

(2000) 03 CAL CK 0002
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction, W.P. No. 13605 (W) of 1999

M/s. Tin Printers Pvt. Ltd.

APPELLANT

Vs

Regional Provident Fund Commissioner, West Bengal and
Others

RESPONDENT

Date of Decision : 10-03-2000

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7(A)
Employees State Insurance Act, 1948 — Section 2, 2(22), 2(9)

Citation : (2000) 2 CALLT 570 : (2001) 88 FLR 187

Hon'ble Judges : Basudeva Panigrahi, J

Bench : Single Bench

Advocate : Mr. Ashish Sanyal, Mr. Uttar Majumdar and Mr. Bappaditya Sen, for the Appellant; Anil Kumar Gupta, for the Respondent

Final Decision : Dismissed

Judgement

B. Panigrahi, J.—This writ petition has been filed by the petitioners for issuing a writ of mandamus against the respondents from not giving effect and a further effect to the impugned order dated 28th May, 1999 vide annexure K to the writ petition and be further declared that the petitioner No. 1 is not covered under the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act 1952 and schemes framed thereunder.

2. The essential facts led to filing of the writ petition is as follows :

The petitioners had started a Partnership business under a Deed of Partnership and were engaged in printing and composing work since 1984, At the beginning, there were only five employees with two partners. But in gradual course of time the number of Partners were increased from two to five and later on eleven employees were engaged. Subsequently in March 1996, the Partnership business was dissolved and it was converted into a Private Limited Company under the name and style as S.G. Tin Printers Pvt. Ltd. having been incorporated under the

provisions of the Companies" Act being incorporated No. 2173632 of 1995.

3. There was an inspection by the Inspector of the Provident Fund Commissioner and at such time it was noticed that the establishment engaged sixteen employees and five Directors were shown to be also the employees of the Company. The provisions of the E.S.I. Act was attracted since 1986. The enforcement officer of the respondent No.1 in his letter dated 30th December, 1994 had communicated to the petitioners that the provisions of Employees" Provident Fund and Miscellaneous Provisions Act 1952 (hereinafter be served the said Act), is applicable since it had engaged more than twenty employees. In response to the said letter the petitioners gave befitting reply by denying the applicability. The matter was, however, enquired into u/s 7(A) and the respondents were of the view that since the petitioners" establishment covered under the Act, therefore, they cannot disown their liability to make contribution towards the Provident Fund. They demanded Rs. 2,32,196/- (Rupees Two lakhs thirty two thousand one hundred and ninety six only) up to October 1998 as their contribution.

4. It has been submitted by the petitioners that they constituted a partnership firm and the partners have agreed to share profit and loss of the business carried on by all of them, even they received their salary/pay for the works rendered to the firm, notwithstanding such receipt of salary, the firm shall not be liable to pay any contribution. If the Directors who have been working as workers in the establishment are excluded from computing the number of persons engaged in the establishment, then. It shall not be covered under the Act.

5. It may be noted here that the petitioners have claimed that-

(a) there was a contract to serve and that contract must be free act of the servant.

(b) the servant must agree to be under the control of the master, both as to the work which he shall execute as also the details of the work and the manner of its execution.

(c) the relationship has to be distinguished from such relationships as exist between the principal and agent, bailor and balled and the like.

6. In view of the existence of the relationship between the partnership and the firm, therefore, it was not open to the authority to treat the partners as an employee so that to make the firm liable to pay the contribution.

7. The petitioners filed a supplementary affidavit by enclosing all the necessary documents/orders communicated by the respondents 1 to 3. Respondent Nos. 1 to 3 filed an affidavit-in-opposition by controverting all the materials of the writ petition. It has been claimed by the respondents that although a partnership firm was constituted from 1st April, 1984 till 31st March, 1996 but subsequently it was registered as a Private Limited Company and continued its operation till date from 1995. The establishment was recommended for coverage by the

Enforcement Officer from August, 1992. At the time of such recommendation it was noticed that the establishment had engaged 21 employees by including five partners.. In tills case 29 FJR 239, Madras is not applicable to the present case. The directors of the Company in their own volition communicated to the respondent Nos.1 to 3 by stating that the unit is covered by the provisions of this Act Thereafter it was not upon to them again to turn round and submit that it was not covered by the provisions of the Act. Once it is seen that if the provisions of this Act is applicable, then, subsequently it is presumably applicable in future also. Identical question came before this Court quite often and this Court was of the view that the order passed u/s 7(A) is appealable. Why proprietary of such order cannot be questioned by filing an appeal. The respondents further have stated that after the liability of the firm had risen to 2.30,196.70, then they just invented this speculative play with a view to avoid payment of the contribution. Therefore, in such context the application filed by the petitioners being without any merit, the same should be spurned immediately.

