
(2014) 12 DEL CK 0290

In the Delhi High Court

Case No : Writ Petition (Civil) No. 2182/2011

Pasupati Spinning and Weaving Mills Ltd.

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 04-12-2014

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 2(9), 7(A), 7A, 7Q
Industrial Disputes Act, 1947 — Section 25F
Penal Code, 1860 (IPC) — Section 193, 196, 228

Citation : (2015) 144 FLR 640 : (2015) 1 LLJ 141 : (2015) 1 SCT 794

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Navin Chawla, Aditya V. Singh and Anurag Narula, Advocate for the Appellant; Aparna Bhat and H.K. Chaturvedi, Advocate for the Respondent

Judgement

Suresh Kait, J.—The present petition is directed against the original order dated 28.03.2005 passed by the Assistant Provident Fund Commissioner and the appellate order dated 28.01.2011, whereby an amount of Rs.56,086/- has been determined on account of provident fund dues for the period from September, 1999 to April, 2003, in respect of respondent No. 2.

2. Vide the aforesaid original order, the petitioner was directed that the amount shall be paid in respective accounts within a period of 15 days from the date of receipt of the order.

3. Also granted liberty to the respondent No. 1 to initiate a fresh inquiry under Section 7A of the Employees' Provident Fund & Miscellaneous Provisions Act, 1952 (for short "the Act") . In case of concealment of any fact by the petitioner/ Establishment for the period under inquiry, the petitioner will be liable to pay liability as determined by the Department. It was further directed that the Establishment is liable to pay an amount of interest at the rate of 12% per annum, as provided under Section 7Q of the Act from the date of due till the date

of payment. The assessment under Section 7A of the Act shall be without prejudice to any demand raised under Section 14B of the Act.

4. Mr. Navin Chawla, learned counsel appearing on behalf of the petitioner/Establishment submits that the respondent No. 2 was the Visiting Consultant/Advisor of the petitioner/Establishment for a period from September, 1999 to April, 2003, on the mutually agreed terms and conditions that the respondent No. 2 was to be paid a consolidated sum of Rs.8,000/- per month for the consultation/ assistance/advice on issues relating to taxation/finance/accounts of the petitioner/Establishment. However, he was not entitled to any other benefits, much less any conveyance allowance/provident fund/bonus/gratuity/children education etc.

5. Mr.Chawla further submits that during the aforesaid period, the respondent No. 2 never raised any dispute in respect of relationship between him and the petitioner Establishment. He was allowed to take up work for other clients besides doing independent practice.

6. Mr.Chawla submits that the learned Tribunal has wrongly considered the respondent No. 2 as the "employee" of the petitioner/Establishment, whereas the respondent No. 2 was engaged just as a Visiting Consultant/Accountant by the petitioner/Establishment and he was not the employee of the petitioner at any point of time.

7. Also submits that the learned Tribunal committed an error apparent on the record by holding that the receipts show different amounts were paid on different dates, however, it is correct on the face of the record as the receipts itself shows that a uniform amount of Rs.8,000/- was being paid to the respondent No. 2 and that too only as "rent" .

8. On a specific query put by this Court that at one place, the petitioner/Establishment has mentioned that the respondent No. 2 was a Consultant or Retainer and at other place, it is mentioned that an amount of Rs.8,000/- was being paid to him as rent. Learned counsel explained that sum of Rs.8,000/- was paid to respondent No. 2 as Retainer or Consultant by the petitioner/Establishment, however, for his own tax benefit, he used to take receipt of rent in lieu of Rs.8,000/-.

9. In support of his case, learned counsel for the petitioner has relied upon a case of The Regional Director, E.S.I. Corporation Vs. P.K. Mohammed (Pvt.) Ltd., , wherein held as under:-

"2. The short facts relevant for consideration of the above question are as follows:

.....Ultimately, it came to the question whether Krishna Menon and Sadasivan Pillai whose services are engaged as consultants on contract basis by the Respondent could be treated as its employees and their names should find a place in the register. It was contended by the Respondent that Krishna Menon retired from the service of the Respondent in the year 1976 and he was aged 73

at the time of inspection. He was engaged as consultant on contract basis from 1st September 1980 onwards. He was being paid only consultancy charges. It is not obligatory on his part to come to the establishment. After the year 1979 about 13 inspections were conducted by different officers and on no occasion they had found it necessary to register the names of those who were rendering consultancy service. The E.S.I. Court accepted the above contention and found that excluding two consultants there were no sufficient number of employees so as to cover the establishment by the Act.

3.

4. The word "employee" is defined as follows under Section 2(9) of the Employees State Insurance Act, 1948:

2(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and

1. who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere, or

2. who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment, or

3. whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service; (and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment for any person 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, but does not include)

(a) any member of (the Indian) naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed (such wages as may be prescribed by the Central Government) a month:

Provided that an employee whose wages excluding remuneration for overtime work exceed (such wages as may be prescribed by the Central Government) a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period.

Admittedly the two consultants are not working in the premises of the

Respondent. Their work is carried on at their own place. They are engaged as consultants in the matter of carrying on the business of the Respondent just like retaining tax consultants. Such engagement cannot create an employer-employee relationship. The Respondent may be one among the several clients of the consultants. They cannot be treated as employees of all their clients to whom they give advice on business matters.

