

(2012) 10 DEL CK 0296

In the Delhi High Court

Case No : Writ Petition (C) No. 6019 of 2010 and CMs. 11846 of 2010 (stay) ,
9338 of 2011

MMTC Limited

APPELLANT

Vs

Employees Provident Fund Organization

RESPONDENT

Date of Decision : 03-10-2012

Acts Referred:

Constitution of India, 1950 — Article 43
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(f)
Factories Act, 1948 — Section 2, 7
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(e), 2(f)

Citation : (2012) 135 FLR 1013 : (2013) LabIC 1243

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Rajender Dhawan and Mr. B.S. Rana, for the Appellant; Keshav Mohan, for the Respondent

Final Decision : Disposed Off

Judgement

Hon"ble Ms. Justice Mukta Gupta

1. The Petitioner, a company incorporated under the Companies Act is trading and engaged in export as well. To carry on its functioning it maintains regional offices in various cities of the country and one such office is located in MMTC Bhavan, Vishakhapatnam as well as at the Harbour office which is also located at Vishakhapatnam Port. Learned counsel for the Petitioner contends that Shri Kumar, Appalaraju, Ramana, Mohan, Mohan Rao and B. Prakash Rao, members of Visakhapatnam Zila SC, ST and OBC Safai Karamchari Sangam (in short the Sangam) are not covered under the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (hereinafter called EPF & MP Act) when they were performing duties in the Petitioner's establishment as members of the Sangam in pursuance of a contract awarded to Sangam by the Petitioner. The case of the Petitioner throughout is that the abovementioned persons were not employees of

Sangam (except Shri B. Prakash Rao) and that Sangam carried out work itself through its members and not employees within the meaning of Section 2(f) of the EPF & MP Act. In the year 1989, the Commissioner for SC & ST recommended that the public sector enterprises may be directed to dispense with the practice of assigning safai work on contract and this work maybe assigned to cooperative societies formed by the members belonging to SC/ST. Pursuant to the directions issued by the Commissioner, Visakhapatnam Zila SC/ST and OBC Safari Karamchari Sangam (in short the Sangam) approached the Petitioner company and offered to carry out the work of cleaning and maintenance at the company's offices at Visakhapatnam. The company agreed to pay a fixed amount to Sangam which amount included cost of material and labour. The members of Sangam, who carried out the work was never employed by Sangam. There was no relationship of employer and employee between Sangam and its members who used to carry out the work in Petitioner's premises and therefore the said persons did not fall within the definition of "employee" as defined in Section 2(f) of the EPF & MP Act.

2. Subsequently for the purposes of gardening, Sangam engaged a gardner, Mr. B. Prakash Rao. He was engaged by Sangam as its employee for gardening purposes. Mr. M. Jagdiswara Rao, Member EPF Committee and State Secretary of BMS (A) made a complaint to EPFO that MMTC was not extending provident fund benefits to an employee as a Gardner for last 12 years. The Assistant Provident Fund Commissioner (APFC) initiated proceedings u/s 7A of the Act and names of Shri Kumar, Appalaraju, Ramana, Mohan and Mohan Rao were also added in the said proceedings even though they were not the employees of Sangam. On 4th November, 2002 APFC issued show cause notice to the Petitioner, reply to which was filed by the Petitioner on 17th November, 2003. On 27th July, 2005 APFC passed an order holding that the said persons were coverable under the EPF & MP Act and assessed the amount. Aggrieved by the said order, the Petitioner filed an appeal before the EPF Tribunal on 26th September, 2005. The learned EPF Tribunal vide its order dated 1st June, 2010 dismissed the appeal of the Petitioner holding that no infirmity is noticed in the order of EPF authorities.

