
(2012) 10 AHC CK 0010

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 2922 of 2000

M/s. Sachan Nursing Home and Another

APPELLANT

Vs

Regional Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 19-10-2012

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1, 16, 2, 2(f)
Partnership Act, 1932 — Section 18, 19, 4

Citation : (2013) 5 ADJ 347 : (2013) 4 ALJ 420 : (2013) 137 FLR 769 : (2013) 137 FLR 768 : (2013) LabIC 2767 : (2013) LLR 981

Hon'ble Judges : B. Amit Sthalekar, J

Bench : Single Bench

Advocate : D.P. Singh, Siddharth Singh, Ravindra K. Jaiswal, Naveen Sinha and Devansh Rathore, for the Appellant; S. Chaturvedi and Amit Daga, D.K. Pandey and P.K. Pandey, for the Respondent

Final Decision : Allowed

Judgement

B. Amit Sthalekar, J.—By this writ petition, the petitioners are challenging the order dated 25/26.10.1999, passed by the Regional Provident Fund Commissioner, Varanasi. The facts of the case, in brief, are that the petitioner is a nursing home and is functioning as a partnership firm. It was established as a clinic in 1984, and thereafter converted into a nursing home. In Para 6 of the writ petition it is stated that the required strength at any given point of time is not more than 14-15 regular employees including doctors, nurses, sweeper, chaukidar and accountant; sometimes even substitutes as casual labour are engaged. On 31.8.1996, at about 4 P.M. 5 officials of the Employees Provident Fund Department came and inspected the attendance register and the petitioner No. 2 was asked to fill up a form which was done by him. The contention is that by the impugned order dated 25/26.10.1999, a liability of an amount of Rs. 1,04,022/- has been fastened upon the petitioners' firm towards employees provident fund.

2. Hence the present writ petition.

I have heard Sri Naveen Sinha, learned Senior Counsel assisted by Sri Devansh Rathor for the petitioners and Sri D.K. Pandey for the respondents.

3. The submission of Sri Naveen Sinha is that at any given point of time the employees in the petitioners' firm has never exceeded 20, and therefore, The Employees' Provident Fund and Miscellaneous Provisions Act, 1952 was not applicable to the petitioner. He has particularly referred to para 4 of the impugned order, wherein, the findings have been recorded by the respondents that as per records on 17.8.1996, the employees' strength was 17 but since there were three partners, namely Sri R.C. Sachan, Sri V.P. Sachan and Smt. Reeta Sachan, therefore, the total employees' strength comes to 20 by including the partners as employees of the petitioners' firm.

4. He has referred to the provisions of section 1, subsection (3) clause (b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 which read as follows:--

1. Short title, extent and application.--[(1) This Act may be called the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.]

(2).....

[(3) Subject to the provisions contained in section 16, it applies--

(a).....

(b) to any other establishment 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:

Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than [twenty] as may be specified in the notification].

5. The submission of the learned Counsel for the petitioners is that the partners of a firm are the owners of the partnership firm and a partnership firm unlike a Company does not have a separate legal entity, and therefore, the partners of the firm cannot be treated to be the employees of the partnership firm.

6. The term "Employee" is defined in section 2(f) of the Act, 1952 and means:--

2. Definitions.--In this Act, unless the context otherwise requires,--

[(a).....

(b).....

(c).....

(d).....

(e).....

(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;]

7. Reference has been made to a decision of the Supreme Court, in, Regional Director, Employees" State Insurance Corporation, Trichur Vs. Ramanuja Match Industries, . wherein, it has been held that liability to pay employees provident fund contribution arises only when 20 or more employees are engaged.

8. The facts of the case are more or less identical to the facts of the present case. In the case before the Supreme Court also the employees" strength was 17 and in para 2 of the judgment the Supreme Court has held that unless the three partners are included, the basic number of 20 is not reached and no liability under the Act accrues.

