

(2013) 02 DEL CK 0001

In the Delhi High Court

Case No : Writ Petition (C) 7949 of 2005, W.P. (C) 2045 of 2006 and W.P. (C) 11906 of 2006

MMTC Limited

APPELLANT

Vs

Employees Provident Fund Organisation

RESPONDENT

Date of Decision : 14-02-2013

Acts Referred:

Citation : (2013) 135 DRJ 604 : (2013) 137 FLR 366 : (2013) LabIC 1270 : (2013) 2 LLJ 814 : (2013) LLR 347

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Rajinder Dhawan and Mr. B.S. Rana, for the Appellant; Rekha Palli with Ms. Punam Singh and Ms. Amrita Prakash, Advocates for Respondent No. 2/ workman, Mr. Keshav Mohan, Advocate for EPFO and Mr. K.K. Saxena, Authorized Representative of the Society in person, for the Respondent

Final Decision : Dismissed

Judgement

Mukta Gupta, J.

CM No. 5759/2012 in WP(C) No. 7949/2005

For the reasons stated in the application, the same is allowed. The additional documents are taken on record without prejudice to rights and contentions of the parties.

CM Nos. 5682/2005 (stay) & 10244/2005 (early hearing) in WP(C) No. 7949/2005

CM Nos. 1808/2006 (stay), 10233/2007 (for modification of order dated 05.03.2007), 2592/2009 (condonation of delay in compliance of order dated 2.2.2009), 2753/2012 (early hearing) in WP(C) No. 2045/2006

CM No. 9017/2006 (stay) & 2790/2012 (early hearing in WP(C) No. 11906/2006

Since this Court has proceeded to hear the writ petitions, no further orders are

called for in the present applications.

Applications are disposed of.

W.P. (C) Nos. 7949/2005, 2045/2006 and 11906/2006

1. By the present petitions the Petitioner impugns the identical orders passed by the Employees Provident Fund Appellate Tribunal dismissing the appeals of the Petitioner against the order of the Assistant Provident Fund Commissioner u/s 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (in short "the EPF and MP Act") directing the Petitioner to pay the employer's contribution. The issue involved in the present petitions is whether the workers employed in the canteen fall within the definition of the "employee" of the Petitioner Company as defined u/s 2 (f) of the EPF and MP Act. Briefly the facts giving rise to the filing of the present petitions are that a complaint was filed by the working President of the Canteen Mazdoor Sabha, that is, the Union alleging non-coverage of the canteen workers under the EPF and MP Act. On receipt of the complaint the Assistant Provident Fund Commissioner initiated proceedings u/s 7A of the EPF and MP Act.

2. The Petitioner in its reply submitted, which are also the contentions of the Petitioner before this Court, that the canteen is run by the cooperative society and the cooperative society engages its own employees, determines terms and conditions of the service of the employees and even takes disciplinary action against them, the canteen does not belong to the company and the cooperative society is a contractor. The Petitioner is neither the employer nor the principal employer of the canteen workers. It is further stated that an industrial dispute is pending adjudication before the Industrial Tribunal with regard to the demand of Canteen Mazdoor Sabha members to treat them at par with the MMTC employees and grant them the same status and benefits. The learned Assistant Provident Fund Commissioner or the Appellate Tribunal could not have decided the issue that the Petitioner was liable to pay the employer's contribution of the provident fund without adjudication by the Industrial Tribunal. In the industrial dispute raised an award has been passed against the Union on 7th August, 2002. It is further contended that during the pendency of the present petitions a settlement dated 21st July, 2010 was executed between the Cooperative Society and the canteen workers and as per the settlement arrived at it was accepted that the canteen workers were employees of the Cooperative Society and had no relation with the Petitioner. The settlement also provided that the Cooperative Society shall comply with the provisions of the EPF and MP Act and deposit the contributions and other charges with the Provident Fund Authority and would apply to the Provident Fund Authority for allotment of the code. The Cooperative Society applied for the code with the Provident Fund Authorities however, it was erroneously rejected. Though the case of the Union before the Appellate Tribunal was that the society was a contractor and the Petitioner was the principal employer however, no evidence was led in this regard. During the inquiry no contract between the alleged principal employer and the Cooperative Society was

proved. The learned Appellate Tribunal failed to notice that to be a principal employer, it was a condition precedent that the canteen was owned by the company and there was a contract whereby the Cooperative Society was appointed as a contractor. The Tribunal did not go into either of these questions. The Tribunal also failed to consider the award of the Industrial Tribunal wherein the parties led oral and documentary evidence. There is no finding of fact that the Cooperative Society is a contractor. The only reason why the Assistant Provident Fund Commissioner came to the conclusion that the Petitioner had overall control in the matter of running of canteen, payment of wages, fixing of the rates etc. was because the Petitioner was paying the subsidy. The purpose of the said subsidy was only to subsidize the expenses of the Society so that they could sell the eatables at a cheaper rate. Hence the impugned order of the Appellate Tribunal and the Assistant Provident Fund Commissioner be set aside. Reliance is placed on *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, .

