

(1999) 07 GUJ CK 0045

In the Gujarat High Court

Case No : Special Civil Application No. 7323 of 1998

Super Security

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 24-07-1999

Acts Referred:

Bombay Shops and Establishments Act, 1948 — Section 1(3), 2, 6, 8, 8(A)
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3)

Citation : (1999) 07 GUJ CK 0045

Hon'ble Judges : D.C. Srivastava, J

Bench : Single Bench

Advocate : Yogini V. Parikh, for the Appellant; Bharat T. Rao, for the Respondent

Final Decision : Dismissed

Judgement

D.C. Srivastava, J.—The prayer of the petitioner in this writ petition is to direct the respondents to give provident fund code number to the petitioner-establishment and to quash the circular dated 3-7-98 of the CPFC, New Delhi and also to quash the letter dated 16-9-98 of Assistant Provident Fund Commissioner, Gujarat. The facts giving rise to this writ petition are as under :

2. The petitioner is a partnership firm registered under the Bombay Shops and Establishments Act, 1948, and is rendering expert services by providing security guards. In the month of April 1998, the petitioner employed 22 persons and as such it became Establishment within the meaning of Section 1 (3) (b) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, (for short "the Act"). The petitioner applied for allotment of provident fund code number to the Provident Fund Authority on 27-4-1998. No action was taken on this letter by the Regional Provident Fund Commissioner. Ultimately by letter dated 16-9-98 (Annexure "E"), the Assistant Provident Fund Commissioner, Gujarat, intimated the petitioner that on the basis of present instruction, provident fund code number cannot be allotted to the petitioner. It is alleged in the petition that since the petitioner applied for allotment of provident fund code number on 27-4-98

i.e. prior to the circular dated 3-7-98, provident fund code number should have been allotted and there has been discrimination, in as much as, provident fund code number has been allotted to other similar establishments who are providing security services.

3. In the first counter affidavit of the Provident Fund Commissioner, the stand of the respondent has been that the petitioner though technically is an establishment within the meaning of Section 1 (3) (b) of the Act, but his establishment is that of contractor and as such no provident fund code number can be allotted to a contractor. Reliance has also been placed upon the circular dated 3-7-98, issued by the Employees' Provident Fund Organization to all the Regional Offices that the practice of allotment of provident fund code number to contractors is discouraged and discontinued.

4. Certain discrimination was alleged by the petitioner in the writ petition that other establishments of similar nature, are allotted provident fund code numbers. This has been replied in another counter affidavit dated 3-12-98 of the Assistant Provident Fund Commissioner, in which he has stated that M/s Gayatri Construction was a builder and not a contractor. Hence, provident fund code number was allotted to this concern. Regarding establishments at serial Nos. 1 to 4, they were allotted provident fund code number prior to receipt of letter dated 3-7-98 and that the matter of allotment of P.F. code number to these concerns is now under consideration and necessary orders will be passed in the light of circular dated 3-7-98.

5. The short point for adjudication in this petition is whether the petitioner is entitled to get a separate P.F. code number on the facts and circumstances of the case and whether there has been any discrimination by the respondent in allotting provident fund code number to other concerns numbering 5 and discriminating the petitioner by refusing to grant provident fund code number. Another point for consideration would be whether the departmental circular letter dated 3-7-98 is arbitrary and discriminatory and is liable to be quashed.

6. In order to decide these questions, certain provisions of the Act have to be kept in mind and it has to be seen whether the petitioner is an establishment in technical sense or is really an establishment and also an employer.

7. Section 1 (3) (b) of the Act deals with short title, extent and application of the Act and provides that this Act applies inter-alia "to any other establishment employing 20 or more persons or class of such establishments which the Central Government may, by notification in the official Gazette specify in this behalf." It is not in dispute that when the petitioner applied for allotment of provident fund code number on 27-4-98, there were 22 employees on the record of the petitioner. Thus, technically within the meaning of Section 1 (3) (b) of the Act, the petitioner becomes an Establishment. This was also admitted by the Regional Provident Fund Commissioner (I) in his conclusion and order dated 28-6-99. In the said order it was however further observed that though the establishment

being an establishment as far as Section 1(3) (b) of the Act is concerned but being a Contractor in its nature is not amenable for issue of separate code number under the Act. This stand was taken by the Regional Provident Fund Commissioner and similar stand was taken in Annexure "E" dated 16-9-98.

