

(2011) 09 DEL CK 0470

In the Delhi High Court

Case No : Writ Petition (C) No. 4408 of 2000

Group 4 Securitas Guarding Ltd.

APPELLANT

Vs

Employees Provident Fund Appellate Tribunal and Others

RESPONDENT

Date of Decision : 20-09-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 2, 6, 7A

Citation : (2012) 1 AD 66 : (2011) 184 DLT 591 : (2012) 132 FLR 921 : (2012) 2 LLJ 640 : (2012) LLR 22

Hon'ble Judges : M.L. Mehta, J

Bench : Single Bench

Advocate : Harvinder Singh and Mr. Pratteek Kohli in W.P.C No. 4408/2000 and Ms. Meera Mathur in W.P.C No. 4433/2000, for the Appellant; Ankit Kohli, for R-2 in W.P.(C) No. 4408/2000 and W.P.(C) No. 4433/2000, Ms. Ruchir Mishra and Mr. Jatan Singh for R-3 in W.P.(C) No. 4408/2000 and Mr. Harvinder Singh and Mr. Pratteek Kohli, Advocates for R-3 in W.P.(C) No. 4433/2000, for the Respondent

Final Decision : Allowed

Judgement

M.L. Mehta, J.—Both these writ petitions are being disposed of together as they have arisen out of a common order dated 01.05.2000 passed by Employees Provident Fund Appellate Tribunal (for short "the Tribunal").

2. Both the Petitioners herein, namely M/s. Group 4 Securitas Guarding Ltd. ("M/s. GSGL" for short) and M/s. Whirlpool of India Ltd. ("M/s. Whirlpool" for short) had challenged order dated 31.05.1999/02.07.1999 & 31.05.1999/22.06.1999 respectively passed against them by the Respondent No. 2 herein, namely, Regional Provident Fund Commissioner, Faridabad (Haryana) u/s 7A of the Employees Provident Fund & M.P. Act, 1952 (for short "the Act"). In both the cases, the Commissioner directed the Petitioners to pay additional provident fund contributions on the amount shown as HRA, conveyance allowance and washing allowance. The Tribunal vide the impugned order dismissed the appeals of the Petitioners holding that M/s. GSGL was supplying security personnel to one M/s.

Havels (I) Ltd. as a contractor and that all these personnel were the employees of the establishment where they were deputed. It was held that since the employees were employed by M/s. GSGL for the principal employer, hence, the principal employer/establishment where the personnel were deputed was liable to pay PF contributions of those employees. Based on this premise, the Tribunal dismissed the appeals of the Petitioners. The Petitioners have assailed the impugned order of the Tribunal. 2. There is no dispute to the fact that M/s GSGL is an independent legal entity and operates all over the world having workforce of large number of employees and engaged in the business of providing "security guard services" to various establishments all over India. M/s. Whirlpool Ltd. and M/s. Havels (I) Ltd. are some of its clients. It is also not in dispute that M/s. GSGL is independently covered under the provisions of EPF Act by virtue of notification u/s 1(3)(b) of the Act which extends provisions of the said Act to establishments engaged in the business of providing "security guard services" and that it has been granted a code number by the authority under the Act. It is also not in dispute that PF department has been accepting contributions from M/s. GSGL treating it as the "employer" in respect of the said employees.

3. The commissioner initiated proceedings u/s 7A of the Act against the Petitioners on the ground that M/s GSGL had allegedly violated compliance under the said Act by not depositing PF contributions on the additional component of HRA, conveyance allowance and washing allowance as paid by it to its employees who were employed by its clients namely M/s Whirlpool and M/s Havels (I) Ltd. The first question that arises for consideration in the present writ petitions is as to whether the security guards/personnel provided by M/s GSGL to its clients M/s. Whirlpool and Ors. would be its employees or that these personnel would be the employees of the establishment to whom they are provided. In other words the question would be as to whether it is M/s GSGL who is the employer of those personnel or it would be the clients of M/s GSGL to whom such personnel are provided. The other question would be as to whether there was any additional liability payable in respect of those personnel by their employer.

4. The contention of the Petitioners is that it is M/s GSGL alone who is the employer in relation to those personnel who were employed by it in various establishments. I am in full agreement with the submission of learned Counsel for the Petitioners in this regard. There is no dispute that M/s GSGL is engaged in the activities of providing "security guard services" which is recognized under the Act as primary activity and not as an agency. It is not disputed that M/s GSGL is an establishment with large number of employees and is directly covered by the provisions of the Act. It has been allotted a PF code number for direct compliance of the provisions of the Act. There is no dispute that such code number is allotted to the employers and not to the contractors. M/s GSGL clearly falls within the meaning of Section 2(e) of the said Act in respect of its personnel deputed at various establishments and factories. It is stated that M/s GSGL was submitting statutory returns and contributions in respect of such employees to the competent authority directly as employer. Section 2(e)(ii) of the Act defines

