
(1990) 03 AP CK 0034
In the Andhra Pradesh High Court
Case No : W.A. No. 218 of 1986

Karachi Bakery

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 29-03-1990

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2

Citation : (1990) 2 APLJ 49 : (1999) 3 LLJ 151

Hon'ble Judges : Y. Dayal, J; Jagannadha Rao, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Jagannadha Rao, J.—The appellant, Karachi Bakery, has filed this writ appeal against the judgment of the learned single Judge dismissing the writ petition and in accepting the correctness of the orders of the Regional Provident Funds Commissioner (hereinafter called the Provident Funds Commissioner) by applying the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter called the Act), for the period April 1, 1977 to March 21, 1979, and levying a Contribution and administrative charges of Rs. 20,384.25.

2. The view of the Provident Funds Commissioner was that if the appellant was having 6 regular and 5 part-time employees (in all 11), and if the appellant had entered into contracts with Devandas Bakery and Ram Bakery for supplying certain bakery products to the appellant, the employees of the said two firms—who are 18 in number-- should be treated as employees of the appellant-firm inasmuch as the said contracts are in connection with the business of the said firm and fell within Section 2 (f) of the Act. At the relevant time, the Act was applicable to establishments having twenty or more employees.

3. The appellant is a bakery in Hyderabad doing wholesale and retail business. There was an inspection by the Inspector in respect of the appellant-firm on October 19, 1977, and a notice was issued on January 27, 1978, allotting a Code

No. AP/5452. By that notice, the appellant was asked to comply with the provisions of the Act in respect of all eligible employees by remitting-under the various schemes - the contribution and administrative charges. The appellant was also directed to submit monthly/yearly statements with effect from April 1, 1977. The appellant sent a reply, dated February 2, 1978, contending that the provisions of the Act did not apply because the employees of Devandas Bakery and Ram Bakery cannot be treated as the employees of the appellant. The respondent issued a further notice, dated February 15, 1978, requesting the appellant to comply with the scheme and on the ground that the appellant committed default, a show-cause notice was issued (served on August 5, 1978) and an inquiry was started on August 11, 1978. The inquiry went on till May 7, 1979. During the inquiry the appellant produced the agreements, dated January 1, 1976, entered into by it with the above said two firms, its accounts, Income Tax particulars, etc. No notices were, however, given by the authority to the Devandas Bakery or Ram Bakery to produce their books of account or other particulars. The impugned order was then passed on July 21, 1979, holding that the above said two firms having entered into a contract with the appellant, the employees of the said two firms who are 18 in number should be treated as the appellant's employees. If that is done, the total number of employees including the 6 full time and 5 part time employees of the appellant, would come to 29 and then the Act would become applicable. It was stated by the Provident Funds Commissioner in his order that in view of the definition of employees in Section 2 (f) of the Act :

"It is a matter of operation of the law, having nothing to do with otherwise independent character of the units".

He observed that after perusing--

(i) the two agreements, dated January 1, 1976, entered into between the appellant on the one hand and each of the aforesaid two firms;

(ii) the trading account, profit and loss account and statement of affairs as on March 31, 1978; and

(iii) the entire circumstances of the case :

"It is very clear..... that the agreement executed is anything but a contract and if so the employees working under these contractors are "employees" and hence covered within meaning of Section 2 (f) of the Act, since the aforesaid employees are working in or in connection with the works of the establishment, viz. Karachi Bakery and their wages are paid indirectly through the contractors".

He held that Ram Bakery and Devandas Bakery are only contractors covered by Section 2(f), that as per the agreement executed they are to get labour charges for the services rendered which charges they did, in fact, receive. He held that it is not a matter of grouping or clubbing the employees, but, "It is a matter of operation of law" and held that the conditions in Section 2(f) were satisfied, and

that the appellant was, therefore, liable to contribute Rs. 20,384.25 towards contribution and administrative charges.

4. The learned Single Judge in the judgment under appeal, proceeded on a similar interpretation of Section 2(f) of the Act. She stated that Devandas and Ram Bakery supply bakery products to the appellant pursuant to the agreements, dated January 1, 1976, that the Regional Provident Funds Commissioner found that the said two concerns are "not independent units" but contractors employed by the appellant for manufacturing bakery products out of material supplied by the appellant. According to the learned Judge, the appellant supervises the operations so as to maintain the quality required and the "labour charges" are paid by the appellant. According to her, the Provident Funds Commissioner found that the above said firms did not supply any products to any other establishments.

