

(2013) 07 BOM CK 0255
In the Bombay High Court
Case No : Writ Petition No. 553 of 2013

M/s. Ajmeri Gold Fingers

APPELLANT

Vs

The Assistant Provident Fund Commissioner and The
Employees Provident Fund Appellate Tribunal

RESPONDENT

Date of Decision : 30-07-2013

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(3)(b)

Citation : (2013) 5 ABR 787 : (2013) 5 ALLMR 516 : (2013) 139 FLR 147 :
(2013) LabIC 3813 : (2013) 3 LLN 517 : (2013) LLR 1127 : (2013) 6 MhLj 144

Hon'ble Judges : R.Y. Ganoo, J

Bench : Single Bench

Advocate : A.R. Deshpande, for the Appellant; Anup Parihar, Advocate for
Respondent Nos. 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

R.Y. Ganoo, J.—Rule. Rule made returnable forthwith. Learned Advocate Mr. Parihar waives service on behalf of respondent Nos. 1 and 2.

2. Officers of respondent No. 1 visited the establishment of the petitioner and on inspection of the site on 31/3/2005, recorded the names of persons who were working in the petitioner's factory. They turned out to be more than 20. Based on that observation, action was initiated against the petitioner in accordance with the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the said Act"). The said action ended against the petitioner in as much as an order came to be passed by respondent No. 1 on 28/3/2007. By the said order, respondent No. 1 came to the conclusion that the petitioner has appointed 20 or more than 20 persons in its establishment and therefore the provisions of the said Act are made applicable to them. The petitioner was aggrieved by the aforesaid order and that is how the petitioner challenged the said order by filing an appeal in Employees Fund Appellate Tribunal being Appeal A.T.A. No. 394(9)2007. The learned Member of

the Tribunal, i.e. respondent No. 2 decided the said appeal and rejected the same on 15/9/2011.

3. It is in these circumstances, the aforesaid two orders are challenged in this petition.

4. Learned Advocate Mr. Deshpande on behalf of the petitioner contended that the petitioners has never engaged persons 20 or more. According to him, in absence of 20 or more than 20 persons in the employment of the petitioner, the provisions of the said Act are not at all applicable. Insofar as this aspect is concerned, when the proceedings were attended to by the petitioner before the respondent No. 1, no material was placed in support of the contention of the petitioner that they had employed persons less than 20. Respondent No. 1 accepted the report filed by the Inspector and came to the conclusion that the petitioner had engaged 20 or more than 20 persons and that is how the provisions of the said Act are attracted.

5. Before the Tribunal, the petitioner relied upon the returns which the petitioners was required to file as per the provisions of the Employees State Insurance Corporation Act. They also relied upon the challans which are being received by them after they deposited certain amounts with the E.S.I.S. Learned Advocate Mr. Deshpande drew my attention to these returns and submitted that in the said returns, it is categorically mentioned that the number of employees on the petitioner's establishment is less than 20. Apart from this document, no other document was produced before the appellate Tribunal.

6. It was contended before this Court by the learned Advocate Mr. Deshpande for the petitioner that the Tribunal has not dealt with these E.S.I.S. returns and challans and, therefore, the impugned order passed by the Tribunal is wrong.

7. It was contended by learned Advocate Mr. Deshpande that for the purpose of consideration of the documents concerning E.S.I.S. returns and challans, the matter be remanded.

8. Learned Advocate Mr. Parihar for the respondents supported the impugned orders and submitted that the petitioner has failed to produce adequate record to show that they were employing persons less than 20 and that the material produced before respondent No. 1 and respondent No. 2 in the nature of the inspection report was sufficient to come to the conclusion that the petitioner had engaged 20 or more than 20 persons in its establishment.

