
(2016) 08 CAL CK 0069
In the Calcutta High Court
Case No : W.P. No. 609 of 1999

Rupa & Co.

APPELLANT

Vs

The Regional Provident Fund Commissioner West Bengal

RESPONDENT

Date of Decision : 04-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3)(a),
1(b), 2(e), 2(f)(i), 6

Citation : (2016) 4 CalHCN 574 : (2016) 3 CLR 471 : (2016) 151 FLR 432 :
(2016) LabLR 1021 : (2016) 4 LLJ 20

Hon'ble Judges : I.P. Mukerji, J.

Bench : Single Bench

Advocate : Mr. Shyamal Sarkar, Senior Advocate Mr. Rajesh Kr. Gupta, Advocate
and Mr. Meghajit Mukherjee, Advocate, for the Petitioners; Mr. Anil Kr. Gupta,
Advocate, for the Respondent P.F. Authority

Final Decision : Allowed

Judgement

I.P. Mukerji, J. (Oral)—The law is this. Under Section 2 (f) (i) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952,(the Act) read with Sections 1(3) (a) and (b), 2 (e) and 6 thereof, an employer, who gets his work done through contract labour, is liable to pay the provident fund dues of the employees of his contractor. There is no dispute that the writ petitioners (the writ petitioner) got their work done by entering into contracts with various contractors, which in the particular trade in which the writ petitioner is engaged, are known as "job workers". On 3rd April, 1998 and 6th April, 1998 summons were issued to them by the Provident Fund Authority under Section 7A of the said Act, to show cause why they should not pay the Provident Fund dues of their contractors.

2. The writ petitioner argued, through Mr. Sarkar, learned senior Advocate that their contractors were independent and were not subject to their supervision or control.

3. Amongst other points they argued that the work entrusted to the job workers was not done exclusively for them by those persons or organisations. They worked for many employers. Therefore, how could the writ petitioner be responsible for the Provident Fund dues of the employees of a contractor who had multiple employers? In fact this point never arose in the decisions cited before me and appears to be very novel. Secondly, it was submitted that even if it is assumed that an employer is liable for the provident fund dues of the contractor, in that event, the employer cannot be liable for the entire provident fund liability. The work a contractor was doing for a particular employer in proportion to the entire work he was doing on job work for all his employers had to be determined. A particular employer can be liable in wages in respect of that proportion of the work done by the employees of the contractor. Furthermore, the exact number of employees of the contractor had to be ascertained.

4. The impugned order dated 10th February, 1999 was a preliminary determination as to whether the writ petitioner was liable. The Assistant Provident Fund Commissioner came to the finding that the writ petitioner was liable for the Provident Fund dues of the employees engaged through the contractors. This order is challenged on the above grounds. Now I come to the facts in some detail.

5. The case of the writ petitioner is this. They are traders. They are marketing hosiery goods. Their trade activity is carried out in this way. They buy yarn from spinning mills. This yarn is sent to the knitters directly by the spinning mills. These knitters weave the fabric. The woven cloth is sent to processors for bleaching, dyeing etc. Thereafter it is sent to the cutters for cutting the cloth. Thereafter, it goes to another set of artisans called "makers" who stitch, do the finishing work and pack the goods. The writ petitioner say that each stage of the work is done by independent contractors. They have no administrative control over them. It is a contract of service. These contractors have their employees whom they control. Now, the writ petitioner's version is that each of these independent contractors also works for other employers. In other words, none of the contractors do work for the writ petitioner, exclusively (see paragraph 4 of the petition).

6. Therefore, the writ petitioner does not have any idea about the number of persons and the identity of these persons employed by each independent contractor. Secondly, the writ petitioner does not know what proportion of the total work of the contractor constitutes the job work assigned to them by the writ petitioner.

7. Mr. Sarkar submits that the writ petitioner employer is not liable for the provident fund dues of independent contractors. Mr. Sarkar contends in the alternative that assuming that the job workers were work contractors under the supervision of the writ petitioner, unless a contractor does work exclusively for an employer, the employer does not have any obligation to make provident fund contribution to the provident fund authority. Moreover, the employees have to be

properly identified.

8. On the other hand, Mr. Gupta appearing for the Provident Fund Authority submits that since the work of the writ petitioner was being sub-contracted to work contractors under their control, they were liable for the dues of the employees of the sub-contractor. He took me through the impugned order in detail.

9. I find on perusal of the impugned order that the representative of the Provident Fund Authority took time from the adjudicator to ascertain whether the contractors were working exclusively for the writ petitioner or whether they were working for other employers as well. However, there is no finding at all in the order as to whether, this enquiry was made or the outcome of this enquiry. The impugned order merely records the submission of the departmental representative that according to him the writ petitioner's contractors worked exclusively for them, without any evidence in support thereof. It also records that according to the departmental representative the writ petitioner was covered by the said Act.

10. First of all, the statutory provisions have to be examined. We are here concerned with only one provision of the Act. "Employee" is defined in Section 2 (f) (i) of the Act in the following terms:

"2(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;"

The related provisions are also important. Section 1(3) (a) (b) and 2 (e) and 6 are also important and are set out below:

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

(a) to every establishment which is a factory engaged in any industry specified in Schedule 1 and in which (twenty) or more persons are employed, and (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.

2 (e) employer means-

(1) In relation to an establishment which is a factory, the owner or occupier of

the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

6. Contributions and matters which may be provided for in Schemes.- The contribution which shall be paid by the employer to the Fund shall be [ten per cent]] of the basic wages, [dearness allowance and retaining allowance (if any)] for the time being payable to each of the employees [(whether employed by him directly or by or through a contractor)], and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, [if any employee so desires, be an amount exceeding [ten per cent.] of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section]:

[Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words ["ten per cent."], at both the places where they occur, the words ["twelve per cent."] shall be substituted:]

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee.