5. After setting out as above in the statement of facts the learned Single Judge referred to Section 2(f) of the Act and observed that the said two firms manufacture bakery products out of material supplied by the appellant pursuant to the contracts: the appellant pays "labour charges", the appellant "exercises control over the quality of the items manufactured and over the speedy execution or rejection of the same" The appellants books showed a deduction of Rs. 1,28, 179.95 plus Rs. 21,380 toward deduction ,on account of "wages" that the amount represented "labour charges" for the employees indirectly paid by the principal employers. She also observed "the contractors do not supply any products to any other concerns.". The learned Judge then held that Sections 1(3) (b) and 2(f) were attracted and concluded :

"I have no doubt in my mind that the persons employed by these two concerns are employed by a contractor in or in connection with the work of the petitioners establishment."

And as such, the persons actually working in those two concerns are also the employees of the appellant-establishment. On that basis the writ petition was dismissed.

6. In this appeal, the following contentions are raised by Sri K.Pratap Reddy :

(I) The learned Single Judge has mistaken some of the facts which were referred to in the submission of the Assistant Provident Funds Commissioner, Sri K.N. Puranik (who argued for the department before the Provident Funds Commissioner), to be the findings arrived at by the Provident Funds Commissioner. The facts so assumed as found, have to be, therefore, eliminated from consideration.

(II) On the facts actually found by the Regional Provident Funds Commissioner and should have been found by the learned Single Judge, the approach to Section 2(f) is vitiated by an error of law apparent on the face of the record in treating supply of finished products under a written contract as a "Labour

contract" and in proceeding to apply Section 2(f) merely because there is a "contract" connecting the appellant and the two firms. The Commissioner as well as the learned Single Judge did not make any distinction between a contractor who procures labour falling u/s 2(f) and an independent contractor who employs labour as his own employees. The latter, according to counsel, does not fall u/s 2(f).

7. Point I : So far as the first contention is concerned, the same appears to us to be true in several respects. In fact, it was in this context only that we have taken considerable care to set out the findings of the Provident Funds Commissioner and of the learned Single Judge, in great detail. We have gone through the orders of the Provident Funds Commissioner carefully and we find that initially he has set out the contentions of the petitioner's counsel, Sri P. Sambasiva Rao and then the contentions of Sri K.N. Puranik, the Assistant Provident Funds Commissioner. After setting them out at length, for about 7 to 8 pages, the Provident Funds Commissioner starts the actual discussion with the following words :

"I have carefully heard the parties hereunto. I agree with the learned advocate of the petitioners Having perused the deeds of agreements....."

The findings of fact, if any, upon which the order of the Provident Fund Commissioner is based must, in our view, be those which are referred to in the paragraphs following, the above said paragraph. If we scrutinise these subsequent paragraphs of the Provident Funds Commissioner's order there are at least three important aspects upon which he did not give any finding that the learned single Judge, in our view assumed wrongly that such findings were given. This mistake has occurred in referring to the facts from the paragraphs relating to the contentions of Sri K.N. Puranik before the Provident Funds Commissioner.

8. Firstly there is no finding by the Provident Funds Commissioner that the employees employed by the said two firms are not taking up the work of any other outsiders. Secondly, there is no finding that the said two units are "not independent units". On the other hand, the Provident Funds Commissioner observed in this part of the order as follows :

"It is a matter of operation of law having nothing to do with otherwise independent character of 1 the units."

Thirdly, the learned Judge stated that "under the agreement" the appellant exercises control over the quality of the items manufactured and over speedy execution or rejection of the same. We do not find any term regarding this aspect in the contracts dated January 1, 1976, executed between the appellant on the one hand and the two firms referred to earlier. In fact, there is no such finding given by the Provident Funds Commissioner.

9. It must, therefore, be held that the learned Judge's observations to the effect

that the employees of these two other firms are not taking up any other work of other persons, that the said 5 two units are not independent units and that the appellant exercises control over the quality of the items manufactured and over the speedy execution or rejection of the same are not based on any such findings arrived at by the Provident Funds Commissioner.

