(2016) 06 KL CK 0007

In the High Court Of Kerala

Case No : W.P.(C). No. 6991 of 2011

Hotel Indraprastha APPELLANT

Vs

Assistant Provident Fund Commissioner RESPONDENT

Date of Decision : 02-06-2016

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A

Citation : (2017) 1 CLR 251 : (2016) 150 FLR 1069 : (2016) LabLR 1226 : (2016) 3 LLJ 341

Hon'ble Judges : P.V. Asha, J.

Bench : Single Bench

Advocate : Sri N. Sukumaran (Senior Advocate), Sri S. Shyam, Sri N.K. Karnis and Sri Bobbymathew Koothattukulam, Advocates, for the Appellant; Dr. S. Gopakumaran Nair (Senior Advocate), Sri M. Chandra Bose, SC, for the Respondent

Final Decision : Dismissed

Judgement

P.V. Asha, J.—The petitioner has filed this writ petition against Ext.P.3 order passed by the respondent under Section 7.A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as ''the Act'') by which the establishment has been included under the provisions of the Act with effect from December 1996, as also against Ext.P.8 order by which the appeal against Ext.P.3 order is dismissed.

2. The case of the petitioner is that the petitioner''s bar hotel is at Mavelikkara and that they are employing only seven regular employees and twelve trainees. The Enforcement Officer of the Alleppey office conducted an inspection in this hotel in May 1998 and found that the petitioner was employing more than twenty employees and it is liable to be included under the Act. After a prolonged and protracted proceedings, Ext.P3 order was passed on 30/05/2003, after considering the contentions raised by the petitioner, finally concluding that the Act would apply the petitioner under Section 1(3)(a) and (b) of the Act and the

scheme thereunder with effect from 31/12/1996. The managing partners and others of the petitioner was therefore directed to comply with the requirements under provisions.

3. The respondent has referred to the proceedings initiated by it subsequent to the inspection conducted and the opportunities afforded to the petitioner several times and the circumstances under which the respondent, finally issued Ext.P3 order on the basis of directions issued in O.P.No.38083/2001.

4. The petitioner had contented that he had never employed more than twenty persons on any particular date during December 1996. In support of his claim, the petitioner produced Ext.P.1 trainees register in which the names of thirteen persons were given along with the post under which they are being trained. Referring to the trainee register, in which attendance is marked, it is pointed out that some of the trainees had already resigned before the end of the month. At the same time, some of the trainees joined the institution only after the first week or the middle of the second week and going by this register none among these thirteen were employed on all the days in December 1996. Apart from that, it is the contention of the petitioner that none of these trainees were paid and they were only imparted training without any wages or food. According to the petitioner, seven regular employees are sufficient to run the same and therefore it does not come under the purview of the Act.

5. The case of the department was that the attendance register was not being maintained properly, and even for the month of February, attendance was seen marked on 30th and 31st of that month. It is also their case that the petitioner having a two star status, cannot run it with a limited staff of seven regular employees and even with the help of trainees, it is practically impossible to run a Two star hotel with the specifications required. According to them, it is necessary to have at least thirty employees. Moreover, it was seen that no person was seen employed on a regular basis as sweeper, cleaner, watchman/security, etc, payments were made without recording the name and without entering available necessary details. It was further found that though a register for trainees was kept, there was no material to show that the petitioner was conducting a training programme for providing training on a regular basis or any material relating to their appointment, conditions of training etc. Therefore, according to them, there was every chance to effect training in such circumstance. It was also found that there was a necessity of accountant, security guard, room boys also and the petitioner had not produced the day book or payment vouchers or the income tax return for the assessment years 1196-1997 and 1997-1998. Further, it was seen that a sum of Rs. 400/- per month was being paid regularly every month towards administrative expenses and department is of the view that there was every reason for including the petitioner under the purview of the Act. Referring to the specifications, fixed by the Government of Kerala, as to the facilities to be provided by a two star hotel, it was urged that there should be a well furnished lounge, a reception counter with telephone, ten lettable rooms, 75% of the same

must be attached with bathrooms and remaining every four rooms should have common bathrooms, a well maintained dining room, clean and hygienic kitchen with experienced and efficient staff members including supervisory staff, provision for laundry and dry cleaning service. For this purpose, it is found that there should have been at least one receptionist, one accountant, one electrician, two securities, three cooks and assistant cooks, two barman, one storekeeper, one manager, three supervisors, seven waiters/assistant waiters, one laundry service, one sweeper, five cleaning staff and one staff for house keeping. Altogether thirty number of staffs were found required for running a Two star hotel.