3. Reliance is placed on the definition of "Employees" u/s 2(f) of the EPF & MP Act wherein a contract of employment between the employee and employer and wages as consideration is an essential element. It is further contended that one of the primary test to check an employer employee relationship is the control and the manner in which the work has to be carried out. Reliance is placed on Chintaman Rao and Another Vs. The State of Madhya Pradesh, . The letter of offer by the society itself says that they are the members of the Sangam and they have provided with rates, terms and conditions along with the material for undertaking the work. The contention of the Petitioner has neither been considered by the EPF Authority nor by the Appellate Tribunal. There is no basis to come to the conclusion that the members of Sangam were labourers of the society. Reliance of the learned Appellate Authority on M/S. Madathupatti Weavers Cooperative Production and Sales Society Ltd. Vs. Regional Provident

Fund Commissioner & Ors. 1997 LAB I.C. 295 is wholly misconceived.

4. Learned counsel for the Respondent on the other hand contends that the test is whether the workers are employed directly or indirectly and even if they are employed indirectly whether they would fall within the definition of employees u/s 2(f) of the EPF & MP Act. Reliance is placed on Section 8A of the Act which provides for the manner of recovery of money by the employers and contractors. Reliance is also placed on Paras 30, 36 and 36B of the Employees Provident Fund Scheme. Referring to Orient Paper Mills Vs. Regional Provident Fund Commissioner and Another, ; Ram Singh & Ors. Vs. Punjab State Co-op. Supply & Marketing Federation Ltd. & Ors. 2007 LAB I.C. 75; Santokba Durlabhji Memorial Hospital Vs. Assistant Provident Fund Commissioner 2000 L.S.(Raj) 192 and M/s. Goel Textile Industries & Anr. Vs. Union of India & Anr. 1991 (62) FLR 436 it is contended that since this is a beneficial legislation, an interpretation which does not defeat the object of the legislation has to be resorted. Applying the test laid down it would be seen that the employees were in their dual capacity, one as members of the society and second as workmen/employees of the society and thus, they are entitled to the beneficial legislation.

5. I have heard learned counsel for the parties. The grievance of the Petitioner in the present petition is that despite the fact it was the contention of the Petitioner that since the concerned persons i.e. Shri Kumar, Appalaraju, Ramana, Mohan and Mohan Rao and B. Prakash Rao were members of the Sangam and not the employees, the learned Appellate Tribunal erroneously relying upon the decision in M/s. Madathupatti Weavers Cooperative Production and Sales Society Vs. Regional Provident Fund Commissioner & Ors. 1997 LAB I.C. 295 dismissed the contention of the Petitioner. A perusal of the reply to the show cause notice and the appeal filed by the Petitioner before the Tribunal shows that the contention of the Petitioner was that a contract was awarded to the society and the work was carried out by its members and the Tribunal erroneously held that the contention of the Petitioner was that it entrusted the job to the society, who engaged the labourer, so admittedly the labourers were working for or in connection with the work of the Petitioner herein. Section 2 (e) & (f) of the EPF & MP Act provides as under: "(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 a 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 (63 of 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 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;

6. A perusal of Section 2(f) shows that any person who is employed for wages in any kind of work manual or otherwise, in or in connection with the work of the establishment, and who gets his wages directly or indirectly from the employer is an employee. In the present case, there is no dispute that the members of Sangam are working in connection with the work of the establishment. The dispute is whether on the terms of the contract the members of the Sangam were taking wages or not and whether the Sangam's members were its employees. The letter of offer dated 19th April, 1995 sent by the members of Sangam to the Petitioner states that the members of the Sangam had formed an association which is registered under the Societies Registration Act and they request the Petitioner to award the work of cleaning and maintenance of its organization to them, as they were very much well-versed with their office and its needs. The second letter dated 19th April, 1995 by the Sangam to the General Manager of the Petitioner reads as under:

To,

The General Manager

MMTC Limited

Visakhapatnam

Dear Sir,

Sub: Our charges and material charges for cleaning and maintenance of MMTC Bhavan, Harbour Office and its field offices - reg

As mentioned in our letter dated 19.04.95 for undertaking the jobs of cleaning and maintenance of MMTC Bhavan, Harbour office and its field offices at D/Yard, VOHP and R-2 area, we enclose herewith the statement showing the materials and its cost for using the same for cleaning purposes.

We would like to mention hereunder the charges for undertaking the job including cost of materials as mentioned in our enclosure.

The other terms and conditions which were imposed earlier to the cleaning contractors are acceptable to us. Once the work allotted to us the necessary EMD will be submitted to you by Demand Draft.