10. Even assuming that part of the Provident Funds Commissioner's order which sets out the arguments of Sri Puranik are to be treated as findings, they must in our view, be treated as based on no evidence since no such material was before the Provident Funds Commissioner nor could these be substantiated by the respondent's counsel before us with reference to the record before the Provident Funds Commissioner, we find accordingly on the first point.

11. Point II : Coming to the second submission of the appellant's counsel the point is whether the decision of the Provident Funds Commissioner and of the learned single Judge on their interpretation of Section 2(f) is correct in law or not. As stated under the first point above, the Provident Funds Commissioner observed that "it is a matter of operation of law" and the matter has "nothing to do with otherwise independent character of the units". He proceeded to state that :

"the agreement executed is anything but a contract and if so, the employees working under these contractors are "employees" and hence covered within, the meaning of Section 2(f) of the Act since the said contract -employees are working in or in connection with the work of the establishment, viz. Karachi Bakery and their wages are paid indirectly through the contractors".

12. Before advertng to the wrong understanding by the Provident Funds Commissioner of the difference between "wages" and "labour charges" as used in the appellant's accounts we shall deal with the provisions of Section 2(f) of the Act, in so far as they are material. We shall refer to Section 2(f) as they stood at the relevant time in 1979 :

"Section 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 an establishment and who gets his wages directly or indirectly from the employer, and includes any persons employed by or through contractor in or in connection with the work of the establishment."

Applying the definition of "employer" in Section 2(f) to the facts of the case if the employees of Devandas Bakery and Ram Bakery could be said to be employed for wages in any kind of work, manual or otherwise, in or in connection with the work of the Karachi Bakery and if those employees get their wages directly or indirectly from the Karachi Bakery whether they are employed by or through a contractor in or in connection with the work of the Karachi Bakery, they could be treated as "employees" of Karachi Bakery. We are only here repeating the provisions of Section 2(f).

13. In our view, the words "whether they are -employed by or through a contractor in or in connection with the work of the establishment", postulate that such persons must be employed by or through a contractor as "contract labour". In other words, the contract for purposes of Section 2(f) between the establishment and the contractor must be a contract by which a contractor agrees and brings labour to be employed by the establishment. The contractor for purposes of Section 2(f) is purely a labour contractor and not an independent contractor who contracts to deliver a finished product to the establishment and who for purposes of manufacture of such a finished product, engages labour for his own purposes. In the latter case, the contractor cannot be treated as one who is employed to get labour for and on behalf of the principal establishment but will be an independent contractor who alone exclusively controls and supervises the work of his employees and directs what work is to be done and how it is to be done. In our view, the Provident Funds Commissioner as well as the learned Single Judge erred in not differentiating between a contractor who is engaged to bring labour for and on behalf of the establishment and one who merely contracts to manufacture and deliver a finished product by employing his own labour.

14. The above distinction has been very clearly brought out in several decisions of the Supreme Court. We deem it sufficient to start with one of the very recent rulings of the Supreme Court where almost all the relevant rulings have been referred and considered elaborately.

In *P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others*, the question arose squarely under the Employees' Provident Funds and Miscellaneous Provisions Act (Act 19 of 1952). On the facts of the case the Court was dealing with a home-worker rolling beedies at home and held that he was an employee of the establishment. It was observed that the definition of the word "employee" was wide as defined in Section 2(f) and a home-worker is involved in an activity connected with the work of the factory engaged in the task of rolling beedies. The words "in connection with" cannot be confined to work performed in the factory itself as a part of the total process of the manufacture. On facts, it was noticed that these workers receive the raw material from the factory, roll the beedies at home and deliver the same to the manufacturer directly subject to the right of rejection of the manufacturer and this is evidence of the requisite degree of control and supervision for treating the manufacturer as the employer.

The above Supreme Court case was, no doubt, a case where the home-workers were employed directly by the manufacturer. But, while dealing with such a class of persons, PATHAK, J (as he then was), categorised employees into three categories :

(a) Firstly those who are engaged directly by an employer;

(b) secondly, those who are employed through the agency of a contractor, the said contractor being a purely labour-contractor who contracts to bring the

labour, to be engaged by or on behalf of the employer, in such a case the contractor brings a relationship of master and servant between the employer and the labour whom he has brought together ; and

(c) thirdly, those labour who are engaged by a contractor who is not an ordinary labour-contractor but is an independent contractor himself is the master for the employees he engages.

