

(1974) 08 DEL CK 0004

In the Delhi High Court

Case No : Civil Writ Appeal No. 533 of 1967

Laksmi Restaurant and Another

APPELLANT

Vs

The Regional Provident Funds Commissioner, Delhi and
Another

RESPONDENT

Date of Decision : 09-08-1974

Acts Referred:

Citation : (1974) 10 DLT 369 : (1975) LabIC 1186 : (1975) RLR 219

Hon'ble Judges : B.C. Misra, J

Bench : Single Bench

Advocate : K. Dayal and R.N. Dixit, for the Appellant;

Judgement

B.C. Misra, J.

(1) The petitioners have filed this writ petition against the demand of the respondent Regional Provident Fund Commissioner, dated 11th May, 1967 (annexure M) by which a sum of Rs. 7990.00 besides administrative charges for the period from February, 1962 to November, 1966, have been demanded from the petitioner and are proposed to be recovered as arrears of land revenue. This demand follows an order passed by the respondent Commissioner dated 17th January, 1967 (annexure J), by which he has made the assessment of the aforesaid amount.

(2) The material facts of the case are that petitioner No. 1 is a partnership firm of which petitioner No. 2 is a partner, which is carrying on business of running a restaurant, inter alia, at Connaught Circus, New Delhi. Petitioner No. 1 is hereinafter referred to as "the petitioners". The firm is registered under the Delhi Shops & Establishment Act, 1954. The question arising for determination is whether the petitioners are governed by the provisions of Employees' Provident fund Act (Act No. 19 of 1952) and the Scheme under it, which has been extended to the hotels and restaurants and other non-factory industries in Delhi by a notification with effect from 10th June, 1981. On 3rd August, 1965 inc

respondent Commissioner (who is the contesting respondent while the second respondent is the District Collection Officer), issued a notice to the petitioners requiring them to furnish material information for purposes of the Act, to which the petitioners sent a reply, inter alia, asserting that the petitioners were a partnership firm, which had been working since 1937 and that they had employed 12 to 17 workers for various months since June, 1961 up to July, 1965, the details of which were given in the reply, in particular the petitioners emphasised that they had not employed 20 or more persons. It appears that on 14th December, 1965, an Inspector of the respondent paid a visit to the establishment of the petitioners and he examined the records including the establishment and wages accounts for the period from June, 1961 to March 1962. But he felt aggrieved since, according to him, the petitioners did not "allow him to turn even a page beyond the said accounts and also did not produce the records from April, 1962 onwards". Consequently, a notice was issued to the petitioners on 4/5th January, 1966 to which a reply was sent by the petitioners on 8th February, 1966. The respondent Commissioner gave another opportunity in January, 1966. In the month of February, 1966, the respondent lent a formal notice stating that the petitioners' establishment fell under the category of restaurant as specified in appendix X to the Act, that it had completed five years on or before 30th June, 1961 and that it had employed 20 or more persons on 31st January, 1962. An advice was given by the respondent to the petitioners to deposit the arrears of contribution of the Employers under the Employees Provident Fund Scheme, 1952. The petitioners protested against the said demand and contended by their letter dated 25th February, 1966 that the scheme applied only to persons who employed 20 or more persons while in their establishment there were only 12 persons in employment. On 11th July, 1966 the respondent wrote to the petitioners that it had been observed from the report of the inspector that on his visit to the shop on 14th December, 1965 he had found that in the month of January, 1962 the petitioners had employed more than 19 such persons in the restaurant's wine shop and in addition "you had also made payment to the staff engaged on parties. In the absence of the names made available however, their names could not be included." It was further pointed out that the onus to prove that the establishment did not employ 20 or more persons lay on the management. The respondent refused to supply list of the 20 employees alleged in the report. This was followed by a notice to hold enquiry in October, 1966, which culminated in an order dated 17th January, 1967, by which the respondent assessed the arrears of provident fund besides penalty. The petitioners protested against the same and after exchange of further correspondence, the recovery proceedings were initiated against the Petitioners on or about 11th May, 1967 as mentioned above. Aggrieved by this action, the petitioners have filed this writ petition on the allegations that the establishment of the petitioners was not covered by the Act or the scheme framed under the Act and that the impugned order and the action for recovery was illegal.