5. In *Tata Oil Mills Co. Ltd. Vs. E.S.I.C.*, a question arose as to whether persons who are employed principally for the work of a particular factory would come within the definition of the term "employee" under Section 2(9), even when they do some Ors." work also. This Court held that if the relationship is mostly and basically with a particular factory and not with any other factory, he will be an employee of the particular factory for the purpose of the Act. This is a question of fact which has to be ascertained by a general appreciation of the various circumstances connected with the employment. If the employees are not so specially connected with any one factory, but are only employed in connection with the distribution or sale of the products of various factories with none of which they are principally connected, they cannot be treated as employees of any one factory under the Act.

6. In this case the finding of the fact is that services of Krishna Menon and Sadasivan Pillai are sought for as consultants on contract basis. There is no finding that their employment is solely or mainly under the Respondent establishment. In the light of the above finding of fact, no other view is possible than the one taken by the E.S.I. Court that they would not come within the definition of "employee" under the Act. We are therefore of the view that the consultancy service rendered by two persons to the Respondent would not make them employees of the establishment thus bringing it under the purview of the E.S.I. Act. The appeal therefore stands dismissed."

10. Also relied upon the case of *Food Corporation of India Vs. Provident Fund Commissioner and Others*, wherein the Apex Court held as under:-

"7. The question, in our opinion, is not whether one has failed to produce evidence. The question is whether the Commissioner who is the statutory authority has exercised powers vested in him to collect the relevant evidence before determining the amount payable under the said Act.

8. It is of importance to remember that the Commissioner while conducting an inquiry under Section 7A has the same powers as are vested in a Court under the CPC for trying a suit. The section reads as follows:

Section 7(A) Determination of Moneys due from Employer - (1) The Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner or any Regional Provident Fund Commissioner may, by order determine the amount due from any employer under any provision of this Act (the scheme or the Family Pension Scheme or the Insurance Scheme) as the case may be and for this purpose may conduct such inquiry as he may deem necessary.

(2) The Officer conducting the inquiry under Sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a Court under the CPC, 1908, for trying a suit in respect of the following matters, namely:

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses. and any such inquiry shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196 of the Indian Penal Code.

9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person."

11. The respondent No. 2 has filed reply to the instant petition, wherein in reply to Para 4 of the petition, it is stated that he was appointed by the Management in the month of September, 1999 as an Accountant and his last drawn salary was Rs.13,000/- per month (basic salary of Rs.5,000/- + Rs.8,000/- p.m. as HRA + ex gratia Rs.2,500/- per annum + leave etc.) . Further stated, services of the respondent No. 2 were illegally terminated on 30.09.2003 without complying with the provisions of Section 25F of the Industrial Disputes Act, 1947.

12. It is an admitted case that the respondent No. 2 has raised an industrial dispute against the aforesaid termination order, which is pending adjudication.

13. Vide the original order dated 28.03.2005, the learned Authority specifically stated that none of the parties could produce urgent proof of basic salary and allowances. In the absence of proof of documentary evidence, the learned Authority while passing the original order, took a sum of Rs.5,000/- as basic salary for the purpose of assumption of Provident Fund dues, as submitted by the Member during inquiry proceedings under Section 7A of the Act.

14. Perusal of the receipts at page No. 23 dated 31.10.1999 and at page No. 27 dated 31.12.1999 reveals that the respondent No. 2 had received a sum of Rs.8,000/- each in cash against rent for the months of October and December, 1999, respectively. Some more receipts corroborating the same are also on record. Moreover, these receipts do not establish that the respondent No. 2 was employee of the petitioner/Establishment.

15. Since both the parties did not produce any material or led any evidence before the Authority, therefore, there is no material on record to ascertain the fact that the consultancy service rendered by the respondent No. 2 to the petitioner/Establishment would make him employee of the petitioner/Establishment or not.

16. Under Section 7A of the Act, the Central Provident Fund Commissioner or Deputy Provident Fund Commissioner or any Regional Provident Fund Commissioner may determine the amount due from an employer under any provision of this Act as the case may be and for this purpose may conduct such enquiry as he may deem necessary. The said Authority for the purpose of such enquiry has the same powers as are vested in a Court under CPC, 1908 for trying a Suit in respect of enforcing the attendance of any person or examining him on oath; requiring the discovery and production of documents and receiving evidence on affidavit. The Commissioner / authority should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. This is the legal duty of the Commissioner, which the said authority failed to do so in the present case.

17. In view of the above discussion, the original order dated 28.03.2005 and the appellate order dated 28.01.2011 are hereby set aside and the case is remitted to the Authority to hold a fresh inquiry in the matter.

18. It is clarified that if the parties do not produce the record pertaining to the alleged employment, the said Authority may take steps in accordance with law and pass order accordingly.

19. Pursuant to award passed by the Authority, the petitioner/Establishment has deposited a cheque of Rs.56,086/- with the Regional Provident Fund Commissioner. The said Authority is directed to invest this amount in the form of FDR and the same shall be released with interest to be accrued, subject to the outcome of the inquiry, as directed above.

20. Accordingly, the parties are directed to appear before the Regional Provident Fund Commissioner, Regional Office: 28 Community Centre, Wazirpur Industrial Area, Delhi-52, on 12.01.2015 for directions.

21. The present petition stands allowed with above observations.

22. The Registry of this Court is directed to send a copy of this order to the Authority mentioned above.