of the legislation. In that case, the Supreme Court held that the "trading and Commercial activities can be brought within the term #shop# under the ESI Act. In Paragraph 4, it was held as follows:

4. On behalf of the Petitioner it is urged before us that since no goods were actually being delivered in the premises in which the Petitioner was having its establishment the said establishment could not be treated as a shop which is referred to in Item 3(iii) of the government's notification. The word "shop" is not defined in the Act or in the notification issued by the State Government. According to the Shorter Oxford English Dictionary the expression "shop" means "a house or building where goods are made or prepared for sale and sold". It also means a "place of business" or "place where one's ordinary occupation is carried on". In ordinary parlance a "shop" is a place where the activities connected with the buying and selling of goods are carried on. The evidence produced in the case shows that the Petitioner is carrying on its business at its business premises in Secunderabad. At that place the Petitioner carries on the commercial activity facilitating the emergence of contracts of sale or goods between its foreign principals and the State Trading Corporation/Minerals and Metals Trading Corporation of India. It arranges for the unloading of the goods under its supervision and for the survey of the goods despatched by its foreign principals at the ports on behalf of its foreign principals and on the goods being delivered to the Central Government it collects the price payable by the government and remits it to its foreign principals. All these activities are directed and controlled from its premises at Secunderabad. It is thus clear that the activities carried on by the Petitioner constitute trading activities although the goods imported from abroad are not actually brought to the said premises and delivered to the purchaser there. In our opinion it is not actually necessary that the delivery of the goods to the purchaser should take place at the premises in which the business of buying or selling is carried on to constitute the said

premises into a "shop". The delivery of the goods sold to the purchaser is only one aspect of trading activities. Negotiation of the terms of sale, carrying on of the survey of the goods imported, arranging for the delivery of the goods sold, collection of the price of the goods sold etc. are all trading activities. The premises where business is carried on by the Petitioner is undoubtedly a shop as the activities that are carried on there relate only to the sale of goods which are imported into India. The Petitioner acts as the agent of its foreign principals who are the sellers. The Petitioner directs and controls all the activities from the premises in question. If orders are received at a place which ultimately fructify into sales and the resulting trading activity is directed from there that place comes to be known as a "shop". In our view the Employees' Insurance Court placed a very narrow interpretation on the expression "shop" while upholding the contention of the Petitioner by confining "shop" to a place where goods are actually stored and delivered pursuant to a sale. We agree with the decision of the High Court that while construing a welfare legislation like the Act and the notification issued there under a liberal construction should be placed on their provisions so that the purpose of the legislation may be allowed to be achieved rather than frustrated or stultified. There is no doubt that the establishment of the Petitioner at Secunderabad is a "shop" where selling activity is carried on and by virtue of the notification issued by the State Government the Act became applicable to it. The Petitioner is bound to comply with the provisions of the Act as admittedly at all relevant times the Petitioner had engaged more than 20 persons for wages at its place of business. There is no ground to interfere with the judgment of the High Court.

16. The Supreme Court in *M/s. Cochin Shipping co. Vs. E.S.I. Corporation*, , while considering the application of the provisions of the ESI Act in terms of Section 1(4) of the said Act in relation to clearing and forwarding agency construed a notification dated 16.09.1974. By the said notification, the authorities covered Hotels, Restaurants, Shops, Road Motor Transport Establishments, Cinema Theatres and Newspaper Establishments. A contention was raised by the clearing and forwarding agents that they will not come under any one of the definition and to bring them under the definition "shop" was erroneous.

17. The Supreme Court referred to its earlier judgment in *M/s. International Ore and Fertilizers (India) Pvt. Ltd.*, case (cited supra) and held that merely because other establishments which are akin to shop are enumerated, it does not, in any manner, gives a narrow meaning to the word "shop" and also it does not dilute the meaning of the word "shop". The object of the notification is to envelop as many establishments as possible without leaving any room for doubt. Therefore, the Court held that the stevedoring, clearing and forwarding operations will include clearing of documents in the customs house, which are necessary for the export or import of goods and those services also form part of carrier's job. Therefore, if a shop carries on systematic economic or a commercial activity, that would be enough to bring the said establishment without specifically enumerating

the specific activities carried on by the said establishment.

18. The Supreme Court subsequently dealt with the application of ESI Act in relation to an advertising agency vide its judgment in AIR 1994 1154 (SC) . The Supreme Court after referring to the earlier judgments in International Ore's case (cited supra) and also the Cochin Shipping Case (cited supra) held that the ESI Act is a beneficent legislation and therefore, it was reasonably possible to construe the word "shop" so as to include the activity of an advertising agency. In paragraph 16, it was held as follows:

16. In the light of these judgments and the expanded meaning now given to the word "shop", the evidence which we have reproduced above setting out the different activities of an advertising agency needs to be considered. Clients call on an advertising agency to initiate campaigns for promotion of their products. Advertising campaigns can be conducted in the different media and otherwise. The advertising agency gives advice in this behalf and as to possible expenses. The advertising agency prepares and presents alternative campaigns for the client to choose from. For such purpose it must prepare the necessary art work and the appropriate words to go with it. It employs specialists in these fields. The advertising agency is paid for the service it renders as aforesaid by the client. It also receives commission from the media through whom advertising is done.

19. Very recently, the Delhi High Court in Anant Raj Agencies Pvt. Ltd., v. Regional Director, ESI Corporation and Anr. reported in 2011 (2) LLN 738 (Del.) held that the agency involving in purchase and sale of immovable properties can be an establishment and brought within the term "shop" as per the provisions of the ESI Act. In paragraph 8, it was stated as follows:

8. It is the admitted case of the Petitioner that they are providing services. When services are being sold, it becomes a commercial activity. Since the Act is intended for social welfare of the workers, it has to be given an extended meaning.

20. If it is seen in the light of these interpretation, certainly, the activities carried on by the Petitioner can be covered within the provisions of the PF Act. Their attempt to wriggle out by stating that the Trading and Commercial establishment only if they involve in any goods will come within the purview of the Act is not correct.

21. Merely because commission is paid to the employees, they does not cease to be employees and even commission agents can be said to be an employee in this connection. For this purpose, reference may be made to the judgment of the Supreme Court in Indian Banks Assn. v. Workmen of Syndicate Bank, reported in 2001 1 LLJ 1045 : (2001) 3 SCC 36. Further reference was also made to Canbank Financial Services Ltd v. RPFC reported in 1996 (3) LLJ (sppl) 1006. Ultimately, it is not the nomenclature which matters but the actual work done by the so called Commission Agent alone matters.

22. With reference to the contention regarding minimum number of employees being engaged was less than 20, the said issue is purely a question of fact. The Tribunal had accepted the findings of the third Respondent. The said finding of fact cannot be interfered in a writ petition filed under Article 226 of the Constitution.

23. In view of the above, there is no case made out. Accordingly, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition stands closed.