

(2009) 10 DEL CK 0187

In the Delhi High Court

Case No : Writ Petition (C.) No's. 13762-78 of 2004

Gangadhar Bajpai and Others

APPELLANT

Vs

IOC and Others

RESPONDENT

Date of Decision : 28-10-2009

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17, 2, 6, 8, 8(A)

Employees State Insurance Act, 1948 — Section 2, 39, 40, 44, 87

Citation : (2009) 164 DLT 265 : (2010) 124 FLR 316 : (2010) 1 LLJ 834

Hon'ble Judges : S.N. Aggarwal, J

Bench : Single Bench

Advocate : Asha Jain Madan, for the Appellant; IOC and Ors., for the Respondent

Final Decision : Partly Allowed

Judgement

S.N. Aggarwal, J.—The present writ petition has been filed by the petitioners who are 17 in number, for directions to the management of M/s Indian Oil Corporation (respondent No. 1 herein) that it should deposit their future provident fund and ESI contribution in its own account code to ensure that each one of them gets ESI card and other benefits.

2. The petitioners were engaged as Security Guards by M/s Indian Oil Corporation (IOC) through contractors namely M/s Super Safeways Pvt. Ltd., M/s V.P.N. Security Agency and M/s Dev's Security. The petitioners who were contract employees had raised an industrial dispute being I.D. No. 130/1998 for their regularization by IOC (respondent No. 1). The dispute raised by the petitioners for their regularization was referred by the Central Government to the CGIT for adjudication. The terms of reference were as follows:

Whether the demand of the Union that the services of the contract labourers namely, Sh. Prithvi Raj and others working as Security Guards in the premises of the management of Indian Oil Corporation Ltd. be regularised w.e.f. the date of their joinings (as shown against their name as per list enclosed) by the

management of Indian Oil Corp. Ltd who is the principal employer, is justified? If so, to what relief the concerned contract labourers/workmen are entitled and from what date?

3. The reference vide award dated 06.09.2006 was answered by the Industrial Tribunal in favour of the petitioners. They were ordered to be regularised in the service of the respondent No. 1. However, the operation of the said award was stayed by this Court in writ petition filed by the management of IOC being W.P. (C.) No. 1074/2007. The stay against the award is stated to be still continuing.

4. This writ petition has been taken up for final disposal on an assumption that the petitioners continue to be contract labourers.

5. Ms. Asha Jain Madan, learned Counsel appearing on behalf of the petitioners, has argued that in view of the provisions contained in Rule 30 of the Employees' Provident Funds Scheme, 1952, it is the liability of the principal employer to pay the employer's and employee's share of contribution of provident fund in the first instance. The learned Counsel appearing on behalf of the petitioners has also referred to the definition of "employee" given in Section 2(f) and has also referred to the provisions of Section 6 and Section 8(a) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 to contend that the entire scheme of the Act and the rules framed there under cast an obligation on the principal employer to deposit the employer's and employee's share of the provident fund contribution even in respect employees engaged through the contractor.

6. Mr. Jagat Arora, learned Counsel appearing on behalf of the respondent No. 1 (IOC) has contended that since the petitioners are the contract labourers and as, according to him, the contractor through whom they were employed is already deducting and depositing the Provident Fund and ESI contribution, the liability for the payment of the same cannot be fastened on the principal employer, i.e., IOC.

7. I have given my anxious consideration to the rival arguments advanced by the learned Counsel for the parties but I have not been able to persuade myself to agree with the submissions made on behalf of the respondent No. 1 (IOC).

8. Rule 30 of the Employees' Provident Funds Scheme, 1952 and provisions contained in Section 2(f) and Sections 6 and 8A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 are relevant and the same are extracted below:

Rule 30 of the Employees' Provident Funds Scheme, 1952

30. Payment of contributions-(1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

(2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges 1[***].

(3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges 1[***].]

Section 2(f) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952

2(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 3[an establishment], and who gets, his wages directly or indirectly from the employer, 4[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;] 5[(ff) exempted employee means an employee to whom a Scheme 1[or the insurance Scheme, as the case may be,] would, but for the exemption granted under 6[***] Section 17, have applied;

(fff) "exempted 7[establishment] means 3[an establishment] in respect of which an exemption has been granted u/s 17 from the operation of all or any of the provisions of any Scheme 1[or the Insurance Scheme, as the case may be], whether such exemption has been granted to the 1[establishment] as such or to any person or class of persons employed therein;]

Section 6 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952

6. Contributions and matters which may be provided for in Schemes.-3[***] The contribution which shall be paid by the employer to the Fund shall be 4[5[ten per cent]] of the basic wages, 6[dearness allowance and retaining allowance (if any)] for the time being payable to each of the employees 7[(whether employed by him directly or by or through a contractor)], and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, 8[f any employee so desires, be an amount exceeding 5[ten per cent.] of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section]:

8[Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words 9[twelve per cent.] shall be substituted:] Provided further that where the amount of any contribution payable under this act involves a fraction of a rupees, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee.