8. It is not in dispute that the petitioner is a Contractor though it is employing various employees and is placing services of such employees to various establishments which have been notified by the Central Government by notification in the official Gazette like Indian Oil Corporation, ONGC, IPCL, etc. The petitioner is not an establishment in the strict sense. No work from the labourers employed by the petitioner is taken for the concern of the petitioner nor the petitioner is running any industry or business or factory. On the other hand, it simply engages labourers and provides them as Security Guards to various establishments from which requisition is made to the petitioner. The distinction between the establishment and contractor on these facts cannot be ignored. Thus, basically the petitioner is a contractor though technically it is also an establishment within the meaning of Section 1 (3) (b) of the Act.

9. The next question for consideration is whether the contractor can as a right claim allotment of provident fund code number from the provident fund authorities. So far as the statute is concerned, the Act does not cast any obligation upon the Provident Fund Authorities to allot provident fund code number to a contractor. On the other hand, P.F. code number is to be allotted to the employer namely the main establishment where the work is taken by the employer from the workmen. The Karnataka High Court in an unreported decision between M. Venugopal Reddy and Hindustan Aeronautics Ltd. and another, Writ Petition No.25754/98, decided on 13-10-98 took the view that there is no obligation under the Act to allot provident fund code number to the contractor. In this case, the respondent No.1 while inviting the tenders from the petitioner insisted upon the petitioner to furnish provident fund code number. He applied to the respondent No.2 for allotment of P.F. code number which was not allotted. The Karnataka High Court took the view that the contractor is not required to have separate account numbers of E.S.I. and P.F. in respect of the employees engaged by him and thus there is no statutory obligation on the part of the contractor to compulsorily obtain necessary separate account under the different Acts and the Rules framed thereunder.

10. I have given my thoughtful consideration to the provisions of the Act and I was unable to find out any provision under the Act in which the provident fund authorities are obliged to issue provident fund code number to a contractor. The only obligation upon the authority is to issue provident fund code number to an employer. Employer has been defined u/s 2(e) of the Act. Section 2 (e) (ii) of the Act provides that "employer" means in relation to an 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 shall be the employer. The petitioner on the facts of the case cannot be said to have ultimate control over the affairs of establishment to which services of the labourers or workmen are provided by it. On the other hand, the employer on the facts and circumstances of the case will be the principal employer and not the contractor. The principal employer on the facts of the case will be the employer who takes the services of the employees or the labourers provided by the contractor.

11. "Employee" has been defined u/s 2 (f) of the Act. It provides that "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.

12. Keeping in view the above definition of "employee", it is again clear that employee will be the person who is employed either by the contractor or through a contractor in or in connection with the work of a establishment. In the instant case there is no work of establishment of the petitioner. On the other hand, the work of the establishment is the work at the place where the labourers employed by the petitioner are sent for rendering services. Consequently the relationship of employer and employee between the petitioner and the labourers engaged by him cannot be said to be existing for the purpose of the provident fund under the Act.

13. Section 6 of the Act provides that the contribution shall be paid by the employer to the Fund at the rates mentioned under this Section. Thus, under this Section contribution to provident fund is to be made by the employer and not by the contractor.

14. Section 8 of the Act also provides that any amount due from the employer in relation to an establishment to which any scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or as the case may be, the Insurance Fund, etc., may, if the amount is in arrear, be recovered in the manner specified in Sections 8 (B) to 8 (G). Thus, here also recoveries are to be made from the employer in case the amount remains in arrears.

15. Section 8(A) of the Act deals with the recovery of moneys by employers and contractors. Sub Section 1 of Section 8 (A) provides that the amount of contribution, (that is to say the employer's contribution as well as the employee's contribution in pursuance of any Scheme, paid or payable by an employer in respect of an employee employed by or through a contractor and the employer's contribution in pursuance of the Insurance Scheme may be recovered by such employer from the contractor, either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor. This Section, therefore, makes it clear that the amount of provident fund payable by an employer in respect of an employee employed by or through

the contractor may be recovered by the employer from the contractor and the mode of recovery would be by way of deduction from the amount payable to the contractor under the contract or as a debt payable by the contractor.