Thanking you,

Yours faithfully,

For Visakhapatnam Zilla SC/ST & BC

Safayi Karamchari Sangam

(B. ADINARAYANA)

7. A perusal of the terms would show that the members of the Sangam took the job not on the basis of the wages but on contractual basis including the cost of the material. Thus on the basis of letters dated 19th April, 1995 it will have to be considered whether the members of the Sangam were employees covered under the EPF & MP Act. In *M/s P.M. Patel and Sons and Ors. Vs. Union of India and Ors.* (supra) their Lordships held:

9. Now to be an employee it is necessary that the relationship of master and servant should exist with the employer. The principal question is whether such a relationship exists between the manufacturer and a home worker. Several cases were placed before us by the parties in this connection, and reference may be made to them. In *Chintaman Rao and Another Vs. The State of Madhya Pradesh*, this Court held that independent contractors, known as Sattedars, with whom a manufacturer contracted for the supply of beedis could not be described as workers within the definition of sub-section (1) of Section 2 of the Factories Act, nor could their coolies, because the Sattedars undertook to supply the beedis by manufacturing them in their own factories or by entrusting the work to third parties. The Sattedars were not subject to a right of control by the manufacturer in respect of the manner in which the work was to be done. The Court applied the principle that the test for determining the relationship of master and servant lay in the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant was to do but also the manner in which he should do it. In passing, the Court referred to home workers employed by the Sattedars for making beedis in their respective homes, and the Court observed that they could not be regarded as persons employed by the manufacturer directly or through any agency. Thereafter, in *Shri Birdhichand Sharma Vs. First Civil Judge Nagpur and Others*, this Court considered a case where the manufacturer had employed workmen in his beedi factory and who were at liberty to work at their homes, and the Court held that the conditions in which they worked made them "workers" within the meaning of clause (1) of Section 2 of the Factories Act. The significant feature of the judgment lies in the observation of the Court that in the case of the beedi industry the right of rejection of the beedis if they did not come up to the proper standard was evidence of the supervision and control exercised by the manufacturer. Noting that the nature and extent of supervision and control varied in different industries, the Court said:

Taking the nature of the work in the present case it can hardly be said that there

must be supervision all the time when biris are being prepared and unless there is such supervision there can be no direction as to the manner of work. In the present case the operation being a simple one, the control of the manner in which the work is done is exercised at the end of the day, when biris are ready, by the method of rejecting those which do not come up to the proper standard. In such a case it is the right to supervise and not so much the mode in which it is exercised which is important.

Reference may be made next to Shankar Balaji Waje Vs. State of Maharashtra, . The majority view taken on the particular facts of that case was that the workers were not subject to the control and supervision of the manufacturer. The learned Judges constituting the majority appear to have overlooked the observations in Shri Birdhichand Sharma Vs. First Civil Judge Nagpur and Others, that the right of rejection of the beedis prepared by the workers in itself constituted a sufficient element of supervision and control. Our attention was also invited by the petitioners to Orissa Cement Ltd. Vs. Union of India (UOI), but this is a case where the question was whether a notification was valid which made the employer liable to pay into the provident fund, constituted under the Provident Funds Act, 1952, the share of workers who were in fact the employees of independent contractors. The Court drew a careful distinction between labour employed by the manufacturer and that employed by an independent contractor. Most of these cases were considered thereafter by this Court in D.C. Dewan Mohideen Sahib and Sons Vs. The Industrial Tribunal, Madras, and while reviewing the law the Court rejected the plea of the manufacturers against the application of the Industrial Disputes Act on the ground that the workers ostensibly employed by the "so-called contractors" were in fact the workmen of the appellants who had employed them through their agents or servants. It may be pointed out, however, that the Court reiterated the view expressed in Shri Birdhichand Sharma Vs. First Civil Judge Nagpur and Others, that the rolling of beedis was work of such a simple nature that supervision was not required all the time and it was sufficient if supervision was exercised at the end of the day through the system of rejecting defective beedis. The law took a major shift in Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another, as to the criteria which determined the relationship of master and servant. Mathew, J., who spoke for the Court, reviewed the earlier decisions of this Court as well as some of the decisions rendered in England, and pointed out that the test of control as traditionally formulated was no longer treated as an exclusive test. He observed: (SCC pp. 507-08, paras 28 & 29)

It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded, which factors should in any case be treated as determining ones. The plain fact is that in a

large number of cases, the court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction.