9. The question as to whether the partners of a firm can be said to be employees of the firm so as to attract the provisions of the Employees State Insurance Act or not has been discussed in para 4 of the said judgment which reads as follows:

4. It is appropriate that at this stage we refer to the position of a partner qua the firm. Section 4 of the Partnership Act, 1932 defines "partnership" and one of the essential requisites of a partner ship is that there must be mutual agency between the partners. A Full Bench of the Patna High Court in Seth Hira Lal and another v. A Sheikh jamaluddin, 221 rightly emphasised upon the position that an important element in the definition of partnership is that it must be carried on by all or any one of the partners acting for all. Section 18 of the Partnership Act statutorily declares every partner to be an agent of the firm for the purposes of the business of the firm and section 19 states that an act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. A partnership firm is not a legal entity. This Court in Champaran Cane Concern v. State of Bihar, pointed out that in a partnership each partner acts an agent of the other. The position of a partner qua the firm is thus not that of a master and a servant or employee which concept involves an element of subordination but that of equality. The partnership business belongs to the partners and each one of them is an owner thereof. In common parlance the status of a partner qua the firm is thus different from employees working under the firm, it may be that a partner is being paid some remuneration for any

special attention which he devotes but that would not involve any change of status and bring him within the definition of employee.

10. Thus on a reading of para 4, it is beyond doubt that a partnership firm is not a legal entity and even if some remuneration is being paid to the partners that would not involve any change of status and bring him within the definition of an employee.

11. Reference has also been made to a decision of the Supreme Court in Employees' State Insurance Corporation Vs. Apex Engineering Pvt. Ltd., .

12. In that case the respondent was a Company registered under the Companies Act, 1956 and reliance was placed before the Supreme Court on the judgment in the case of Ramanuja Match Industries (supra), in support of the contention that the Directors/Managing Directors of the Company were not an employee of the company.

13. Repelling the contention of the respondent company in that case the Supreme Court reiterated and reaffirmed its judgment in the case of Ramanuja Match Industries (supra), and in para 9 of the said judgment held that the position of a partner qua a firm is not that of a master and servant or an employer and employee. The partnership business belongs to the partners and each one of them is an owner thereof. Para 9 of the said judgment reads as follows:

9. The aforesaid decision of this Court clearly rules that the Managing Director while acting as such can have dual capacity both as Managing Director on the one hand and as servant or employees of the company on the other. The Division Bench in the impugned judgment with respect was in error in bypassing the ratio of the aforesaid decision of this Court by observing that it was a judgment rendered under the Income Tax Act and, therefore, it had no bearing on the scheme of the present Act. We also find that the Division Bench was equally in error when it placed reliance for its decision on the judgment of this Court in the case of Regional Director ESI Corporation v. Ramanuja Match Industries. In the said decision a Bench of two learned Judges of this Court held that a partner of a firm receiving salary is not an employee within the meaning of section 2 sub-section (9) of the Act. Ranganath Misra, J. (as he then was), speaking for this Court held that the partners cannot be held employees of the partnership firm. A partnership firm is not a legal entity and in a partnership firm each partner acts as an agent of the other. The position of a partner qua the firm is thus not that of a master and a servant or employer and employee which concept involved an element of subordination and not that of equality. The partnership business belongs to the partners and each one of them is an owner thereof. In common parlance the status of a partner qua the firm is thus different from employees working under the firm. It may be that a partner is being paid some remuneration for any special attention which he devotes but that would not involve any change of status and bring him within the definition of employee.

14. Sri D.K. Pandey, learned Counsel for the respondents on the other hand submitted that from the records, it will be seen that the three partners of the petitioners' firm had drawn salary, and therefore, they would fall within the definition of the term "employee", as defined in section 2(f) of the Act, 1952 and therefore, there was no illegality or infirmity in the impugned order dated 25/26.10.1999.

15. Having considered the submissions of the learned Counsel for the parties with reference to the provisions of the Act, 1952 quoted above and the two judgments of the Supreme Court referred to by the learned Counsel for the petitioners, there is absolutely no doubt that even if a partner or partners of the firm draw some remuneration from the partnership firm that would not convert their status from that of owner to an employee of the partnership firm. A partner/partners of a partnership firm is the owner of the firm and there is no relationship of master and servant or employer and employee between him and the partnership firm has held in the Ramanuja Match Industries (supra).

16. In fact the facts of the case of Ramanuja Match Industries are identical to the facts of the present case, inasmuch as in that case also the magical figure of 20 to bring the partnership firm within the ambit of the Employees State Insurance Act, could be arrived at only if the three partners of the firm were treated as employees and added to the employees' strength as observed by the Supreme Court in para 2 of the Ramanuja Judgment (supra). In view of the above discussion and the facts of the present case, and the law settled by the Supreme Court the impugned order dated 25.10.1999 is absolutely illegal and without jurisdiction and is accordingly quashed.

The writ petition is allowed. There shall be no order as to cost.