

(1997) 05 RAJ CK 0010
In the Rajasthan High Court
Case No : Civil Writ Petition No. 688 of 1996

Parvati Construction Company	Vs	APPELLANT
Rajasthan Housing Board and Others		RESPONDENT

Date of Decision : 29-05-1997

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1, 19, 2, 3, 7A

Citation : (1997) 3 WLC 547 : (1997) 1 WLN 569

Hon'ble Judges : P.P. Naolekar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

P.P. Naolekar, J.—The Schedule appended to this order enumerates writ petitions which, according to learned Counsel appearing for the respective parties, involve common question of law and facts as involved in this writ petition. Accordingly, the judgment/order passed in this writ petition shall as well govern and decide those writ petitions also and the Schedule shall form part of this order.

2. As per the allegations made in the writ petition, the petitioner is A-Class contractor of the Rajasthan Housing Board, Jodhpur. The petitioner has contracts with respondents No. 3 to 6 for construction of residential houses in different schemes of the respondents. For the aforesaid construction purpose, the petitioner engages various labours like masons, carpenters, plumbers, etc. daily on the contract basis or daily-wages basis and there is no permanent labour with the petitioner. The labours engaged are as per the requirement of the work every day. The carpenters, plumbers, masons, etc. are engaged on contract basis also and the contractors bring their own labour per day as per requirement and the petitioner has no permanent labour-force. In the field of building-construction work there are many types and many stages of the work which need different jobs and different kinds of labour for day to day work as the construction goes on. For digging of mud there are different kind of labour, for plastering, flooring,

painting, etc. they need different kinds of labours. Likewise for sanitation and pipe-fitting there are different kinds of labours who have their own skill and specialisation in the respective field. Some of the labours available to the contractors perform the work on the measurement basis instead of daily-wages basis. The labours who come on work at the site on a particular day, there is no certainty that they will necessarily come on the job the next day. There are many sub-contractors available in different fields of construction. They also engage labour on daily-wages basis, it is further alleged that the petitioner does not have a single regular labour/employee and it engages labour as per its requirement of the work.

3. The petitioner received a letter from the respondents whereby some information was asked for from the petitioner regarding labour engaged by it. The petitioner submitted reply that it does not engage any permanent labour and the number of casual labour does not exceed 20. It has also informed to the respondents that the petitioner and the likes have All-India union and the members of the union have approached the Central Government u/s 19(a) of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (in short, to find mention hereinafter as "the Act of 1952") for removal of the difficulties as to whether the workers employed at the work-sites of the establishment engaged in the building-construction industry are employees as per the definition given in Section 2 of the Act of 1952. The Central Government has given a finding in favour of the members of the union. But, the respondents did not pay any attention to the submission made by the petitioner and issued letter stating that in the absence of the information regarding employees 6% deduction from the bills of the contractors shall be made for the month of October 1993. Aggrieved by the aforesaid direction/order, some of the petitioners challenged the order by filing various writ petitions before the Rajasthan High Court. During the pendency of the writ petitions, the respondent Housing Board had issued a letter that the Housing Board will not make any deduction on account of Provident Fund from the bills of the contractors and the sum already deducted will be refunded to the contractors. On the aforesaid basis, the writ petitions were disposed of by the High Court as having become infructuous.

4. However, the respondents have again issued order No. BHA/95/748 dated 21.12.95 whereby 10% deduction of the employees' contribution and the same amount of contribution from the contractors is to be deducted from the running bills of the contractors with effect from 01.05.95. The scheme provides for deduction from each running bill of every contractor doing the work of the Rajasthan Housing Board of the amount, being contribution towards the Provident Fund. The order is not to apply to the contracts executed before 1st of October, 1993. For the purpose the contractor was directed to furnish the particulars of the labour and the detail of the salary paid in the prescribed proforma. Such a deduction shall be made only from those contracts which have been executed after 01.10.93 and shall not apply to the contracts executed before 1.10.93. The order further provides that from 01.10.93 to 30.04.95, the

labourers who worked for at least 60 days shall be deemed eligible for the provident-fund contribution. However, from 01.05.95, every labourer who has worked even for a single day shall be deemed eligible for the provident-fund contribution. For the labourers who have worked for less than 60 days for the period from 01.10.93 to 30.04.95 a certificate shall be required to be obtained from the Provident Fund Cell for refund. It is this order which is under challenge in this writ petition and the writ petitions mentioned in the appended Schedule. Thus, in nutshell, the petitioner's case is that the manner in which the labourers are engaged by the contractors, they cannot be treated as employees within the meaning of the Act of 1952 and the Employees Provident Fund Scheme.