3. Learned counsel for the Canteen Mazdoor Sabha (Union) states that it is espousing the cause of 32 workmen as two have already expired during the pendency of the present proceedings, who have been working in the canteen since 1983. 90% of the subsidy towards the salary of 32 workmen was given by MMTC Ltd., that is, the Petitioner herein. The Petitioner initially paid their employers contribution from 1983 to 1989 when the subsidy was being paid however, the subsidy was stopped in January, 1989. Further despite this fact the workmen's share towards the provident fund is being deducted from their salary. Despite deduction of the workmen's share neither the Petitioner nor the Society are depositing the provident fund with the Provident Fund Authority. The society applied for an independent code however, the Assistant Provident Fund Commissioner after due notice to the Petitioner conducted an inquiry u/s 7A of the EPF and MP Act. The Society/Respondent No. 2 successfully proved that the Petitioner was in over all control in the matter of running the canteen, payment of salary, wages, fixing and revising the rates of all eatable, payment of bonus, grant of supply and also for taking disciplinary action and issuing necessary directions to the canteen employees. The provisions of EPF and MP Act are beneficial provisions promulgated in favour of the workmen to provide social security and thus are to be construed liberally.

4. It is further contended that while coming to the conclusion regarding the definition of "employee" under the EPF and MP Act recourse cannot be taken to the other enactments. The settlement in W.P. (C) No. 7369 of 2002 has no applicability to the facts of the present case as it was clarified that the said settlement was only in regard to the issues involved in the said writ petition. It was specifically stated in the agreement that the same had no application beyond W.P. (C) 7369 of 2002. The Appellate Tribunal rightly came to the conclusion that the definition of the "employee" under the EPF and MP Act was different from the definition of the "workman" under the Industrial Disputes Act, 1947 (in short "ID Act"). The Petitioner's request for allotment of separate code to the society has

already been rejected by the Provident Fund Authority on 14th November, 1986 which order has not been challenged by the Petitioner and has thus attained finality. There is no dispute that the canteen workers are entitled to the benefit of provisions of EPF and MP Act. Reliance is placed on Royal Talkies (supra), Ahmedabad Pvt. Primary Teachers" Association Vs. Administrative Officer and Others, and Dr. A.V. Joseph Vs. Assistant Provident Fund Commissioner and another, . Thus there is no merit in the petitions and the same be dismissed.

5. Learned counsel for the Department contends that the definition of "employee" u/s 2 (f) of the EPF and MP Act is wide and cannot be restricted to the definition of the "workman" under the Industrial Disputes Act or "worker" under the Factories Act. The EPF and MP Act is a special enactment and thus the provisions under the ID Act will not prevail over it. Reliance in this regard is placed on Gowri Spinning Mills (P.) Ltd. Vs. Assistant Provident Fund Commissioner and Another, and Orient Paper Mills Vs. Regional Provident Fund Commissioner and Another, . The objection of the Petitioner that the copy of the complaint of the members of the Union was not given to it is wholly unfounded as from the facts it can be made out that neither at the time of filing reply to the show cause notice nor in the appeal nor in the present petition anywhere it is stated that the complaint has not been provided. It is for the first time in the arguments before this Court that this plea has been taken. Further in view of the law laid down in Commissioner, Sales Tax, U.P. Vs. Mohan Brickfield, Agra, , Saraswati Construction Company vs. Central Board of Trustees, W.P. (C) No. 5625 of 2007 and G.V.V. Swamy vs. Regional Provident Fund Commissioner, Hyderabad and others, 1987 LAB IC 719, it is well settled that the onus is on the employer to satisfy the authority with regard to the non-applicability of the provisions of EPF and MP Act on it. Further the letter dated 14th November, 1986 was addressed to the Petitioner that no code under the EPF and MP Act has been given to the society. Despite the said communication neither the same has been challenged nor has any reply been filed thereto. Thus the Petitioner has accepted the stand of the department that the society is not liable to pay the employers contribution fund and it is the duty of the Petitioner to pay the same. The definition of "employee" u/s 2 (f) of the EPF and MP Act is very wide and any person working in connection with the work is also included. Reliance is placed on Shri Mahila Griha Udyog Lijjat Pappad Vs. Union of India (UOI) and Another, , Himachal Pradesh Nagar Vikas Pradhikaran Vs. Regional Provident Fund Commissioner and Another, , D.C.M. Limited Vs. Regional Provident Fund Commissioner, Enfield India Ltd. Vs. Regional Provident Fund Commissioner, , N.J. Nayudu and Company Vs. Regional Provident Fund Commissioner, , Ram Singh and Others Vs. Punjab State Co-op. Supply and Marketing Federation Ltd. and Others, , Dr. A.V. Joseph Vs. Assistant Provident Fund Commissioner and another, and Srikanta Datta Narasimharaja Wodiyar Vs. Enforcement Officer, Mysore, .