[Explanation 1].-For the purposes of this 9[section], dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

[Explanation 2].-For the purposes of this 11[section], "retaining allowance" means an allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services.]

It is quite plain from Section 2(f) (i) that an employee includes a person employed for wages in any kind of work in an establishment and is employed through a contractor. The employer is duty bound to contribute to the provident fund if the contractor fails to do so. The responsibility of the employee is co-extensive with that of the contractor. It is settled by the authorities referred to herein below and is an admitted position that the word "contractor" does not include an independent contractor. An independent contractor usually supplies finished goods or renders service and is not subject to the control and

supervision of the employer. A contractor is usually a works or job contractor under the control of the employer.

11. Now let us examine the authorities cited by learned Counsel for the parties.

In *Chintaman Rao and another v. State of Madhya Pradesh* reported in AIR 1958 SC 388 cited by Mr. Sarkar, the Supreme Court made a distinction between a contractor and an independent contractor. The distinguishing mark of a contractor was that he did "jobs of work" for the employer directly under his control. In that case beedi makers of a particular employer were held to be independent contractors. Hence, their employees would not be covered under the said act. In *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments* reported in AIR 1974 SC 37, also cited by Mr. Sarkar the right of rejection of an employer was a key factor in determining whether the contractor was independent or a contractor under the control of the employer. This was also held by the Supreme Court in *Mangalore Ganesh Beedi Works v. Union of India* reported in AIR 1974 SC 1832.

In *M/s P.M. Patel & Sons and others v. Union of India and Others* reported in AIR 1987 SC 447 also cited by the said learned counsel, the point for determination was whether a contractor making beedis outside the factory of the employer, on orders placed by the employer was covered by the said Act. The Supreme Court held that the operation of the above sub-section was not confined to work within the factory but extended to work outside it and that the employer was responsible for the provident fund dues of the employees of the contractor. The court made a factual distinction between the case at hand and the one in *Chintaman Rao and another v. State of Madhya Pradesh* reported in AIR 1958 SC 388 by stating that in the latter case the manufacturer took supply of manufactured beedis from a contractor who was held to be an independent contractor.

This key factor of supervision of the work of the contractor by the employer was also recognised in *C.E.S.C. Ltd. v. Subhas Chandra Bose and others* reported in AIR 1992 SC 573 and also in a Division Bench judgement of the Gujarat High Court in *M/s Satish Plastics v. Regional Provident Fund Commissioner* reported in 44 FLR 207. In *Food Corporation of India v. Provident Fund Commissioner and Others* reported in (1990) 1 SCC 68 the Supreme Court opined that notice to contractors and obtaining a list of worker was very essential. This was also the opinion of our Court in *Gurbir Kaur v. Regional Provident Fund Commissioner, Employees' Provident Fund Organisation & ors.* reported in 2006 (1) CHN 547. Mr. Sarkar cited all these cases as well.

Mr. Gupta appearing for the Provident Fund Authority submitted that there was no manner of dispute that the writ petitioner got the work done through contractors. Under the scheme of the said act they were liable to pay the Provident Fund dues of the employees of the contractor. He also added that whether the contractor was doing work exclusively for the writ petitioner or was

also working for others did not matter because the Act did not make any kind of differentiation between these two types of contractors. He relied on the principles laid down in the case of *M/s P.M. Patel & Sons and others v. Union of India and Others* reported in AIR 1987 SC 447 and *C.E.S.C. Ltd. v. Subhas Chandra Bose and others* reported in AIR 1992 SC 573.

12. The employment of words in the Act is very clear. An employer is responsible to make Provident Fund contribution for his employees. Under Section 2 (f) (i) an employee includes the employees of the contractor. The Act does not grant any exemption to an employer who works through a contractor doing work for other employers as well. None of the cases cited from the bar deal with this particular problem i.e. the liability of an employer whose contractor engages employees but works for diverse employers. How are the employees to be identified? How is the work of an employer which is done by a particular employee of the contractor to be apportioned? What part of the total wage of an employee is to be apportioned as the wage paid to him towards a particular employer's job work?

13. As I have said that if an employer engages a contractor he is liable towards the Provident Fund dues of his employees. Nevertheless, the provision has to be given meaning and purpose for the purpose of application of the Act.

14. In my opinion, first of all the Provident Fund Authority should have considered whether the job workers of the writ petitioner were independent contractors. Secondly, if the answer to the above question was in the negative, it was imperative for them to ascertain the number and the identity of the workers employed by the contractor or contractors. Secondly, the amount of work that each worker of this contractor did for the writ petitioner had to be determined. Thereafter, the proportion of the monthly or daily wage of each worker which was payable for the work of the writ petitioner had to be ascertained. Only then the Provident Fund liability of the writ petitioner could have been fixed.

15. In the impugned order no facts or evidence are referred to or analysed. Only the argument of the representative of the Provident Fund Authority is recounted. This kind of exercise was erroneous and bad in law. The impugned order dated 10th February, 1999 under Section 7A of the said Act together with the order dated 13th September, 1999 is set aside. Nearly 20 years have elapsed since this adjudication was made. I do not think that any information will now be available. Nevertheless, the Provident Fund Authorities may take steps in accordance with law following the ratio of this judgement and the judgements referred to therein.

16. Both the writ applications are accordingly allowed. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.