(3) A counter affidavit has been filed by Mr. R. R. Sahae, Regional Provident Fund Commissioner, in which he has contested the contentions raised on behalf of the petitioners. He has stated in paragraph I that the petitioners' restaurant was established in 1947 and was doing the restaurant business, i.e. catering inside the restaurant and also for outside parties. The assertion of the petitioners was denied that the number of employees with the petitioners was 11 and at all event never exceeded 17. It was asserted that the petitioners had on 31st January, 1962 employed more than 20 employees. In paragraph 4 of the counter affidavit, the statement made in para 1 appears to have been diluted and it is stated that on verification of the records of the petitioners, it was found that the petitioners had employed more than 19 employees. This is also reiterated in answer to ground No. 8. The case set up by the respondent is that the petitioners were employing more than 19 persons in their regular employ in addition to catering staff for doing outside work, who were casual workers. With regard to onus of proof, the respondent has in the counter affidavit placed reliance on Bankim Chandra Chakravarty and Another Vs. Regional Provident Fund Commissioner and Others, .

(4) A rejoinder to the counter-affidavit has been filed on behalf of the petitioners and they have denied that the number of persons employed by them was over 20 and in fact they asserted that on 31st December, 1961 and January, 1962 there were only 11 employees. They have further asserted that the casual workers for catering work were not regular employees and they could not be entitled to the benefit of the scheme. Along with the rejoinder, the petitioners have filed documents to show that in the Hotels and Restaurants in the Union Territory of Delhi, which employed 20 or more employees the petitioners' name is not included in the list, which list had been prepared for purposes of wage Board for Hotels and Restaurants. It is common ground that neither party has approached the Central Government u/s 19-A of the Act.

(5) Mr. Keshav Dayal, counsel for the petitioners, has contended that (1) casual workers for catering parties are not regular employees of the petitioners and they are, Therefore, not covered by the scheme ; (2) the employees are, in fact, casually engaged only for a day or so on special occasions outside the restaurant and cannot by any stretch of imagination be called employees of the petitioners, (3) the respondent has not disclosed the names or- the identity of any employee in addition to those entered in the attendance register of the petitioners, (4) the assertion of the respondent that on 31st January, 1962 the petitioners employed more than 19 persons is not borne out by any evidence or material on record, and lastly (5) the observation about the onus of proof by the respondent is plainly illegal. The order is, Therefore, challenged.

(6) Taking up the last contention first, so far as the onus of proof is concerned, the respondent has relied on Bankim Chandra Chakravarty and another v. Regional Provident Fund Commissioner. The authority has clearly no application to the facts of this case. In that case, a finding had been recorded by the

Provident Fund Commissioner about the number of persons employed by the establishment, which was challenged in a writ petition. In that connection their lordships observed that the onus of proving that the finding of the Commissioner about the number of employees being/more than 20 was erroneous lay on the petitioner and the petitioner must place sufficient material before the court for the purpose. No quarrel can be found with the observation of the learned Judges. It is true that if any body feels aggrieved by some order and files a petition in the High Court, he must bring sufficient material before the court to displace the finding. This has nothing to do with the question of onus of proof in the case pending determination before the Provident Fund Commissioner.

(7) In my opinion, in matters like this, the question focus of proof is immaterial. The Provident Fund Commissioner is an authority created by the statute who has to administer the statutory provisions according to law. For this purpose he is entitled to collect material by resort to powers under various provisions of law including the examination of the books of accounts and other records of the establishment. But, the finding of the Commissioner must be based on evidence and relevant material on record and the case cannot be decided only on the question of onus of proof. Again there is no presumption of law that every establishment employs more than 20 persons and so anybody who alleges to the contrary must establishing it. As a matter of fact, where the number of employees is disputed it must be decided as any other fact according to law on relevant material in accordance with the well established principles and not merely on surmises or conjectures or onus of proof. The contention of the respondent on this point is repelled.