During the last two decades the emphasis in the field has shifted and no longer rests so strongly upon the question of control. Control is obviously an important factor and in many cases it may still be the decisive factor. But it is wrong to say that in every case it is decisive. It is now no more than a factor, although an important one.

He was dealing with a case where the workers who were tailors went to tailoring shops and were given work as and when work was available, and when cloth was given for stitching to a worker he was told how he should stitch it, and if the instructions were not carried out the work was rejected and he was asked to re-stitch it. Some of the workers were allowed to take the clothes home for stitching. The Court held that there was a relationship of master and servant because of the right in the employer to reject the work done, and it reiterated that "the degree of control and supervision would be different in different types of work". In the present cases, the right of rejection can similarly be said to represent the control and supervision exercised by the manufacturer over the beedis prepared by the home workers. Quite obviously, while in *Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another*, it was possible for the employer to direct re-stitching of the garment, no such direction can be reasonably envisaged in the case of substandard beedis. A Constitution Bench of this Court had occasion to consider the law in *Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others*, which questioned the validity of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966. The Court adopted the test of rejection of defective beedis for determining whether the beedi workers were the employees of the manufacturer or the independent contractors. The Court observed: (SCC p. 62, para 35)

the manufacturers or trade mark holders have liability in respect of workers who are directly employed by them or who are employed by them through contractors. Workers at the industrial premises do not present any problem. The manufacturer or trade mark holder will observe all the provisions of the Act by reason of employing such labour in the industrial premises. 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 products to the manufacturer 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. If the right of rejection rests with the manufacturer or trade mark holder, in such a case the contractor who will prepare beedis through the contract labour will find it difficult to establish that he is the

independent contractor.

8. There can be no dispute that as long as members of the Sangam were working through the contractors they fell within the definition of employee u/s 2(f) of the EPF & MP Act and for that the Petitioner was liable to pay the provident fund. However, the issue in the present case is that once the members of Sangam entered into a contract with the Petitioner whether they could be termed as employees. It may be noted that in the present case besides the members of the Sangam being not employees of the Sangam except Shri B. Prakash Rao who was employed by the Sangam they were not even taking wages from the Petitioner. A perusal of the letter dated 16th April, 1995 shows that the work of cleaning and maintenance of MMTC Bhawan, Harbour Office and its field offices etc., were done on contract basis which included the cost of material also. Since the necessary requirement of being employed for wages and not being employees of the Sangam is not met, I find that the impugned order is perverse and illegal to the extent it directs provident fund to be deposited by the Petitioner in respect of members of the Sangam i.e. Shri Kumar, Appalaraju, Ramana, Mohan and Mohan Rao. Thus, the impugned order is set aside to this extent.

9. The reliance of the Tribunal on the decision of the Single Bench of the Madras High Court rendered in M/s. Madathupatti Weavers Cooperative Production and Sales Society (supra) is misconceived as the said decision has been over-ruled by the Division Bench of the Madras High Court. In the said decision the learned Single Judge held that members of the society were employees of the establishment in connection with its work performed. In appeal before the Division Bench by the society i.e. Q-793, Madathupatti Weavers Cooperative Vs. Regional Provident Fund Commissioner 2003-LLJ-3-795 in paragraph 18 - 21 it was held:

18. On merits, it is submitted that the appellant weavers cooperative society formed on the basis of one for all and all for one as a co-operative movement for the purpose of producing and selling the finished cloth. The members of the co-operative society cannot be construed as "employees" and the society also in turn cannot be construed as an "employer" and there is no such relationship between them. In the affidavit, it is stated that the society do not have looms of their own. The members, who are weaving through their own looms in their respective houses, are provided with yarn and they take yarn to their houses and they weave in their looms and bring it to the society as finished cloth. According to them, amount is paid for the cloth. According to them, amount is paid for the cloth produced by them and there is no employer and employee or master and servant relationship between the members and the society. The society employed eight persons as their staff to maintain their records and other connected work. All the members of the society are shareholders and they formed the Board of Management. They elect the President and Vice-President among themselves. They share the profits, if any, among themselves. Besides, it is stated that all

shareholders, who are members do not get yarn regularly and weave the cloth, nor is there any time frame work. The society also does not exercise any supervising control over them.