16. Sub Section 2 of Section 8 (A) provides that a contractor from whom the amounts mentioned in Sub Section (1) may be recovered in respect of any employee employed by or through him, may recover from such employee the employees' contribution under the Scheme by deduction from the basic wages, dearness allowance and retaining allowance which goes to show that if the contractor pays the amount mentioned in Sub Section (1) of Section 8 (A), he can recover the same from the employee by deduction from the basic wages, dearness allowance and retaining allowance of such employee.

17. Thus, from the above provisions in the Act it is clear that the provisions under the Act and the Scheme framed under the Act are to be complied with by the principal employer and not by the contractor.

18. From the above discussions, it is clear that there is no provision under the Act under which a contractor can insist the provident fund authorities to allot provident fund code number to him. If this is so, then any circular which has been issued departmentally to clarify the position and taking stand that no P.F. code number is to be allotted to the contractor can not be said to be illegal or against the provisions of the Act.

19. Learned counsel for the petitioner, however, contended that in view of the Apex Court verdict in K. Kuppusamy and Another Vs. State of T.N. and Others, , the departmental circular cannot override the statutory rules and as such the departmental circular being illegal has to be quashed. I do not find any merit in this contention. This case on the face of it is distinguishable on facts and the principles laid down therein do not apply to the facts of the case before me. Since there is no specific provision in the Act under which contractor can be allotted P.F. code number, the departmental circular dated 3-7-98 cannot be said to be in violation of any provisions of the Act and as such it cannot be quashed. Departmental circulars are issued only for clarifying the ambiguity if any and also for proper and efficient compliance and observance of the schemes framed under the Act. The circular dated 3-7-98 is nothing but direction issued for efficient working of the Scheme framed under the Act. Consequently neither the circular dated 3-7-98 can be quashed nor the letter dated 16-9-98 (Annexure "E") can be quashed nor the order dated 28-6-99 of the Regional Provident Fund Commissioner can be quashed.

20. In so far as the contention that the stand of Provident Fund Authorities is discriminatory is concerned, it also cannot be appreciated and accepted. It has been contended that provident fund code number was allotted to security contractors namely Radhaswami Security, Industrial Security, Omkar Security, Rapik Security and Gayatri Construction. This fact is admitted by the respondent. However, it has been clarified that the first four establishments were allotted

provident fund code number prior to receipt of Central Office's letter dated 3-7-98. Learned counsel for the petitioner however contended that application of the petitioner was also moved for allotment of P.F. code number on 27-4-98 which is a date prior to 3-7-98 on which the circular was issued. Hence, on grounds of parity, P.F. code number should have been allotted to the petitioner also. In the counter affidavit dated 3-12-98 the Assistant Provident Fund Commissioner has given satisfactory reply to this plea by stating that M/s. Gayatri Construction was a builder and not a contractor. Consequently it was allotted separate P.F. code number. Regarding other establishments and contractors it has been stated that no doubt they were allotted P.F. code numbers prior to 3-7-98, yet the department is considering their respective cases and necessary orders will be issued in the light of the circular dated 3-7-98 after following due process of law for which paragraph 4 of this counter affidavit is referred. In view of the same there remains no occasion for arbitrary treatment to the petitioner nor there has been any discrimination. If some action was taken by the respondent issuing P.F. code number to four contractors prior to receipt of letter dated 3-7-98 and the application of the petitioner remained pending and the respondent is ready to reconsider the cases of four contractors to whom P.F. code number was allotted prior to circular dated 3-7-98, the attitude of the respondent cannot be said to be discriminatory or arbitrary. Hence, also the letter Annexure "E" dated 16-9-98 or the order dated 28-6-99 cannot be quashed.

21. Since there is no specific provision in the Act obliging the Provident Fund Authorities to issue separate P.F. code number to a contractor, no writ of mandamus can be issued to the respondent to issue P.F. code number to the petitioner. Likewise, the circular dated 3-7-98, the letter dated 16-9-98 and the order dated 28-6-99 also do not require to be quashed for the reasons stated above. There is thus no merit in the writ petition which is liable to be dismissed.

22. The petition is hereby dismissed. No order as to costs.