5. The background, in which the aforesaid decision has been taken by the respondents Housing Board appears to be that initially an order was passed dated 08.02.94 by the Legal Advisor in file No. 535011/9 (5) BFC (Annexure-Rule 1/7) u/s 19A of the Act of 1952 regarding giving effect to the provisions of the Act to casual/temporary workers on the work-sites engaged in the building-construction activity. A decision was given to the effect that the provisions of the Act of 1952 and the Scheme of 1952 do not apply "to the casual and absolutely temporary employees and some kind of permanency or semipermanency of the employees is contemplated for the purposes of applicability of the Act as well as the Scheme". It appears that in view of the aforesaid decision arrived at, the respondents made submission before the High Court in the earlier writ petitions and those petitions were rendered infructuous. The respondents were not satisfied with the decision dated 08.02.94 and, therefore, moved for review of the said order. The matter was taken up by the Joint Secretary to the Government of India. A decision on the review petition was given on 23.12.94. It was observed in the order that the powers of the Central Government u/s 19A have been delegated to the Legal Advisor for the purposes of removal of the doubts and difficulties coming in the way of enforcement of the Act. While doing so it is not expected that any decision or policy or notification of the Central Government would be modified by him on his own. The Legal Advisors' decision itself modifies the scope of the notification dated 11.10.80 and goes against the spirit of the application of the Act and Scheme of the construction-workers. The categories made of the employees under the impugned order goes against the judicial pronouncement. While considering the case u/s 19A it was expected of the Legal Advisors to remove the difficulties brought up by the applicants so that the benefit reaches to all categories of covered employees. In case he was at a loss to find suitable remedy or procedure it would have been in the fitness of things for him to have brought the entire issue to the notice of the Central Government. Neither of the two courses was adopted by him and the finding was given without considering the entire issue. No effort was indeed made to ascertain the outcome of the recommendation of the tri-partite working-group set up by the Central Government. On the aforesaid conclusions, the authority directed that the order passed by the Legal Advisor on 08.02.94 requires to be cancelled and made void ab initio and it is decided accordingly. The Employees

Provident Fund Officers shall enforce the provisions of the Act applying it to the building and construction activities as per Section 2 and the notification dated 11.10.80.

6. Thus as a result of the review petition, the order passed by the Legal Advisor was set at naught and it appears, that as a result thereof, the impugned order has been issued by the respondents. It will be pertinent to note here that in the review order no specific directions have been issued as to what shall be the status and position of the workers, engaged by the contractors to carry out the nature of the work in building contracts as alleged by the petitioner vis-a-vis the Act of 1952 and the scheme framed thereunder. The review order only set aside the order passed by the Legal Advisor and has directed that the Act and the Scheme shall be applied to the employees of the building and construction industry as per Section 2(f), which is in general terms.

7. On 11.10.80, a notification dated 23.09.80 was published in the Gazette of India in exercise of the powers conferred under Clause (b) of subsection (3) of Section 1 of the Act of 1952 specifying every establishment engaged in building and construction industry and in each of which 20 or more persons are employed to be a class of establishment to which the provisions of the Act. shall apply with effect from 31.10.80. By this notification the Act was made applicable to all the establishments engaged in building and construction industry where 20 or more persons were employed. The Act of 1952 would apply to the industry of the petitioner who is engaged in the work of building and construction. But the real question in this case is whether the manner of engagement of the labourers to carry out the nature of the works alleged in the petition, the labourers can be said to be employees within the meaning of the Act of 1952 and who is the authority to decide that question. Whether the principal employer the respondents can determine that question and enforce the provisions of the Act or it would require adjudication by the authority as provided u/s 7A of the Act of 1952.

8. The Act was brought into force for providing a provident-fund for the employees engaged in factories and other establishments. The basic purpose for providing a provident fund is to make provision for the industrial workers after their retirement and, in case of their premature death, for their dependents. To achieve this ultimate object, the Act is designed to cultivate the habit and spirit in the workers to make savings with the allurements that the same amount would be contributed by the employer and with the further object to encourage stabilisation of steady labour-force in the industry. With this object in mind, para 29 of the Scheme of 1952 provides for contribution payable by the employee under the Scheme, which shall be equal to the contribution payable by the employer in respect of the employee, giving the employee liberty to increase his contribution than provided under the Scheme subject to the condition that the employer shall not be under the obligation to pay any contribution over and "above any contribution payable under the Act. Para 30(1) imposes a