employer in relation of any other establishments, the person who, or the authority which, has the ultimate control over the affairs of the establishment. It could not be said that the clients like M/s. Whirlpool and Ors. have any control over the affairs of M/s GSGL. On the other hand M/s GSGL has control over its employees and the establishment. The said security personnel/guards not only received their appointment letters, but also wages and allowances from M/s GSGL after signing the registers maintained by M/s GSGL and were governed by the terms and conditions of their services with M/s GSGL. The clients of M/s GSGL have no control in the fixation of terms and conditions of the service of security guards. The security personnel are deputed by M/s GSGL in the establishment of their clients not permanently, but, on rotation and transfer basis depending upon the requirement and exigency of the services related to its clients. The clients have no disciplinary control over those personnel. The submissions of the learned Counsel for the Petitioners that in some cases M/s GSGL maintains control rooms in the client's establishment to supervise and regulate the working of the security guards/personnel deputed there and that besides security guards M/s GSGL also deposes other staff at their clients establishment who take care and regulate the working of the security personnel, was not extroverted. From all these it could be seen that the personnel provided by GSGL to its clients including M/s Whirlpool and Ors. were not provided as a contractor, but on principal to principal basis. Thus the clients cannot be termed as the principal employer of those security guards provided by M/s GSGL.

5. Section 6 of the Act makes it mandatory for the employer to contribute to the Provident Fund on the basis of wages, dearness allowance, retaining allowance as payable to its employees. It is the obligation of the employer alone to contribute to the fund and that too on the basic wages, dearness allowance and retaining allowance as mentioned in this section. Likewise, Section 7A also provides that the competent authority named therein ought to determine the amount due from the "employers" under the provision of this Act. In this scheme of the provisions of the Act there does not remain any doubt that it is the employer alone who is under an obligation and is liable to contribute to P.F. In the case of Tata Engineering and Locomotive Company, Ltd. v. Union of India and Ors. 1996 II LLN 1194, there was similar issue before the Bombay High Court. In the said case the question arose under the Act with regard to the workers employed with Respondent No. 3 who were attending conservancy work of Tata factory at Pune. The Court held that the relationship between the Petitioner and Respondent No. 3 has to be gathered from the circumstances as a whole and not by picking a word here and there. The court held that Respondent No. 3, which was a registered Cooperative Society and provided conservancy workers had an existence of its own independent of TELCO and the fact that the said Respondent No. 3 was covered by separate code number, indicated that TELCO could not be called upon to account for any payments on their behalf. The court upheld the contention of TELCO that it was merely one of the many clients of Respondent No. 3 who was doing conservancy work through its own set of employees at

various establishments and factories and therefore, cannot be regarded as a "principal employer" in relation to Respondent No. 3, employees. The Court further held that Section 8A has no application to the case because a contractor contemplated under that section of the Act is one who is a mere front or headman of the principal employer and this could not be said of the Respondent No. 3.

6. In the case of *Basanta Kumar Mohanty v. State of Orissa* 1992 (1) LLS 190 it was held by the Orissa High Court that the Security and Detective Service (India) Ltd. which was providing security services to Talcher Thermal Power Station was not a contractor in relation to the employees deputed by it to Talcher Thermal Power Station nor was it required to obtain a license as contractor under the Contract Labour Act thereby holding that the contract between the two parties was a principal to principal contract for services and not for supply of Labour.

7. Section 6 of the Act casts an obligation upon the employer to contribute to the Fund only on the basic wages, dearness allowance and retaining allowance payable to the employees. According to the Respondent provident fund was liable to be paid not only on the basic wages, but, on the minimum wages, dress allowance and conveyance allowance. It was on this premise that the Commissioner issued the aforesaid orders u/s 7A against the Petitioners.

8. u/s 2(b) of the EPF and MP Act, 1952, "basic wages" is defined as under:

Section 2(b) "basic wages" means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include

- i. the cash value of any food concession;
- ii. any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;
- iii. any presents made by the employer;

9. From the above it may be seen that the definition of basic wages has an exclusive clause in which various allowances including HRA, overtime allowance, bonus, commission or any other similar allowances have been provided so as to enable the employer and employee to determine their liability to make contribution to Provident Fund. Having regard to the above, there does not remain any doubt to hold that the view taken by the Commissioner and the Tribunal was based on a wrong interpretation of the provision of law.

10. Similar question was arose in the case of *Manipal Academy of Higher Education v. Provident Fund Commissioner*, decided on 12th March, 2008 in

which it was held that HRA and other similar allowances are not liable for PF contribution. Similar question also arose before the Punjab and Haryana High Court in a case relating to the Petitioner M/S. G4S Security Services (India) Ltd. titled as Asstt. Provident Fund Commissioner Vs. G4S Security Services (India) Ltd. and Another, wherein it was held that exclusion clause in Section 2(b) is fairly large and the exclusions made while determining the basic wages cannot be said to be unjustified unless they are totally at variants and in complete deviation of the concept of the allowances sought to be under the exclusion clause. The Court held that the Respondents have rightly excluded certain allowances such as house rent, washing and conveyance allowances while determining their liability towards the fund. This decision of the Single Judge was maintained by the Division Bench in its decision delivered in LPA No. 1139 of 2011 (O&M) dated 20.07.2011.

11. In view of the above discussion, the impugned order of the Tribunal is held to be contrary to law and are thus quashed.

12. The Writ Petitions are allowed.