6. Mr. K.K. Saxena, President of the Society also submitted on behalf of the society that the Canteen was working on behalf of the Petitioner and 90%

subsidy was obtained from the Petitioner. Though the society had asked for its code however, no code was allotted to it. Further in compliance of the orders passed by this Court, the society had deposited the provident fund contribution of the employees deducted by it to the Regional Provident Fund Commissioner (RPFC).

7. I have heard learned counsel for the parties and perused the records.

8. The issue involved in the present case is whether the workers of the Canteen Mazdoor Sabha fall within the definition of "employees" of the Petitioner u/s 2 (f) making it liable to deposit the employers provident fund contribution. Section 2 (f) of the EPF and MP Act provides as under:

"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 person-

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment;]

9. A perusal of the Section itself shows that the definition of "employee" u/s 2 (f) is wider than a "worker" under the Factories Act or a "workman" under the ID Act. The Section not only covers the employees directly employed by the employer but also the employees getting wages indirectly from the employer and persons working in connection with the work of an establishment. Thus the provision permits the authorities to lift the veil and find out who is the actual/principal employer. In the present case it is the admitted case of the Petitioner that 90% subsidy was being paid by it to the society. The Petitioner enjoyed overall control in the matter of running the canteen like payment of salary, wages, fixing the rates of all eatables, determining the bonus, grant of supply and also to take disciplinary action. The Respondents have placed ample evidence on record in the form of wage bills which were duly submitted to the Petitioner by the society. In Royal Talkies (supra) relied on by both the sides it was held:

16. Merely being employed in connection with the work of an establishment, in itself, does not entitle a person to be an "employee". He must not only be employed in connection with the work of the establishment but also be shown to be employed in one or other of the three categories mentioned in Section 2(9).

17. Section 2(9)(i) covers only employees who are directly employed by the principal employer. Even here, there are expressions which take in a wider group of employees than traditionally so regarded, but it is imperative that any employee who is not directly employed by the principal employer cannot be

eligible u/s 2(9)(i). In the present case, the employees concerned are admittedly not directly employed by the cinema proprietors.

18. Therefore, we move down to Section 2(9)(ii). Here again, the language used is extensive and diffusive imaginatively embracing all possible alternatives of employment by or through an independent employer. In such cases, the "principal employer" has no direct employment relationship since the "immediate employer" of the employee, concerned is some one else. Even so, such an employee, if he works (a) on the premises of the establishment, or (b) under the supervision of the Principal employer or his agent "on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on in or incidental to the purpose of the establishment", qualifies u/s 2(9)(ii). The plurality of persons engaged in various activities who are brought into the definitional net is wide and considerable; and all that is necessary is that the employee be on the premises or be under the supervision of the principal employer or his agent. Assuming that the last part of Section 2(9)(ii) qualifies both these categories, all that is needed to satisfy that requirement is that the work done by the employee must be (a) such as is ordinarily (not necessarily nor statutorily) part of the work of the establishment, or (b) which is merely preliminary to the work carried on in the establishment, or (c) is just incidental to the purpose of the establishment. No one can seriously say that a canteen or cycle stand or cinema magazine booth is not even incidental to the purpose of the theatre. The cinema goers ordinarily find such work an advantage, a facility an amenity and some times a necessity. All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. It is sufficient if it is incidental to it. A thing is incidental to another if it merely appertains to something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Much depends on time and place, habits and appetites, ordinary expectations and social circumstances. In our view, clearly the two operations in the present case, namely, keeping a cycle stand and running a, canteen are incidental or adjuncts to the primary purpose of the theatre.