responsibility and liability on the employer to pay both the contributions in the first instance, i.e. his contribution and the contribution of the employee engaged by him directly or through contractor. Sub-clause (2) provides that in respect of the employees employed by or through contractor, the contractor shall recover the contribution payable by such employee and shall pay to the principal-employer the amount of member's contribution with an equal amount of his contribution. Thus the responsibility is imposed upon the contractor to deposit both the contributions under the Provident. Fund Scheme for the employees, engaged by him. Sub-clause (3) covers the case of employer who himself engages labourers through contractor or by contractor to carry out his work. Such employer is called the principal employer. Sub-clause (3) imposes the responsibility on the principal employer to pay both the contributions payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by him through contractor or by contractor. Para 30 of the Scheme clearly indicates that at the first instance the employers contribution and that of the employees contribution either engaged by him directly or by or through contractor shall be the responsibility of the principal employer. The responsibility of the contractor for the employees engaged by him for performance of the contract of the principal employer is to collect and deposit with the principal employer his and the employees contributions. Under the Scheme, the primary responsibility is of the principal employer to deposit the contribution of the provident fund and in turn the contractor is required to deposit the amount of both contributions for the employees engaged by him with the principal employer. Admittedly, the petitioner is a contractor engaged in the building and construction work of the respondent Housing Board as admitted by it in the writ petition and, in that sense, the Rajasthan Housing Board shall be the principal employer and the petitioner shall be the contractor of the principal employer. The employees engaged by the contractor or through the contractor for the principal employer shall be the employees of the principal employer. It is so made clear by the definition of the employee u/s 2(f) of the Act wherein employee shall include and be a person who is employed by or through a contractor in or in connection with the work of the establishment of the employer.

9. In *The Regional Provident Fund Commissioner, Andhra Pradesh Vs. Sri. T.S. Hariharan*, the question came up for consideration before the apex Court whether Clause (b) of Sub-section (3) of Section 1 applies to establishment of employees of 20 or more persons and means that the person who is employed by an establishment for any purpose whatsoever and for however short duration or that the employment must be for some minimum period in the establishment; and, it has been held in para 10 as under:

Considering the language of Section 1(3)(b) in the light of the foregoing discussion it appears to us that employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business, prosperity or its financial capacity and

stability form which it can reasonably be concluded that the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by this definition. The word "employment" must, therefore, be construed as employment in the regular course of business of the establishment; such employment obviously you not include employment of a few persons for short period on account of some passing necessity or some temporary emergency beyond the control of the company. This must necessarily require determination of the question in each case on its own peculiar facts. The approach pointed out by us must be kept in view when determining the question of employment in a given case.

10. In *Cotton Corporation and Others Vs. Union of India (UOI) and Others*, the Division Bench of this Court had an occasion to consider the question whether the casual worker who is employed in connection with the work of a factory or any other establishment would be the member of the Provident Fund Scheme; and, it has been held as under:

Therefore, the ratio is that so far as the casual labourers are concerned, they are not governed by the provisions of the Act. If they are not covered by the Act, therefore, likewise they are not covered by the scheme as well. The scheme of 1990 does not specify as to whether it will exclude the casual employees or not. Therefore, the expression "employee" occurring in the scheme has to be read in the context of the main Act and the interpretation of the expression "employee" given by the Hon'ble Supreme Court in the case of *T.S. Hariharan (supra)*. Therefore, Clause 2(ii) of the scheme of 1990 should be construed to mean that the employee here should be taken to be an employee employed in the establishment other than those who are excluded in connection with the establishment should not be a casual labour/employee. But the question as to whether the employee is a casual or not will again be a question of fact and this will depend upon each case. Section 19-A lays down that such question can be determined by the Central Government. Therefore, we hold that the scheme is not ultra vires of the Act but it will not be applicable to casual employees and where in a particular case an employee is casual or not which is essentially a question of fact that can only be clarified by the Central Government, u/s 19-A of the Act of 1952.

11. On consideration of the apex Court's decision, it appears that the workman engaged for a short duration for carrying out the work of abnormal contingency which is not a regular feature of the work of the establishment and which does not reflect its business, shall not be an employee within the meaning of the Act and Scheme framed thereunder and that will be a question requires determination in each case on its own peculiar facts. The Division Bench of this Court has gone to the extent of saying that the casual employee engaged would not be an employee within the meaning of the Scheme and whether a particular employee is a casual employee or not is to be determined in a particular case as question of fact. The Division Bench has not considered the question of fact. The

Division Bench has not considered the question whether the casual employee engaged to carry out the regular feature of the establishment would be an employee within the meaning of the Act and the scheme framed thereunder. In both the cases, it has been held that the nature of employment in an establishment shall determine the question of application of the Act and the scheme framed thereunder and that would be a question of fact to be determined in each case.