After considering the contentions, both the petitioner as well the Enforcement officer, the 1st respondent found that the argument of the petitioner that he was engaging unregistered trainees in addition to regular employees was acceptable. However, it was found that coverage under section 1(3)(a) and (b) of the Act is twenty establishment employees, twenty or more persons. As it was found that different categories of persons were engaged, even if it is not coming under the definition of employee, as the Act is a social benevolent legislation, seven regular employees and thirteen persons engaged as trainees can be reckoned for the purpose under Section 1(3)(a) and (b) of the Act. Referring to the definition of the Employee under Section 2(f), it was held that the trainees were also liable to be treated as employees as it was found that there was no persons engaged under the Apprenticeship Act, 1961. As against the argument raised by the petitioner that not more than twelve persons were engaged on a single day during the month, the respondent took note of the engagement of one person against which payment was being made regularly at the rate of Rs. 400/-, even though the case of the petitioner was that the said payment was being made to the tax consultant. It was found that the register does not reveal the persons who are maintaining the accounts in order to show the particulars of payment. In view of the fact that the petitioner''s establishment was a two star hotel, it was concluded that the petitioner is engaging more persons than what is admitted. Though it is stated that the department failed to prove any payment being made to the trainees, it was found that there was proof for payment of wages to seven persons regularly and another person at the rate of Rs. 400/- However, stating that the petitioner was not maintaining genuine records and thus intentionally keeping the employees below the required statutory number, in order to deprive the provident fund and other benefits, it was found necessary to prevent the same. It was under these circumstances that the petitioner was ordered to be under the coverage of the provisions of the Act and scheme to the extent of wages/salaries already paid by him to the employees on record.

The petitioner has produced Ext.P.4 in support of his claim that the payment was being made to the tax consultant on the basis of the bills, he has presented from time to time and such payment cannot be reckoned towards payment towards employment under the establishment, meant to bring this establishment under the purview of the Act. Aggrieved by Ext.P.3, petitioner has filed Ext.P.5 appeal producing the series of documents including the copy of the daily list and the series of documents. The appellate authority, after hearing the petitioner passed Ext.P.8 order rejecting the appeal. While considering the appeal, the appellate authority stated that as per Section 2(f), a person appointed as trainee will not be treated as an employee. In as much as the trainee is a person who has no right to job and he can be turned as an apprentice, relying on the judgment in RPFC v. M/s.Central Aercaunt and Coco marketing and Processing Co-op.Ltd. reported in 2006 LLR (SE). The appellate authority found that the trainees were engaged regularly and they were doing the job of regular employee. Therefore, relying on the judgment of NEPC Textile Ltd. v. RPFC reported in 2007 LLR of the Madras High Court cited that "person though engaged as apprentice but required to do the regular work of employee have been rightly held as employee of mill".

6. It is as against the order passed by the respondent as well as the appellate authority that this writ petition is filed. The respondent has filed a counter affidavit justifying the impugned action and stating in order to run a bar of petitioner''s status, with two star facility, it actually requires more than twenty employees and therefore Ext.P.3 orders are passed in accordance with law.

7. The definite case of the petitioner before the appellate authority as well as the respondent was that it was not employing more than twelve persons on any day during December 1996. Similarly, it is also the case that the wages are not paid. Therefore, according to the petitioner, even assuming that the trainees would be reckoned towards persons employed there were even only less than twenty persons. Moreover, regarding the payment of Rs. 400/-, they had a definite case that it was being given to the tax consultant. Thus, the appellate authority has not considered any of these aspects while rejecting the appeal.

8. It is also to be noted that in Ext.P.3 order itself, it is admitted that the establishment entertain only those who are willing to work without any remuneration and even without food and accommodation. The aspirants are only interested in getting certificate from a Two star Hotel after actual preliminary training or further training after obtaining a certificate from a leading institution. Hence the department cannot prove definite payment being effected to them and the seven regular employees. Petitioner''s contention with reference to Ext.P.1 trainee register that there were no action for engagement of more than twelve trainees at a time is not considered.

9. In these circumstances, I set aside the orders impugned and direct the appellate authority to pass fresh orders, after hearing the parties. Till such time Ext.P.3 order shall be kept in abeyance.

