

(2014) 08 BOM CK 0057
In the Bombay High Court
Case No : Writ Petition No. 4658/2003

Hindustan Lever Limited

APPELLANT

Vs

The Assistant Provident Fund Commissioner

RESPONDENT

Date of Decision : 26-08-2014

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(f), 7-A, 7-A(1), 7-A(2)
Industrial Disputes Act, 1947 — Section 2(s)
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 30(2)
Penal Code, 1860 (IPC) — Section 193, 196, 228

Citation : (2015) 4 BomCR 75 : (2014) 143 FLR 950 : (2014) 4 LLJ 603 : (2014) LLR 1098 : (2015) 1 MhLj 771

Hon'ble Judges : Z.A. Haq, J

Bench : Single Bench

Advocate : A.A. Naik, Advocate for the Appellant; R.S. Sundaram and K.P. Marpakwar, Advocate for the Respondent

Final Decision : Allowed

Judgement

Z.A. Haq, J.—The petitioner has challenged the order passed by the Assistant Provident Fund Commissioner on 17th October, 2003 by which the Assistant Provident Fund Commissioner has determined the liability of the petitioner u/s 7-A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act of 1952"). The petitioner has challenged the show cause notice dated 2nd/3rd June, 2003 which was issued by the Assistant Provident Fund Commissioner requiring the petitioner to attend the inquiry u/s 7-A of the Act of 1952.

2. The case of the petitioner is:

Petitioner manufactures soaps and detergent at its factory at M.I.D.C. Khamgaon. On 10th March, 1990 the respondent no.2 was engaged as part time Medical Practitioner, initially for a period of one year and this contract was

renewed from time to time. Initially the respondent no.2 was paid per visit, however subsequently, the remuneration payable to the respondent no.2 was fixed. The respondent no.2 was irregular and, therefore, the contract was terminated by the notice dated 6th December, 2002. The respondent no.2 filed complaint (ULP) No. 187/2002 before the Labour Court. An application u/s 30(2) of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as "the Act of 1971") was also filed by the respondent no.2 which was rejected by the order dated 15th February, 2003. The respondent no.2 approached the Assistant Provident Fund Commissioner, who by the impugned order, concluded that the respondent no.2 is the employee of the petitioner and determined the liability of provident fund dues payable to the respondent no.2. The petitioner being aggrieved by the order passed by the Assistant Provident Fund Commissioner has filed this writ petition.

3. Shri Naik, the learned Advocate for the petitioner has submitted that the respondent no.2 was not the employee of the petitioner and he was performing the job on contract basis. According to the petitioner, the Labour Court while rejecting the application of the respondent no.2 u/s 30(2) of the Act of 1971 had also given the finding that the respondent no.2 was not the employee of the petitioner. It is submitted that the Provident Fund Commissioner while exercising the powers u/s 7-A of the Act of 1952, does not have authority to decide "employer-employee" relationship, he has the power only to determine the amount due from the employer under the provisions of the Act of 1952, the Scheme or [Pension] Scheme or the Insurance Scheme. It is submitted that the Assistant Provident Fund Commissioner has transgressed his jurisdiction by deciding that the respondent no.2 is the employee of the petitioner. The submission on behalf of the petitioner is that the respondent no.2 was performing his professional duties as part time retainer till 6th December, 2002 and he continued with his independent practice. It is submitted that in Writ Petition No. 6423/2013 between the same parties, it is held that the respondent no.2 is not the workman. It is submitted that the respondent no.2 was paid fix remuneration as per retainerhip agreement and it cannot be treated as salary paid to the respondent no.2 considering him as the employee of the petitioner. In support of this submission, the learned Advocate has relied on the judgment of Calcutta High Court given in the case of Souvik Mukherjee Vs. State of West Bengal and Others, It is submitted that the Assistant Provident Fund Commissioner while conducting the inquiry has not exercised the powers conferred by Section 7-A(2) of the Act of 1952 and, therefore, the inquiry and the order passed pursuant to the inquiry are vitiated.

4. Dr. Sundaram, the learned Advocate for the respondent no.1 has submitted that the respondent no. 2 is an employee of the petitioner as contemplated by Section 2(f) of the Act of 1952 and it being an admitted fact that the petitioner was paying fixed remuneration to the respondent no.2, the submission as made on behalf of the petitioner that there is no "employer-employee" relationship between the petitioner and the respondent no.2, cannot be accepted. The

learned Advocate for the respondent no.1 has submitted that the provisions of Section 7-A(2) of the Act of 1952 provide that the Officer conducting the inquiry u/s 7-A(1) of the Act of 1952 has the same powers as are vested in the Court under the Code of Civil Procedure, 1908, for trying the suit, in respect of the following matters, namely:-

- (a) enforcing the attendance of any person or examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavit;
- (d) issuing commissions for the examination of witnesses;

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196, of the Indian Penal Code.