10. It cannot be disputed that running of the canteen exclusively for the employees of the MMTC is certainly an incidental function. Further the EPF and MP Act being a special enactment would prevail over the definition of the workers under the factories act or the workman under the ID Act. The submission that the award of the Industrial Tribunal, on the demand of the Canteen Mazdoor Sabha to treat its members at par with the MMTC employees and to grant the same benefits with effect from 1st October, 1979, having been decided against the Union has no relevance to the facts of the case.

11. Learned counsel for the Petitioner has laid a lot of stress on the fact that there was no pleading that the Petitioner was the principal employer and in the absence of the society being held as contractor of the Petitioner no finding can be arrived at. It may be noted that no prejudice is being caused to the Petitioner

due to the shift in the stand of the workers Union before the Appellate Tribunal wherein it is contended that the Petitioner was the principal employer. The written arguments on behalf of the Petitioner before the Assistant Provident Fund Commissioner itself deal with this issue and in Para-4 it was stated by the Petitioner that the canteen is run by the society, the said society is not a contractor engaged by the company, the canteen is not the canteen of the company, the canteen is not an establishment of the company and, therefore, the company is neither the employer nor the principal employer of the members of the union. Thus even if it was not specifically stated in the complaint or in the show cause notice that the Petitioner was a principal employer or that there was a contract between the Petitioner and the society, the Petitioner had deciphered the same from the pleadings and had clearly averted to the said issue. The Assistant Provident Fund Commissioner on the basis of the documents furnished by the Union came to the conclusion that not only members of the Union were eligible towards provident fund benefit but it was also proved that the Petitioner was in overall control of the running of the canteen, payment of salary, wages, fixing the rates of eatables, payment of bonus, grant of subsidy bonus etc. and also for taking disciplinary action and issuing necessary directions to the canteen employees.

12. As regards contention of learned counsel for the Petitioner that the complaint filed by the members of the Union was not provided to it, it may be noted that this issue was neither raised in the reply to the show cause notice nor in the written submissions filed before the Assistant Provident Fund Commissioner nor was it a ground before the Appellate Tribunal nor is it a ground in the present petition, hence the issue not being pleaded, it cannot be urged by the learned counsel for the Petitioner at the time of final hearing.

13. Lastly it is contended by learned counsel for the Petitioner that a settlement had been arrived at between the Society and the Union in Writ Petition (C) No. 7369 of 2002. A perusal of the said settlement shows that it was only in relation to the award dated 7th August, 2002 which was the subject matter of challenge in W.P. (C) No. 7369 of 2002. In the said settlement between the Petitioner, the members of the Union and the society though it was agreed that the members of the Union would accept that the canteen belongs to and is run by the MMTC Cooperative Canteen Society and the workmen agreed to withdraw W.P. (C) No. 7369 of 2002 however no settlement was arrived at between the parties regarding the issue pending in the present petitions. It is stated that the Society will comply with the provisions of EPF and MP Act, deposit the contributions and seek for a code. This part of the clause was non-est as the application for providing the code to the Society had already been declined which order had become final and had not been challenged by the Petitioner despite communication dated 14th November, 1986. Without the provident fund authority being a party to the settlement, the society, the Petitioner and the members of the Union could not have unilaterally imposed on the Provident Fund Authority that the society would comply with the provisions of the EPF and MP

Act. This settlement can clearly be not acted upon in the present petition.

14. The contention of the learned counsel for the Petitioner that there is no finding by the Assistant Provident Fund Commissioner or the Tribunal that the Society is a contractor is wholly misconceived. A perusal of the Section 2 (f) of the EPF and MP Act shows that an "employee" is any person who is employed for wages in any kind of work in or in connection with the work of an establishment or gets his wages directly and indirectly. The definition also includes persons employed by or through a contractor or engaged as an apprentice. Sub-clauses 1 and 2 of Section 2 (f) are only inclusive and they include the persons falling in this category besides the persons who are employed for wages either directly or indirectly for the employer and working in or in connection with the work of an establishment. Thus it is not essential for the authority to return a finding that the society was a contractor and the absence of an agreement in relation thereto does not vitiate the order. In view of the aforesaid discussion the petitions are dismissed. The Registry is directed to release the amount of Rs. 3,60,000/- deposited in this Court along with the interest accrued thereon to the Regional Provident Fund Commissioner, who shall take action thereon in accordance with law.