In the last type of case, the contractor is a separate and independent entity. The learned Judge referred to *Chintaman Rao and Another Vs. The State of Madhya Pradesh*, as a case where the contractors known as *sattedars*, with whom manufacturer contracts for the supply of beedies were (sic.) regarded as independent contractors and therefore, the coolies employed by the *sattedars* could not be treated as employees of the manufacture for purposes of the Factories Act. The Supreme Court refers also to *Orissa Cement Ltd. Vs. Union of India (UOI)*, and *D.C. Dew Mohideen Saheb v. Industrial Tribunal, Madras (1964 I LLJ 633) (SC)* as case where the distinction between "labour employed by the manufacturer" and those employed by an independent contractor was brought about. The law, according to the Supreme Court, took a major shift of *Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another*, wherein Mathew, had reviewed the entire case law and pointed out that the test of "control" was no longer an exclusive test. There could be no magic formula for all cases and in fact the Court must "perform a balancing operation" weighing up the factors which points in one direction and balancing them against those pointing in the opposite direction. The "control" test is not always decisive. The degree of control would be different in different types of work. A right of rejection could be treated as an element of control, *PATHAK, J* (as he then was) then referred to *Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others*, which case dealt with the validity of the *Beedi and Cigar Workers (Conditions of Employment) Act, 1966*. There the Constitution Bench of the Supreme Court observed :

"When the manufacturer engages labour through the contractor, the labour is engaged on behalf of the manufacturer, and the latter has, therefore, liability to such contract labour; It is only when the contractor engages labour for or on his own behalf and supplies the finished product to the manufacturers that he will be the principal employer in relation to such labour and the manufacturer will not be responsible for implementing the provisions of the Act with regard to such labour employed by the contractor....."

From the aforesaid observations of the Supreme Court, it is clear that unless there is material that the labour engaged by *Devandas Bakery and Ram Bakery* is engaged for and on behalf of *Karachi Bakery*, it cannot be said that they are labour employed through a contractor within Section 2(f) of the Act.

15. In the present case, the agreements, dated January 1, 1976, are agreements by the appellant with the two other firms for supply of bakery products. Of

course the raw material is supplied by the appellant. There is no clause permitting supervision or control of the work. There is no clause in the deed nor any evidence that the two firms do not accept work from anybody else. There is no clause even that the appellants will pay the labour charges of the employees" of the two firms. No right of rejection is incorporated vis-a-vis employees of the two firms. (The Provident Funds Commissioner while agreeing that Devandas Bakery and Ram Bakery are independent units (a fact which was noted to the contrary by the learned Single Judge) manufacturing finished products for Karachi Bakery under the agreements, dated January 1, 1976, thought that because there was a contract which was in connection with the appellants-work, the employees of the said contractors should have to be treated as the employees of the appellant. The distinction between a contractor who merely employs labour for and on behalf of an employer and a contractor who employs his own labour to manufacture and deliver a finished product, to another establishment has been totally over-looked by the Commissioner. Such a distinction was noticed not only in the two other cases above referred to but also in Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, , where the entire case law relating to independent contractors had been discussed by the Supreme Court. This case was followed recently in Workmen of Food Corporation of India v. Food Corporation of India, 1985 (50) FLR 142.

16. Learned counsel for the respondent, Sri I.A. Naidu, argued that the burden of proof to prove that the employees of Devandas Bakery and Ram Bakery are not the employees of the appellant, lay on the appellant. This contention, in our view, reverses the real onus in law. If an authority wants to contend that employees not directly employed by an employer should also be treated as employees of that employer, the burden of proof lies on the authority to establish the said fact.