8. Mr. Sanyal, the learned advocate appearing for the petitioners has argued with great intensity of conviction that since the partners of the firm were not receiving salary/pay under any express or implied contract for the work rendered to the firm, notwithstanding such engagement as employee, he/they cannot be held to be employees of the firm. In support of his submission he has placed the judgment reported in AIR 1958 Andhra Pradesh 555. On a careful study of the Judgment it appears that the facts of that case is entirely distinguishable from the facts of the present case. In the case referred to (supra) the Andhra Pradesh High Court was of the view that the partner charged for breach of trust cannot be prosecuted on account of receipt of the money from the firm for the work done as an employee. But in this case it has to be found out whether one of the partners after receiving remuneration can be taken as an employee of the factory.

9. The learned Advocate appearing for the petitioners has also placed reliance on the judgment reported in AIR 1959 P&H 694 in the case of S. Jagat Singh v. Commissioner of Income Tax. In the decision cited (supra) it was decided whether an income on account of salary acquired by the assessee with the aid of Joint family property could be treated as an income of the assessee in the individual capacity. Therefore, such consideration is beyond the pale of discussion of the present case. Therefore, the point decided in the above case seems to be irrelevant for our purpose.

10. Similarly, the case reported in 1982 Tax LR 2070 in the case of Lakshman Das Varanasi v. Commissioner of Income Tax.

11. Mr. Sanyal placed reliance on the Judgment reported in Regional Director, Employees' State Insurance Corporation, Trichur Vs. Ramanuja Match Industries, in the case of Regional Director, Employees State insurance Corporation v. Ramanuja Match industries. In the aforesaid Judgment it has been held as follows :

"A partner who belongs to the class of employer cannot rank as employee because he also works for wages for the partnership. Undoubtedly the term employee is the correlative of employer. In common parlance the status of a partner qua the firm is 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. The contention that on the basis of the statute being beneficial, a partner should also count as an employee is unsustainable.

12. It is true that the above Judgment supports the contention of Mr. Sanyal. But the scope and applicability of the above Judgment was considered in a latter Judgment reported in Supreme Court of India in the case of Employees' State Insurance Corporation v. Apex Engineering Private Limited where it has been held as follows :

"A conjoint of section 2(9) and section 2(22) of the Employees' State Insurance Act clearly indicates that the Managing Director was entrusted with the work of Managing Director on remuneration of Rs. 12,000/- per year, that is Rs.1,000/- per month and in view of this remuneration he had to discharge his extra duties as Managing Director even apart from his functions as an ordinary Director. Thus it could not be gainsaid that he was receiving the remuneration under the contract of employment pursuant to the resolution of the Board of Directors and that remuneration was paid to him because he was carrying on his extra duties as Managing Directors. So far as the first condition is concerned it must, therefore, be held that he was a person employed for wages and his employer was the company which is a legal entity by itself. It could not, therefore, be said that he was a self employed person or agent of the employer which would be the case of a managing partner in a partnership firm which by itself is not a legal entity. So far as the second condition is concerned it also cannot be denied that the duties of a Managing Director were entrusted to him in connection with the work of the establishment and for such work which he would carry out he would be entitled to the remuneration of the Managing Director. The High Court has placed strong reliance on the Articles of Association of the Company which stated the extra duties of the Managing Director. But those extra duties were in connection with the work of the establishment and not de hors it and it was for these extra duties that he was to be paid the remuneration which otherwise would not have been paid to him if he had remained an ordinary Director. So far as the third condition is concerned, by the resolution of the Board of Directors, he was directly employed and entrusted with the work of Managing Director. The Managing Director can be said to have been employed for wages on any work connected with the administration of the establishment as his functions as Managing Director entitled him to borrow money not exceeding Rs. 10,00,000/- at any time with or without security as he deemed fit. He was also authorised to invest a sum not exceeding Rs. 10,00,000/- in aggregate in either movable or immovable assets as may be necessary. He was further empowered to lend a sum not exceeding Rs. 1,000/- without any security. These all were funds of the

company which could be invested by him and even the power to borrow money was also for the purpose of the company. All these activities were connected with the administration of the factory. It is also not in dispute that remuneration of Rs.1,000/- per month or Rs. 12,000/- per year was paid to the Managing Director for discharging his duties as Managing Director and the same was permissible as prescribed by the Central Government at the relevant point of time. Thus all the requisite conditions for applicability of the term "employee" as defined by the Act stood satisfied in the case of the Managing Director.

A Managing Director of a company could not be treated on par with partner of a partnership firm who has been given some remuneration for his extra work.

If a person satisfies the definition of the term "employee" as found in section 2 sub-section (9) of the Employees' State Insurance Act, 1948 and he is paid remuneration for discharging the extra work assigned to him for earning such remuneration it cannot be said that it would not be "wages".