19. The specific averments made in the affidavit are not denied in the counter-affidavit. Paragraph 4 dealing with this point states to the effect that the society has admitted that they supplied the raw materials to the weavers, who returned the finished goods back to the society. Thus, according to the counter, weaver workers were engaged in the business of the appellant society. They did weaving for the society and the society supplied yarn and paid the wages after receiving the finished cloth and sold them. There is no finding with reference to the nature of transaction except stating that the workers are doing business of the society.

20. Co-operation means work together. But, in law, it has a specific meaning of "working together". The co-operative movement has a history of social development and weavers societies have a role in the freedom movement of our country for self reliance in the production and distribution of the textile needs of our country. The law relating to co-operative and credit is regulated. Article 43 of the Constitution of India as one of the Directives mandates the State of endeavour to promote cottage industries on an individual or co-operative basis in rural areas. The respondents have not applied the basic issues involved prior to or during the determination. There appears to be an undue haste, lack of openness in consideration with fair opportunity and to cover the society under the Act.

21. The Tamil Nadu Co-operative Societies Act, 1983 for short "Societies Act" is a consolidated law for making provisions for organisation, management and supervision of co-operative societies in Tamil Nadu. The object is to provide for orderly development of co-operative movement in accordance with cooperative principle such as open membership, democratic management,..... distribution of surplus... self help and mutual aid... so as to bring about improvement in better method of production... a weaver society has been defined u/s 1(3) of the societies Act as follows:

Registered society which has its principle object the production of handloom cloth or fabrics or cloth through, or with the help of its members and marketing the same and includes any registered society which has as its principal object the provision of facilities for the operation of a weavers society.

10. As regards the supervision and control exercised by the society it was held in paragraphs 25, 28 & 31 as under:

25.....But, in the present case, there is no question of rejecting of the cloths or supervision over the weavers and there is no question of compelling them to do the work. Further, the society is a non-profitable organisation to help the poor weavers to have their own cotton loom in their own houses and share their profits through a co-operative venture. We, therefore, agree with the view taken by the learned Judge in relation to the relationship of the members with the

society.

28. In that case, the members work in the premises of the society for the wages paid by the society and in the light of expression "wages" u/s 2(22) of the Act to mean all remuneration paid by the society being distinct legal entity from its members and of the members work for wages for the society, they are employees. There is no such finding with materials in our case.

31. On the contrary, it is pointed out that the members of the society have their own looms in their residence and they do their work along with their family members and there is no supervision and time frame work, etc. There is absolutely no question of master and servant-relationship between the members and the society.

11. The decision of the Division Bench of the Madras High Court in Madathupatti Weavers (supra) was taken in appeal by the Department to the Supreme Court wherein the civil appeal was dismissed by the Supreme Court in its decision reported as Regional Provident Fund Commissioner and Ors. Vs. Madathupatti Weavers Cooperative Production and Sales Society Ltd. 2008 (3) LLN 507. Thus, it is very clear that in a case where the members of the society join with the object to share in the production and profit, they cannot be said to be the employees. There is nothing on record to show that the members of the Sangam were being paid wages by the Petitioner. There is no doubt that the control on the work would be of the Petitioner, but that alone is not sufficient to fasten an employer-employee relationship. In view of the aforesaid discussion, the impugned order passed by the EPF Appellate Tribunal dated 1st June, 2010 is set aside to the extent it directs provident fund to be deposited by the Petitioners in respect of members of the Sangam i.e. Shri Kumar, Appalaraju, Ramana, Mohan and Mohan Rao and the order of the Assistant Provident Fund Commissioner dated 27th July, 2005 is also set aside. Petition and applications are disposed of.