It is submitted that the Act of 1952 is a social legislation enacted for providing for the institution of provident funds, family pension fund and deposit-linked insurance fund for employees in factories and other establishments. The submissions on behalf of the respondent no.1 is that considering the objects of the Act and the powers given to the Authorities while conducting inquiry u/s 7-A of the Act of 1952, it cannot be said that the powers of the Authority are limited only to determine the amount payable to the employee and the Authority cannot decide the issue about "employer-employee" relationship. The learned Advocate has pointed out the communications sent by the petitioner to the respondent no.1 which are at page nos. 56 to 67 of the paper book and has submitted that these communications show that the respondent no.2 was the employee of the petitioner and the petitioner had been exercising all the powers of the employer and the disciplinary control over the respondent no.2 and after considering all this material on the record, the Assistant Provident Fund Commissioner has rightly concluded that the respondent no.2 is the employee of the petitioner and the petitioner is liable to pay the amount as determined by the Assistant Provident Fund Commissioner.

5. Dr. Sundaram, the learned Advocate has submitted that "retainer" is also "employee" for the purposes of Section 2(f) of the Act of 1952. In support of this submission, he has relied on the judgment given by this Court in the case of Gain Financial Consultants Pvt. Ltd. Vs. The Regional Provident Fund Commissioner, Maharashtra and Goa and Others,

Dr. Sundaram, the learned Advocate has submitted that the Assistant Provident Fund Commissioner has power to decide "employer-employee" relationship as per the provisions of Paragraph 26 and Paragraph 26-B of the Employees' Provident Funds Scheme, 1952. The learned Advocate has relied on the judgment given in the case of P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others, and has submitted that the Assistant Provident Fund Commissioner can decide the "employer-employee" relationship while conducting

the inquiry u/s 7-A of the Act of 1952. It is submitted that the order passed by the Assistant Provident Fund Commissioner is proper and based on the appreciation of the material on record and need not be interfered with in the extraordinary writ jurisdiction.

6. Shri Marpakwar, the learned Advocate for the respondent no.2 has adopted the submissions made on behalf of the respondent no.1.

7. In reply, Shri Naik, the learned Advocate for the petitioner has submitted that paragraph 26-B of the Employees' Provident Funds Scheme, 1952 gives power to the Regional Commissioner to resolve the dispute between the employer and employee and in the present case the impugned order is passed by the Assistant Provident Fund Commissioner and, therefore, the impugned order is without authority.

8. Shri Naik, the learned Advocate for the petitioner has relied on the judgment given by the Hon'ble Supreme Court in the case of E.S.I.C. Medical Officer's Association Vs. E.S.I.C. and Another, and has submitted that the respondent no.2 cannot be held to be "workman". The above mentioned judgment is given by the Hon'ble Supreme Court considering the definition of "workman" u/s 2(s) of the Industrial Disputes Act, 1947. For the purposes of the present case, the definition of "employee" as per section 2(f) of the Act of 1952 would be relevant. The definition of "employee" as per Section 2(f) of the Act of 1952 and definition of "workman" as per Section 2(s) of the Industrial Disputes Act, are different.

The issue raised by the parties as to whether the respondent no.2 can be said to be workman or employee, in my opinion, is not required to be considered in view of the findings to be given by me for disposal of the writ petition.

9. If any question arises whether an employee is entitled or required to become or continue as a member, or as regards the date from which he is so entitled or required to become a member, the decision in this regard has to be taken by the Regional Commissioner as per the paragraph 26-B of the Employees' Provident Funds Scheme, 1952. In the present case, the proceedings were referred to the Regional Provident Fund Commissioner on 28th of July, 2003 for taking decision according to the provisions of Paragraph 26-B of the Employees' Provident Funds Scheme, 1952. However, the Regional Provident Fund Commissioner returned the proceedings to the Assistant Provident Fund Commissioner for conducting inquiry u/s 7-A of the Act of 1952. This is recorded in the impugned order. The decision has been taken by the Assistant Provident Fund Commissioner though there is a dispute about the entitlement of the respondent no.2 to become the member which is required to be resolved by the Regional Commissioner according to the paragraph 26-B of the Employees' Provident Funds Scheme, 1952. The respondents have not pointed out that the powers of the Regional Provident Fund Commissioner under para 26-B of the Employees' Provident Funds Scheme, 1952 can be delegated and/or have been delegated to the Assistant Provident Fund Commissioner. The order passed by the Assistant Provident Fund

Commissioner deciding that the respondent no.2 is the employee of the petitioner is without power and authority and is unsustainable in law. Therefore, the impugned order passed by the Assistant Provident Fund Commissioner on 17th October, 2003 is set aside. It is clarified that the judgment will not preclude the authorities from taking decision in the matter, according to law.

10. The writ petition is allowed in the above terms. In the circumstances, the parties to bear their own costs.