(2010) 03 DEL CK 0030

In the Delhi High Court

Case No : WP (C) 823 of 1995

Pee Aar Electrodes APPELLANT

Vs

The Regional Provident Fund Commissioner and Another RESPONDENT

Date of Decision : 12-03-2010

Acts Referred:

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

Citation : (2010) 125 FLR 610 : (2010) 3 LLJ 355

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Pradeep Kumar Arya, Narinder Chaudhary and Vijay Chopra, for the Appellant; A.P. Sinha, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—This writ petition is preferred for quashing of the order dated 1st February, 1995 of the respondent No. 1 Regional Provident Fund Commissioner (RPFC) of determination u/s 7A of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 holding the provisions of the Act applicable to the establishment of the petitioner. Though u/s 7D as inserted in the Act w.e.f. 1st July, 1997, the order as impugned in this petition is appealable before the Provident Funds Appellate Tribunal but this petition having been preferred prior to the incorporation of the said Section 7D is maintainable. This Court vide ex parte order dated 9th March, 1995 while issuing notice of the petition stayed the operation of the order dated 1st February, 1995 and the said order was made absolute on 22nd February, 1996 till the decision of the writ petition.

2. The Act, as per Section 1(3)(a) is applicable to an establishment in which 20 or more persons are employed. The only controversy raised in the present petition is as to whether the establishment of the petitioner can be said to be employing 20 persons.

3. On the basis of an enquiry report submitted by the enforcement squad of the

respondents, coverage notice was sent to the petitioner. The petitioner disputed the applicability of the Act on the ground of not employing 20 employees and also on the ground of being not an industry specified in Schedule I of the Act. The RPFC vide order impugned in this petition held against the petitioner on both counts. The petitioner has in the writ petition not challenged the finding of its factory being specified in Schedule I of the Act and has confined the challenge only to the number of employees employed by it. While according to the petitioner, it employs 19 persons, according to the RPFC, at the time of visit by the enforcement squad of the respondents, besides the 19 employees, an accountant of M/s Jindal Singla & Associates Chartered Accountants was also found working in the establishment of the petitioner. The controversy is whether the same would make the number of persons employed in the establishment of the petitioner as 20, so as to make the provisions of the Act applicable to the petitioner.

4. The RPFC in the impugned order has held that:

(i) Section 2(f) defines "employee" as any person employed for wages in any kind of work in or in connection with the work of an establishment and who gets wages directly or indirectly from the employer and includes any person employed by or through a contractor in or in connection with the work of the establishment.

(ii) That though there is no written contract between the petitioner and M/s Jindal Singla & Associates Chartered Accountants, yet payments are being made on monthly basis which generally are not made to any chartered or cost accountant for preparing of annual balance sheet or accounts.

(iii) "The normal day-to-day work(s) pertaining to accounts books, ESI, Sales Tax, etc. are being undertaken by some personnels who are deputed by so called accountant firm "Jindal Singla & Associates" to attend the work of M/s Pee Aar Electrodes. Thus there is a necessity in the establishment to obtain services of a person to attend such type of work as cited hereinabove and to meet that necessity the employer instead of engaging any person directly prefers to obtain the services of any personnel through a firm of chartered accountant for which payments are being made in cash on monthly basis and received by someone.

The RPFC thus held the establishment of the petitioner to be employing 20 or more persons.

5. The main plank of the contention of the petitioner is that a chartered accountant firm cannot be treated as an employee; that the chartered accountant firm is rendering professional service to the petitioner and can by no means be held to be an employee of the petitioner. The petitioner has filed a photocopy of an affidavit of the partner of M/s Jindal Singla & Associates (Chartered Accountant) to the effect that they are looking after accounting including auditing and taxation matters of the petitioner on a professional fee of Rs. 400/- per month; that to meet out the professional obligations they either call the representatives of the petitioner to their office with the records and

sometimes send a person from their side to the establishment of the petitioner; that such person sent by them to the establishment of the petitioner works under the instructions of the chartered accountant firm and reports to them and the petitioner has nothing to do with any such person sent by them as regards the work to be done by such person on behalf of the chartered accountant firm. They have further deposed that their representative is their employee and draws salary from them and does not work as a part time accountant with the petitioner.

6. The counsel for the respondents has contended that the nature of the duty and the monthly payment make the representative of the chartered accountant firm, the employee of the petitioner.