17. It is then argued that the appellant has a right of rejection including right of control and supervision as observed by the learned Single Judge. This contention has to be rejected in the light of our decision on the first point, for the Provident Fund Commissioner did not actually give any finding that the agreement contained a term as to the control and supervision of the work of these employees including a right of rejection. The right of rejection in our view, must be qua the employees and not qua the employees and not qua the contractor where the contractor has engaged the employees not for the employer but for himself or for his own work of manufacturing a product. In the latter case the employer might reject the product produced by the contractor and not pay him for the finished product but so far as the employees of the contractor are concerned, the right of rejection of the product vests solely with their immediate employer who is an independent contractor. This contention has, therefore, no force.

18. Reliance is then placed for the respondent on the decision of the Supreme Court in Royal Talkies, Hyderabad, Employees"State Insurance Corporation (197

II LLJ 390), which is a case arising under the Employees' State Insurance Act 1948. The definition of employee in 2 (9) of the Act as it stood then is not pan materia with Section 2(f) of the Act under consideration. That was a case of employees of a canteen which was being run in the premises of a theatre as an accessory or amenity or adjunct thereof. While holding that the employees of the canteen are also to be covered for insurance by the proprietor of the theatre, the Supreme Court relied upon the definition of employee in Section 2(f) of the Act which is totally different from Section 2(f). Further, that Act is intended, as is clear from its preamble, to provide amenities to cover sickness, maternity and employment injury and cover the employees engaged in connection with work "carried on in or incidental to the purpose of the factory or establishment" as in Section 2(9)(ii). These words are not there in the Employees' Provident Funds Act. It is true that Section 2(9)(i) of the Employees' State Insurance Act uses the words "any work of or incidental or preliminary to or connected with the work of the factory or establishment" but those words occurring in Clause (i) of Section 2(9) deal with labour directly engaged. Apart from the clear differences in the language employed by the two acts, the purposes of the Act are also different. In the Employees' State Insurance Act the purpose; is to provide insurance coverage but the purpose under the Employees' Provident Funds Act is to provide provident fund coverage. The above decision is, therefore, distinguishable.

19. Coming to the question of wages paid to the employees of these two other firms, there appears to us to be some "confusion" between the words "wages" used in Section 2(f) and labour charges as shown in the accounts. So far as the employees directly employed by the appellant are concerned, the words used in the accounts (as extracted in the order of the Provident Funds Commissioner) are "wages" falling u/s 2(f). So far as the employees of the two other firms are concerned, the word used is "labour charges" which is treated as expenditure allowable as a deduction for purposes of income tax. In fact, there is no material and it is nobody's case, that the appellant is paying the wages to the employees of the two other firms, treating them as its own servants.

20. Thus, on the basis of the facts, as found by the Provident Funds Commissioner, it is clear, that two other firms were treated as independent units and so treated, the employees of these independent units engaging their own labour for their purposes of manufacture of separate products cannot be brought u/s 2(f) of the Act. It is true the contracts, dated January 1, 1976, provide for supply of material e.g., maida but that fact has been seriously relied upon by the Provident Funds Commissioner as an important factor.

21. Lastly, it is argued that the findings arrived at by the Provident Funds Commissioner as confirmed by the learned single Judge are findings of fact and that they cannot be interfered with under Article 226 of the Constitution of India. This submission has to fall in view of our findings on the first point, namely, that the learned single judge treated certain facts which were part of the submission

of Sri I.N. Puranik (the Assistant Provident Funds Commissioner) before the Regional Provident Funds Commissioner as facts found by the latter. As no such facts were found by the Commissioner, the assumption of fact made by the learned single Judge are bad as they are non-existent. We are, therefore, free to reach the impugned order of the Provident Funds Commissioner and test its validity. The Provident Funds Commissioner, in fact, treated the matter expressly as a question of law based on Section 2(f). The error of law committed by him-which in fact led to an error of jurisdiction-was that he treated the employees of the two "independent units" or independent contractors as contract-labour or labour employed by the contractor for and on behalf of the appellant. This being contrary to the principles as laid down by the Supreme Court, we quash the impugned order of the Provident Funds Commissioner for, if the employees of the two other independent firms have to be excluded, the total number of employees employed by the appellant for the period April 1, 1977 to March 31, 1979, will be admittedly below 20, as per the law at that time and the Act cannot apply.

The judgment in the writ petition is set aside, the writ appeal is allowed and the impugned order of the Regional Provident Fund Commissioner, dated July 21, 1979, is quashed. There will be no order as to costs.