12. By virtue of Section 3(1)(b) read with the notification issued on 11.10.80, the provisions of the Act of 1952 will apply to any establishment engaged in building and construction work employing 20 or more persons. By the nature of the employment and work carried out, as alleged in the petition, it can be said that the workmen engaged by the petitioner are employees within the meaning of Section 2(0) and, thereby, they are employees in an establishment, or it would be question which requires determination by the authority before the provisions of the Act can be made applicable to the petitioner. Section 7A of the Act provides that the Central Provident Fund Commissioner, Additional Central Provident Fund Commissioner, Deputy Provident Fund Commissioner or Regional Provident Fund Commissioner or Assistant Provident Fund Commissioner may conduct the inquiry and pass an order in case where a dispute arises regarding applicability of the Act of 1952 to an establishment or to determine the amount due from employer under any provisions of the Act or the Scheme framed thereunder. When ever there is a dispute regarding the applicability of the Act or a question requires determination as to the amount due from the employer that question can be determined by the authorities mentioned u/s 7A. In the present case, the dispute has been raised by the petitioner that the workmen engaged by it are not the employees of the contractor engaged by it or engaged by the principal employer through it within the meaning of the Act of 1952. The dispute is also raised by the petitioner that no amount of contribution to the provident fund is due from it. When applicability of the Act and payment of provident fund contribution is disputed by the petitioner, unless and until the dispute is adjudicated u/s 7A of the Act of 1952 the principal employer by issuing a unilateral order cannot direct deposit of the amount towards the provident fund contribution nor has authority to deduct it from the running bills of the contractor. The contribution shall be required to be deposited if the Act applies to the establishment. If the Act of 1952 and the scheme framed thereunder do not apply to the petitioner's establishment then there is no liability to deposit the amount. If the Act applies then there is liability to deposit the amount of provident fund contribution by the employer. If the Act does not apply to the contractor for the workmen engaged by it for the principal employer or by it to carry out the work of the principal employer then for those workmen the Act will also not apply to the principal employer. If the workmen engaged are not the employees within the meaning of the Act of 1952 of the contractor they shall not be the employees of the principal employer. But, that question requires determination in each case on the basis of the facts. The unilateral action on the

part of the respondents of issuance of the impugned order dated 21.11.95 (Annex.-5) of deducting the payment from the running bills of the contractors is not sustainable in law and is hereby quashed.

13. It has been then submitted by the counsel for the respondents that the respondents are entitled to deduct the amount under Clause 38(h) of the contract entered into in between the parties to safeguard the interest of the respondents as the principal employer. Clause 38(h) reads as under:

All the contractor working in Rajasthan Housing Board shall fully liable for the payment of all dues for his establishment under the Section 7A of the Employees P.F. Act, 1952 (as amended from time to time). All the P.F. benefit as per the Act, shall be provided by the contractor to his establishment engaged on temporary or permanently. He shall be responsible to keep all records and shall furnish to Regional P.F. Commissioner or to its nominated representative and to Engineer-in-charge being principal employee.

In case contractor fails to submit the requisite information for deposit of the P.F. of his employees as per provision, the 5% of the gross payment towards the P.F. account shall be kept as misc. deposit till the contractor produce the clearance certificate from the Department of P.F. Commissioner.

Under this clause in the contract, the contractor is required to provide all benefits of provident-fund Act to the persons engaged in his establishment on temporary or permanent basis and he is made responsible to keep all the records in relation thereto and further to furnish it to the Regional Provident Fund Commissioner and also to the Engineer-in-Charge being the principal employer. In case, the contractor fails to submit the requisite information for deposit of the provident-fund of his employees as per the provisions of the Act of 1952 or the Scheme, 5% of the gross payment towards the provident fund account shall be kept in the miscellaneous account. If the contractor produces the clearance certificate from the Department of the Provident Fund Commissioner, he shall be entitled to the refund of the amount kept in deposit. On legitimate consideration of the clause in the contract and keeping in view the object sought to be achieved by the Act, it is required by the contractor to submit all information regarding person engaged by the contractor temporarily or on permanent basis in his establishment, to the Provident Fund Commissioner and also to the Engineer Incharge being the principal employer. It will be open for the authority to take up proceedings u/s 7A of the Act of 1952 and to determine the applicability of the Act and the Scheme to the petitioner and the extent of its liability, if any, towards the workmen engaged in its establishment. On failure to furnish such information the respondent Housing Board is entitled to keep 5% of the gross payment with it under the Provident Fund account as miscellaneous deposit till the contractor produces the clearance certificate from the Department of the Provident Fund. Therefore, under this clause, it would be within the rights of the Housing Board to keep in deposit 5% of the gross deposit towards the Provident Fund account if necessary particulars are not furnished by the contractor of engagement of

temporary or permanent labour with his establishment. In the eventuality of such deduction being made by the Housing Board, it would be open for the contractor to approach the Provident Fund Commissioner u/s 7A and obtain a decision whether the Act and the Scheme framed thereunder shall apply to the nature of the employment provided by him in his establishment.

14. The writ petition stands allowed in the terms aforementioned. There shall, however, be no order as to costs.