(8) The next question of applying the provisions of the Act to casual workers is a matter of some importance. Under the Act, employer and the employee have been defined by sub-clauses (e) and (f) of section 2 as follows :

"(E)"employer" means- (i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of the deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948, the person so named ; and (ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent ; (f) "employee" means any person who is employed for wages in and 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 person employee !by er through a contractor in or in connection with the work of the establishment."

(9) Section 1(3) of the Act has been applied to establishments employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf, subject to the

proviso that the Government may by giving the prescribed notice, apply the Act to any other establishment employing less than twenty persons. A provision is also made if under sub-section (4) for applying the provisions of the Act to other establishments. Sub-section (5) has been amended in 1960 by Act 46 of 1960, whereby the prescribed minimum number of 50 has been reduced to twenty. This provision of law came up for consideration before the High Court of Madras in *M/s. East India Industries (Madras) Private Limited v. Revisional Provident Fund Commissioner*, where their lordships held that employment even for one day brought a factory within the scope of section 1(3) (a) and that the expression "in which fifty or more persons are employed" in section 1(3)(a) did not envisage "continuity of employment of all the fifty persons. This provision of law was also" considered by the High Court of Andhra Pradesh in *Nageena Traders (P) Ltd. v. Regional Provident Fund Commissioner, Hyderabad-*". The Division Bench of the High Court of Andhra Pradesh differed from the view of the High Court of Madras and held that the casual labour fell outside the scope of section 1 (3), hence the establishment's whole employees did not come up to twenty, excluding casual labourers did not fall within the purview of section 1 (3) and the provisions of the Provident Fund Scheme could not be applied to them. They further observed that the employment of the labour by or through a contractor did not make material difference to the applicability of the Act. Both these conflicting views were considered by the Supreme Court in a recent decision in the *Provident Fund Inspector, Guntur v. T. S. Hariharan*. The leading judgment was delivered by 1. D. Dua J. Their lordships have observed that "the narrow question which directly arises for our consideration is whether clause (b) of sub-section (3) of section 1 when it speaks of the establishment employing 20 or more persons means that the person so employed may be employed by the establishment for any purpose whatsoever and for however short a duration or that the employment must be for some minimum period in the establishment." Their Lordships felt that the language used in the clauses did not give any clear indication to construe the word in the light of the legislative scheme and the ultimate effect of adopting one or the other construction. Their lordships in substance did not accord approval to either the Madras view or the Andhra Pradesh view and observed as follows :

"Considering the language of section 1 (3) (b) in the light of the foregoing discussion it appears to us that employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can reasonably be concluded that the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by this definition. The word "employment" must, Therefore, be construed as employment in the regular course of business of the establishment, such employment obviously would not include employment of a few persons for a short period on account of some passing necessity or some temporary emergency beyond the control of the company. This must necessarily

require determination of the question in each case on its own peculiar facts. The approach pointed out by us must be kept in view when determining the question of employment , in a given case,"

The High Court of Mysore in Srikantha Subbaraja and others v. S. P. Sundarajashar, noticed the aforesaid decision of the Supreme Court and it found that the earlier view of the High Court of Mysore which had followed the Madras view and differed from the Andhra Pradesh view was no longer good law and the court after noting the relevant passage from the decision of the Supreme Court observed that the employment must Therefore be considered as employment in the regular course of business. The court following the decision of the Supreme Court held that it was necessary that twenty or more persons should have been employed in the establishment for a regular work which should also have a commercial onus with its general financial capacity and stability .Such employment would not include employment of a few persons for a short period on account of some emergency or contingency. In my opinion the rule of law laid down by the Supreme Court is that the employee in orde"r to earn the benefit of the scheme and the A:t must be employed by the establishment in the course of its regular business. The regular employment would not rest on the nature of the terms of employment, but on the nature of the business carried on by the establishment and its commercial rooms. In this view of the matter, the Act would be .applicable to the regular employees and not to the employees for casual work.