13. Therefore, on a careful reading" of the Judgment it appears that the Apex Court has held that the Managing Director/Director of the company cannot be treated on par with the partnership firm who has been given some remuneration of his extra work. In the aforesaid case Romanuja Match industries case was considered and the Apex Court treated that the facts of that case are different from the facts of that present case where the Directors of a Company has been involved.

14. Great reliance was placed in the Judgment reported in F.J.R. Factory Journal Reporter, volume (XXIX) page 239 in the case of Employees' State Insurance Corporation v. Pioneer Laundry. But a careful consideration of the facts of the case I find the facts of the present case was quite distinguishable from the above case. Therefore, that Judgment is not applicable. In the aforementioned case it was the salary of a partner who was designated as a Manager but in our case the Directors who have been receiving salary as an employee. In the Apex Engineering case, it has been decided by the Supreme Court that the Director of the Company cannot be equated with the partner. Therefore, the Judgment is not applicable.

15. Mr. Gupta, the learned Advocate has relied upon a Division Bench Judgment of this Court in the case of Bengal Ingot Co. Ltd. v. Regional Provident Fund Commission reported in 1995 (11) CHN 457. It has been held in the aforesaid judgment that once the PF Commissioner u/s 7(A) of the Act decided that a person was an employee, there is no further scope for this Court by exercise of writ jurisdiction to give a contrary findings which is as follows :

"10. The term "employee" as defined u/s 2(f) of the Act means not only for performing any work in connection with the establishment, but also any other work for the employer-company manual or otherwise and that while construing the provisions of section 2(f) of the said Act we have to bear in mind the object of the Act and the principles of interpretation that have to be adopted in

construing the provisions of the Act. We have also to bear in mind in construing the provisions of the said Act which as framed for the well-being of the employees and the Court must not countenance any subterfuges to defeat the provisions of such a social legislation. It is also well-settled that in construing the material provisions of the said Act, if two views are reasonable, the Court should prefer the view which holds the achievement of the Act. The expression any kind of work manual or otherwise. In or in connection with the work of an establishment we are of the view that maintaining a medical unit for the purpose of looking after the health hazards of the employees is a mandatory duty and/or obligation on the part of the employer and even though one is not performing any work indirectly for production or work undertaken by the company, certainly it is an ancillary or incidental work of the establishment.

A driver engaged for the purpose of driving a car of a company may not perform any work of the establishment as the establishment may only be created for the production of materials, but certainly such a driver discharges his duties which in ancillary or incidental to main purpose.

It is not in dispute that even a part-time employee may come within the scope and ambit of the said Act in view of the definition of an "employee" u/s 2(f) of the said Act"

16. M/s. S.G. Tin Printers Pvt. Ltd. started their work as a partnership firm in the year 1984 but in due course of time the said firm was converted into a Private Limited Company having been incorporated under the provisions of the Companies" Act After the firm was merged into a Private Limited Company, all the characteristics of the partnership firm in existence, got merged into Private Limited Company. Therefore, it has lost all characteristics of the partnership firm after it was incorporated. From time to time the inspection was made by the Enforcement staff. Supplementary affidavit has been filed by the respondents 1 to 3 wherein they had reiterated their stand that the establishment has engaged five working partners to run the regular business. Those five directors had been receiving salary as stated in the balance sheet of the company. There has been master and servant relationship between the Company and the working partners. The declaration has been submitted by one of the partners that they are the employees of the Company. In annexure Z it is noted that 16 employees and 5 partners have been engaged to run the business. Therefore, those partners can not but be treated as the employees of the Company. Accordingly, I hereby hold that while considering the applicability of the Act those 5 directors who have been working as the working partners shall also be included in the category of the employees.

17. Mr. Gupta, the learned Advocate appearing for the respondents 1 to 3 has strongly contended that this Court cannot decide the applicability of the Act against the observation made u/s 7A of the Act by the Regional Provident Fund Commissioner. He has also placed reliance on a xerox copy of the Judgment in WP No. 7201 (W) of 1999 where Mr. A. Kabir. J. held that such matter should be

questioned by filing an appeal before the appeal authority. It is true that ordinarily the observation made u/s 7A of the Act should be assailed before the appellate authority but when the question of arbitrariness or whimsical attitude of the authority has been pressed into service such question cannot be left to be decided by the appellate authority and there will be no bar to exercise writ jurisdiction to undo such wrong. There is no inflexible rule or straight Jacket formula that in no case this Court can exercise writ Jurisdiction to decide such question. Every case shall depend upon its own facts and circumstances. Since an important question of law was raised by the petitioners, such questions ought not to have been left to be decided by the appeal authority. Accordingly, in view of the above observation I hold that writ petition is maintainable but, however, since the working directors are treated as employees, therefore, the Company cannot be absolved from paying the PF Contribution. Accordingly, I do not find any merits in the writ petition and the same is dismissed but in the circumstances without costs.

18. Petition dismissed