Section 8(a) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952

8A. Recovery of moneys by employers and contractors

(1) The amount of contribution (that is to say the employer's contribution as well as the employees' contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme); and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of an employee employed by or through a contractor may be recovered by such employer from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

(2) A contractor from whom the amounts mentioned in Sub-section (1) may be recovered in respect of any employee employed by or through him may recover from such employee the employee's contribution under any Schedule by deduction from the basic wages dearness allowance and retaining allowance (if any) payable to such employee.

(3) Notwithstanding any contract to the contrary no contractor shall be entitled to deduct the employer's contribution of the charges referred to in Sub-section (1) from the basic wages dearness allowance and retaining allowance (if any) payable to an employee employed by or through him or otherwise to recover such contribution or charges from such employee. Explanation : In this section the expression "dearness allowance" and "retaining allowance" shall have the same meanings as in Section 6.

9. A plain reading of the above statutory provisions makes it abundantly clear that it is the liability of the principal employer in the first instance to pay/deposit the employer's and employee's share of contribution of Provident Fund with the Regional Provident Fund Commissioner even in the case of contract labourers engaged through the contractors.

10. The contention of Mr. Jagat Arora, learned Counsel appearing on behalf of the respondent No. 1, that the principal employer cannot be made liable for paying the PF contribution because the contribution on account of PF is being already deposited by the contractors, is of no legal consequence in view of the statutory provisions referred above.

11. The learned Counsel appearing on behalf of the petitioners has contended

that the contractors through whom the petitioners were got employed in the service of respondent No. 1 are changed from time to time and on account of such change break comes in payment of contribution of their Provident Fund with the Regional Provident Fund Commissioner and, for that reason, she has urged that directions should be given to the respondent No. 1 to deposit the employer's and employee's share of contribution of PF to IOC being the principal employer of the petitioners.

12. It is not disputed in the present case that the petitioners are working in the premises of IOC as Security Guards and, therefore, it cannot be disputed that the IOC is at least the principal employer of the petitioners for the purpose of applicability of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. In this regard a reference can usefully be made to the counter affidavit filed on behalf of the respondent No. 2 (RPFC) which is at page 71 of the Paper Book and is extracted below:

Under the provisions of the Act of "The Employees Provident Fund & Miscellaneous Provisions Act, 1952" the Principal Employer would be Indian Oil Corporation. Act does not recognise the Contractor as employer.

13. From the above stand taken by the Regional Provident Fund Commissioner, it may also be seen that even as per RPFC, IOC is the principal employer of the petitioners and, for that reason, it is liable to deposit the provident fund contribution (both employer's and employee's share) from time to time.

14. As to what amount is actually payable by IOC on account of its Provident Fund liability in respect of the petitioners, this question has to be gone into in appropriate proceedings u/s 7A of the Act by the concerned authorities.

15. As far as liability of respondent No. 1 for payment of ESI dues under the provisions of the Employees State Insurance Act, 1948 is concerned, the learned Counsel appearing on behalf of the petitioners has referred and relied upon the provisions contained in Sections 2(a), 39, 40 & 44 of the said Act to contend that the provisions are pari passu same as that contained in the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. This proposition is not disputed by the counsel appearing on behalf of the IOC. In fact, I myself have gone through the statutory provisions contained in Sections 2(a), 39, 40 & 44 of the Employees State Insurance Act, 1948 and on going through the same, I find that it is the liability of the principal employer to pay even for the ESI contribution in respect of the petitioners.

16. Mr. Jagat Arora, learned Counsel appearing on behalf of the respondent No. 1, has referred to a notification of Government of India dated 27.03.2003 which is at page 113 of the Paper Book by which IOC was exempted from the applicability of the provisions of Employees State Insurance Act, 1948. This exemption relied upon by the learned Counsel appearing on behalf of the respondent No. 1 will not apply to the case of the petitioners for two reasons. Firstly, the exemption was in respect of regular employees of IOC. The

petitioners are not the regular employees of respondent No. 1. They may become regular employees of respondent No. 1 subject to final outcome of the writ petition being W.P.(C.) No. 1074/2007 pending in this Court. In case, petitioners become regular employees then they will be entitled to benefits which are more than the benefits available under the Employees State Insurance Act, 1948 and this is in view of provisions contained in Sections 87 and 90 of the Employees State Insurance Act, 1948. The second reason why the exemption does not apply to the petitioners is that the exemption is valid only for one year but could have been renewed thereafter on year to year basis. There is no material on record to show that the respondent No. 1 was exempted from the applicability of Employees State Insurance Act, 1948 after issuance of notification dated 22.03.2003 which is at page 113 of the Paper Book. Thus looking from any angle, it can safely be concluded that the respondent No. 1 is liable even for ESI contribution in respect of the petitioners who as per its own case are the contract labourers.

17. In view of the foregoing, this writ petition is partly allowed to the extent that it is directed that the respondent No. 1 shall be liable to deposit the PF and ESI contribution in respect of the petitioners in future with the concerned authorities. The respondent No. 1 after complying with the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the Employees State Insurance Act, 1948 qua the petitioners will be at liberty to recover the said amount from the contractors in accordance with law.

The parties are left to bear their own costs.