7. Though no fault can be found with the reasoning of the RPFC that if the petitioner is availing services of an accountant, such accountant even if engaged indirectly through the chartered accountant firm, can be treated as an employee of the petitioner for the purpose of the Act but peculiarly the impugned order does not name the said accountant. All that has been found is that the work pertaining to keeping of accounts is being under taken "by some personnels who are deputed" by the chartered accountant firm and that the need of the petitioner for having an accountant is being fulfilled, instead of by engaging / employing any person directly, "by obtaining the services of any personnel through a firm of chartered accountant.'' I am afraid on such findings, the establishment of the petitioner cannot be said to be employing 20 or more persons. A firm of chartered accountant cannot be the employee of the petitioner within the meaning of Section 2(f) of the Act. Though the definition of employee u/s 2(f) is wide enough to include a contract labourer but does not include a contractor, even if the chartered accountant firm were to be equated to a contractor. An employee, within the meaning of Section 2(f) of the Act, has to be a natural personal and cannot be a firm as the chartered accountant firm is. Had there been a finding in the order of the RPFC that a particular individual of the said chartered accountant firm is regularly looking after the accounts of the petitioner even if not exclusively looking after the affairs of the petitioner, it could have been argued by the respondents that he / she should be considered as the employee of the petitioner. However, the finding is of "some personnels" or " any personnel" indicating plurality, of the chartered accountant firm doing the said job for the petitioner. It indicates that the chartered accountant firm deputes any of its Chartered Accountants, Accountant, Assistant, Trainee, Article, Clerk etc. for the works of the petitioner and the said person need not to be the same all the time. In such a situation, it cannot be said that any particular person is the 20th employee of the petitioner to make the provisions of the Act applicable to the petitioner. No relationship of employer, employee between the petitioner and any such person can in the circumstances be said to exist. Such an arrangement would constitute hiring by the petitioner of the services of the chartered accountant firm and would not constitute a contract for employment. This Court in Springdales Schools v. RPFC 2006 II LLJ 321 held that when an education society enters into an agreement with transporter for providing contract carriage

bus and staff for running the bus such as driver, conductor, cleaner and there is no stipulation in the agreement about payment of charges by the transporter to his staff and the said transporter and his staff were also doing the duties of others, the employees of the transporter cannot be said to be the employees of the education society within the meaning of Section 2(f) of the act.

8. The impugned order does not find any particular person, even if from the chartered accountant firm, regularly working for the petitioner to make him an employee of the petitioner. The Division Bench of this Court in K. Gopalan v. Union of India 1973 LIC 287 has included a person employed through a contractor u/s 2(f). However, in the present case there is no finding of any particular person, even if of the chartered accountant firm, working for the petitioner or under the supervision of the petitioner. Rather the finding is of several persons from the chartered accountant firm as per convenience doing the said work for the petitioner and which as aforesaid cannot be said to be a contract for employment. This Court in Laxmi Restaurant v. RPFC 1975 LIC 1186 has held that the Act is applicable to the regular employees and not persons engaged for casual work. Without a definite name it cannot even be said that such person is the retainer of the petitioner. The only inference is of a professional relationship between the petitioner and the chartered accountant firm.

9. The counsel for the respondent relied on Autocrat Tours v. Regional Provident Fund Commissioner 111(2004) DLT 589; in the said case though some of the persons counting whom the establishment was said to be covered were argued to be casual/temporary employees but the Court found that they had remained in the employment during the pendency of the writ petition before the Court. On this basis, it was held that regularly employing such casual workers month after month and year after year cannot be due to some abnormal contingencies or emergency and the said persons were held to be employees and the establishment held to be covered. However, in this case also, there were definite identifiable persons. In the present case there is none. The respondent also relies upon Bengal Ingot Company Ltd. v. The Regional Provident Fund Commissioner, West Bengal (1996) 3 LLJ (Supp.) 176. This was also a case of identified part time worker and counting whom the establishment was held to be covered by the Act. However, as aforesaid in the present case there is no identified person who can be said to be the employee of the petitioner even if through the chartered accountant firm.

10. The petition therefore succeeds. The order dated 1st February, 1995 of the RPFC u/s 7(A) of the Act holding the Act applicable to the establishment of the petitioner is quashed. The petition is disposed of.

No order as to costs.