(10) This, However, does not solve the instant problem. The Supreme Court in the aforesaid judgment cautiously observed in paragraph 2 that as there was no representation on behalf of the respondent and the court did not have the benefit of the respondent"s point of view, their lordships proposed to confine themselves strictly to the limited question of the scope of clauses (a) and (b) of sub-section (3) of section 1 and the judgment was not intended to be considered as expression of any opinion on other controversial aspects. It is. Therefore, necessary for me to example the scheme of the Act a little more closely.

(11) Section 5 of the Act provides for the framing of the scheme, which has been framed and is known as the Scheme of 1965. This scheme really gives the benefit of the provisions of the Act to the employees. The Scheme is sufficiently detailed and makes provisions for various contingencies. Paragraph 26 of the scheme provides that every employee employed in or in connection with the work of a factory or other establishment would be entitled to become a member of the Fund if on the date of the coming into force, he has completed one year"s service or has actually worked for not less than 240 days during the period of twelve months or less in that factory or other establishment under the same employer or partly in one or partly in the other. The provisions of the Scheme point to the effect that the intention is that the employee in order to earn the benefit of the Scheme must have worked For the whole year or at least 240 days out of one year. Explanations I and Ii added to the paragraph show that "

continuous service " includes uninterrupted service, sickness, accident, authorised leave, strike which is not illegal and involuntary unemployment and that the period of 240 days includes a period of involuntary unemployment caused by stoppage of work, etc. In this way, an artificial definition of " continuous service " has been provided, but the essence of the provision is that the workmen should have rendered not less than 240 days service in a year, subject to a few prescribed exceptions. Consequently, no person who has been employed for less than 240 days would be entitled to the benefit of the said Scheme.

(12) There is another aspect of the matter. Paragraph 29 of the Scheme provides that the workman himself has to make a contribution of 6% to 8% of his monthly salary to the provident fund, while the employers are required to contribute only 6%. The benefit of the scheme is, Therefore, not like the grant of the bonus or other benefit which can be conferred unilaterally on the workmen by the employer. Unless and until the workmen are on the regular employment of the establishment and are willing to make their own monthly contribution, it is impossible to conceive that the employer alone can be called upon to make his contribution in respect of an employee who is casual and not in the regular employment. This again supports the conclusion that in order to apply the scheme, the employees of an establishment, who exceed twenty, must have been employed regularly in the course of business. This would necessarily exclude casual workers, who are employed occasionally on temporary work for less than 240 days a year. As a result, I hold that casual workers of the petitioners occasionally employed for outside parties cannot be taken into consideration in determining the number of their employees for the purposes of applying the scheme of the Act to the establishment.

(13) This answers the substantial question of law raised in this writ petition. The stand of the respondent however, is that even excluding the aforesaid casual employees, the petitioners have employed more than 19 persons on 31st January, 1962. It is significant that the respondent does not allege the employment of more than the minimum number of persons on any other date or during any other period. The observation about 31st January, 1962, is again not based on any personal observation of the Inspector or any contemporary record by public authorities. It is based only on the examination of the books of the petitioners made by the inspector in December, 1965. The counsel for the petitioners submits that the report of the inspector is obviously not correct and is perverse. The records of the petitioners, which they have shown to the court and which they alleged to have shown to the inspector bear out that in January, 1962, the petitioners had employed only 15 workers. It is a matter of some surprise that the inspector did not make a report about the workmen he found working in the petitioners establishment on the date he had made the visit, nor has any report made by him been produced by the respondent on the record of this writ petition. The finding of the respondent in respect of the petitioners employing more than 19 persons is not based on any relevant evidence or

material whatsoever. The finding can, Therefore, not be sustained and must be set aside.

(14) In the result, I allow the writ petition and issue a mandamus directing the respondents not to give effect to the order dated 17th January, 1967 and notice of recovery dated 11th May, 1967. It is, however, made clear that it will be open to the respondent to initiate fresh proceedings against the petitioners in accordance with law, if they be so advised. The parties are left to bear their own costs.