

(2011) 06 MAD CK 0331

In the Madras High Court

Case No : Writ Petition No. 29158 of 2010 and M.P. No. 1 of 2010

The Joint Commissioner/Executive Officer

APPELLANT

Vs

The Employees Provident Funds Appellate Tribunal and The
Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 07-06-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3),
1(4), 2, 7A, 7I

Citation : (2011) 06 MAD CK 0331

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : P. Gopalan, for the Appellant; V.J. Latha, for R-2, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner is the Executive Officer of Arulmigu Subramaniaswamy Thirukoil, Tiruttani. They have come forward to

challenge an order passed by the Employees Provident Fund Appellate Tribunal in A.T.A. No. 854(13)2009, dated 20.07.2010. The Tribunal

had dismissed the appeal filed by the Petitioner temple as against the order passed u/s 7A of the EPF Act.

2. By the order passed u/s 7A, the second Respondent Regional Provident Fund Commissioner, Vellore had determined the amount due and

payable by the temple in respect of NMR workers engaged by them. They were directed to pay a sum of Rs. 4,89,269/- together with interest. It

was stated by them that the temple had 202 permanent employees and 42 daily rated workers during March, 2006. Under paragraphs 26 and 29

of the EFP Scheme, the management is bound to enroll all the employees including NM Rs under the purview of the EPF Act and to pay

contributions towards provident fund. It was in that view of the matter, after calculating the non payment of dues, the amounts were directed to be

paid. Challenging the same the Petitioner had filed an appeal u/s 7-I before the EPF Appellate Tribunal. The Tribunal took up the case as A.T.A.

No. 854(13)2009.

3. The contention of the management of the temple was that they had voluntarily applied for the coverage u/s 1(4). There is no necessity to cover

the NMR employees. It was also argued that no retrospective coverage can be made. But, however the Tribunal relying upon a judgment in

Technical Moberes System India Pvt. v. RPFC reported in 1995 II LLN 938 held that retrospective notification can be made even u/s 1(4), but

that should not go beyond the date of the agreement entered into to go for the coverage under the Act. In the present case, the coverage was

made only from the date of the agreement, i.e., in March, 2006. The employment of the casual labourers was not disputed. In respect of the term

employee", there is no distinction between the casual employee and the regular employee. For this an inspiration was made from the judgment of

the Andhra Pradesh High Court in Swamy G.B.B. v. RPFC reported in 1987 LIC 719. Therefore, the case of the Petitioner was dismissed.

4. The writ petition was admitted on 22.12.2010. Pending the writ petition, an interim stay was granted. On notice from this Court, the

Respondents are represented by the Standing Counsel.

5. The learned Counsel for the Petitioner strongly relied upon a division bench judgment of Karnataka High Court in Jyothi Home Industries etc.

Vs. Regional Provident Fund Commissioner, and reliance was placed upon the following passage found in paragraph 16.2 of the said judgment

which reads as follows:

16.2. We have already pointed out that it is not every type of employment that attracts the provisions of the Act, as contained in Sub-section (3) of

Section 1 of the Act. It is the employment in the regular course of business of the establishment alone which attracts the provisions of the Act. The

duration is not material, but it is the nature of employment which is material in order to attract the provisions of the Act. As long as the employment

is for the purpose of regular course of business, in other words, it is in or in connection with the business of the factory or establishment it would

attract the provisions of the Act and the Scheme. If the employment is not in or in connection with the regular business of the factory or

establishment it would not attract the provisions of the Act and in such an event, the duration would not be relevant. However, we must add here

that as and when such question arises it has to be determined with reference to the facts and circumstances of each case. It has to be determined

as to whether the employment is in or in connection with the regular business of the establishment or not. As the scheme has to be read and

construed in conformity with the provisions of the Act, unless it contains in express terms or by necessary implication, a provision which is contrary

to the provisions of the Act, it cannot be held as ultra vires of the provisions of the Act. In the instant case, Para 26(1)(a) of the scheme as

amended by the notification dated October 19, 1990, does not contain in express terms or by necessary implication a provision which is contrary

to the provisions of the Act. In fact, para 26(1)(a) as amended, more or less uses the words used in the definition of the expression "employee" in

Clause (f) of Section 2 of the Act. The expression "employee" is defined as follows:

(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;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing order of the establishment.

Para 26(1)(a) of the Scheme also states that every employee employed in or in connection with the work of a factory or other establishment to

which this Scheme applies, other than an excluded employee, shall be entitled and required to become a member of the fund from the day this

paragraph comes into force in such factory or other establishment. Therefore the import of para 26(1)(a) of the Scheme is the same as that of the

definition of the word "employee" in Section 2(f) of the Act. That being so, we are of the view that Para 26(1)(a) of the Act, cannot be held to be

ultra vires of the provisions of the Act. But the scope of it, as already pointed out, is only to cover such of the employees who are employed in the

regular course of business in or in connection with the work of establishment. As pointed out by the Supreme Court in Hariharan's case such

employment does not include the employment of a person for a short period on account of some passing necessity or some temporary emergency

beyond the control of the establishment or factory which cannot be considered to be an employment in or in connection with the work of the

establishment or factory as the case may be. Thus, we are of the view that Para 26(1)(a) of the Scheme read with Sub-section (3) of Section 1 of

the Act, and the definition of the word "employee" as contained in Clause (f) of Section 2 of the Act, would cover only such of the persons who

have been employed in or in connection with the work of the establishment in the regular course of business of the establishment or the factory as

the case may be and it would not include employment of the persons for a short period on account of some passing necessity or for some

temporary need or emergency. Further, if the question as to whether a person has been employed in regular course of business of the factory or

the establishment or is only employed for emergency or for temporary necessity or on short term employment, arises in a case, it will have to be

decided in the facts and circumstances of that case. This conclusion of ours is in conformity with, and advances, the object of the Act, as pointed

out by the Supreme Court in Hariharan's case (supra). As otherwise, the very object will be defeated because a person who is temporarily

employed in or in connection with the regular work in the establishment will not be interested either in the benefit of the Provident Fund Scheme.

Further he will not be available to have such benefit because his stay in the establishment itself would be temporary.

6. But, in the very same passage, the division bench has held that if the question arises whether a person has been employed in regular course of

business of the factory or the establishment or is only employed for emergency or for temporary necessity or on short term employment, it will have

to be decided on the facts of the each case. In the present case, the Petitioner management merely contended that the NMR workers are not

covered by the PF Scheme. Even according to them, out of 42 daily wage employees engaged as NM Rs, 24 were made permanent by various

orders of the court and one sweeper died leaving out 19 daily wage employees and that they were given break in service. One day break-in-

service will be given on 90 days of completion of work. This fact will show that artificial break was given only to prevent them from getting the

benefit of regular employees. These points were never urged with concrete facts before the Tribunal.

7. In view of the above, this Court is not inclined to entertain the writ petition and to interfere with the order of the Tribunal. Hence the writ petition

will stand dismissed. However, there will be no order as to costs. Consequently, connected miscellaneous petition stands closed.