9. I have considered the submissions advanced across the bar. It is true that order passed by the Tribunal does not refer to the E.S.I.S. return and the challans. Even if it is accepted for a moment that these documents indicate that persons less than 20 were in the employment of the petitioner, the petitioner had not produced any other record to show that the petitioner had employed persons less than 20. If the petitioner had employed persons less than 20 as claimed, the petitioner could have easily produced the muster roll, salary acquittance roll,

various vouchers issued or such other documents to show that the payment in the nature of salary and other dues is being made to those persons. The provisions of E.S.I.S. Act will be definitely applicable to the persons who are on the pay roll of the petitioner and surely they will not be applicable to persons who may work for few days and go away. This will mean that there is an admission on the part of the petitioner that they had appointed few persons with their establishment. If this being so, it was not difficult for the petitioner to produce muster roll, salary acquittance roll or any other material to show that they paid salaries to certain number of persons but less than 20. In my view, for the aforesaid reasons, even if there is no reference to E.S.I.S. returns and E.S.I.S. challans in the order passed by the Tribunal, that by itself, is not sufficient to hold that prejudice is caused to the petitioner by not considering those E.S.I.S. returns & challans by the Tribunal. It would have been different if the petitioner had relied upon the muster roll, salary acquittance roll or any other document to show that salaries/allowances were paid to certain persons but less than 20 and, if such documents would not have been considered, surely the submission for remand could have been considered. It is in these circumstances I am not inclined to accept the arguments advanced by the learned Advocate for the petitioner that the order passed by the respondents be set aside and the matter be remanded to the Tribunal for rehearing and for inviting finding on the documents namely E.S.I.S. returns and challans.

10. It is also required to be mentioned that even before this Court, after suffering at the hands of the Tribunal, the petitioner has not produced any record in the nature of muster roll/salary certificate or acquittance roll or any other document showing that the petitioner had employed persons less than 20 on their establishment. This will go to show that the documents in the nature of E.S.I.S. returns and challans were placed before the Tribunal only to see that some show is made that certain documents are placed before the Tribunal. In my view, placing on record E.S.I.S. returns and challans, was an halfhearted attempt. Surely, if the petitioner's case was genuine that they had employed persons less than 20, they would have produced the necessary documents as mentioned above.

11. For the aforesaid reasons, the stand of the petitioner that they had employed persons less than 20 is required to be rejected. The stand of the respondents that the petitioner had engaged 20 or more than 20 persons is required to be accepted on the basis of the report, which has gone unchallenged.

12. It was sought to be argued by learned Advocate Mr. Deshpande that the petitioner is not governed by the provisions of the said Act as the petitioner does not fall under the notification, which is issued by the Central Government in accordance with the provisions of Section 1(3)(b) of the said Act.

13. The text of the notification is reproduced in para 10 of the plaint. By the said notification, every trading and commercial establishment employing twenty or more persons each and engaged in the purchase, sale or storage of any goods

including establishments of exporters, importers, advertisers, commission agents and brokers, and commodity and stock exchanges, but not including banks or warehouses established under any central or state Act are covered under the said Act. Learned Advocate Mr. Deshpande submitted that on consideration of the activities which are carried by the petitioner, they do not fall within the ambit of the term, "trading and commercial establishment" and performing an activity as set out in the text of the said notification.

14. The petitioner is purchasing maida and other articles to manufacture an item, which is similar to wafers and the manufactured product is sold in the market. According to learned Advocate Mr. Deshpande, the said product is sold to wholesalers only. According to Mr. Deshpande, the activity carried out by the petitioner does not fall within the ambit of this notification.

15. Learned Advocate Mr. Parihar pointed out that the petitioner is purchasing goods such as maida and other articles for manufacture of wafers and selling it to the wholesalers. After having noted the activity carried out by the petitioner-factory, it is clear that the petitioner is covered by the notification as they are purchasing certain articles and they are selling goods, which are manufactured in the factory. The contention of learned Advocate Mr. Deshpande that the sale of goods to wholesalers only should not be treated as sale, cannot be accepted.

16. For the aforesaid reasons, I am inclined to observe that the petitioner is governed by the provisions of the said Act as they are governed by the notification issued by the Central Government as per the provisions of Section 1(3)(b) of the said Act. In view of the aforesaid discussion, the arguments advanced by learned Advocate Mr. Deshpande are required to be rejected. Consequently, the writ petition is dismissed with no order as to costs.