

(1981) 09 MAD CK 0092

In the Madras High Court

Case No : Writ Petition No. 1993 of 1978

The Poly Clinic, Nagercoil

APPELLANT

Vs

Regional Commissioner, Employees Provident Fund, Tamil Nadu and Others

RESPONDENT

Date of Decision : 24-09-1981

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 5
Employees State Insurance Act, 1948 — Section 2(9)
Industrial Disputes Act, 1947 — Section 2

Citation : (1983) 1 LLJ 449

Hon'ble Judges : Sathia Dev, J

Bench : Single Bench

Judgement

1. The point involved in this petition lies within a very short compass, but is an interesting one. The contention of the petitioner is, in so far as apprentice trainees are concerned they are not covered by the provisions of the Employees' Provident Funds and Family Pension Fund Act, 1952 (19 of 1952) (hereinafter called the Act). After the institution of the Writ Petition, the petitioners sought for an opinion under S. 19A of the Act and the opinion rendered on 3rd April, 1980 is also challenged.

2. Mr. Sanjay Mohan, Counsel for the Petitioner refers to the definition of an "employee" in S. 2(f) of the Act, which is to the following effect :

"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 employed by or through a contractor in or in connection with the work of the establishment."

He then refers to S. 2(9) of the Employees' State Insurance Act, 1948 (34 of 1948), wherein "employees" has been defined more or less similar to the definition found in the Act, but, in any event, comprehends a wider range of

persons who are engaged in factories and establishments. In dealing with the question as to whether an apprentice would come within the scope of the definition of S. 2(9) of the Act 34 of 1948, in *The Employees' State Insurance Corporation and Another Vs. The Tata Engineering and Locomotive Co. Ltd. and Another*, the Supreme Court has pointed out that the heart of the matter in apprenticeship, is the dominant object and intent to impart on the part of the employer and to accept on the part of the other person learning, under certain agreed terms, and that a trainee, while undergoing training, cannot be treated as an employee, and, therefore, held that an apprentice would not come within the scope of the expression "employee." The Supreme Court also took note of the definition of a "workman" in S. 2(a) of the Industrial Disputes Act, 1947, which expressly included an apprentice within the expression of "workmen", and pointed out that when Act 34 of 1948 was passed, the Legislature has omitted to include apprentice as part of the definition of the word "employee" and that it has to be treated as a deliberate exclusion made on the part of the Legislature it being well aware that the concept of apprenticeship carries a different connotation, and hence, unless a specific inclusion is made, it cannot be inferred that an apprentice is also an employee or a workman.

3. As states earlier, the definition of an "employee" under S. 2(9) of Act 34 of 1948 is of a wider ambit, but necessarily include all the ingredients which are found in the definition of an "employee" under S. 2(f) of Act 19 of 1952. This decision of the Supreme Court, by itself, is an answer to the objection taken by the Respondents that an apprentice cannot be excluded from the purview of the Act.

4. Not stopping by referring the decision of the Supreme Court mentioned above, Mr. Sanjay Mohan, learned counsel for the petitioner, proceeds further to refer to the decision of the Kerala High Court in *Lord Krishna Bank v. Regl. P. F. Commissioner* (1980) F.L.R. 105 arising under the Act wherein the provision made in the Scheme in S. 2(f) had been taken note of and held that when a scheme is framed under S. 5 of the Act, it cannot go beyond the definition of an "employee" under "the Act", and hence, the attempt to include an apprentice as an employee by relying upon S. 2(f) of the Scheme, cannot be acceded to. This reasoning in the said judgment, cannot be effectively assailed, because any Scheme framed under "the Act" cannot go beyond the provisions and intendment of "the Act".

5. In the order passed under S. 19A of the Act, the only basis for the conclusion arrived at is rested on the definition of "excluded employee" in S. 2(f) of the Scheme, wherein an apprentice is also mentioned therein. Except for this solitary aspect of what is found in S. 2(f) in the scheme, no other substantial point had been taken into account, while passing the order under S. 19A of the Act. In the light of the decision of the Kerala High Court and what has been dealt with above, it has to be held that the order dated 3rd April, 1980 deserves to be set aside.

6. Further, reliance was also placed on the decision in *Kelvin Cinema, Gauhati v. State of Assam* (1973) Lab. I.C. 963 in which it was held that an apprentice would not be an employee within the meaning of "the Act".

7. Mr. Sanjay Mohan would then refer to the counter affidavit, wherein in paragraph 5, it is claimed that the classification of these employees as apprentices is only for the purpose of circumventing this social welfare legislation, and contends that such a statement has been made with impunity, when at no point of time the claim made that apprentices have been engaged by the petitioner, had been ever disputed. He refers to the correspondence exchanged, wherein on a requisition by the respondents for furnishing of particulars, on 29th November, 1977 number of persons engaged as permanent staff, apprentices and temporary, have been listed; and thereafter on an inquiry made as to whether the apprentices are paid, by letter dated 3rd December, 1977 the amounts paid by way of stipend to five of the persons named therein have been mentioned; and thereafter at no point of time the respondents ever came forward with a claim that the said five persons are not apprentices. When the respondents had never disputed about the fact that they have been apprentices, but only claimed that even though they are apprentices, they would be covered by the provisions of "the Act", at this belated stage after the opinion had been rendered under S. 19A, to come forward to claim as if the petitioner had deliberately attempted to circumvent the provisions of the Act, cannot be appreciated.

8. When the correspondence exchanged does not anywhere disclose that the respondents had about certain persons being retained as apprentices for the period already covered, there can be no question of reconsidering the matter, because nothing prevented the Central Government under S. 19A while passing an order to call for the necessary materials to be produced on behalf of the respondents, to show that all the persons are only employees and there are no apprentices at all. The enquiry to be conducted under S. 19A being a fact finding enquiry, it is incumbent upon the Central Government to call for production of oral and documentary evidence about by the employer and also by the concerned department when disputed questions of fact arise for determination, and thereafter decide as to how many are workmen or not. Otherwise it would be a farce of holding hearings under the Act. When such an endeavour had not been carried out, at this stage to come forward with a claim in the counter affidavit as if they are apprentices, cannot be accepted.

9. The disposal of this Writ Petition would not preclude the respondent to find out hereafter, as to whether the persons working in the establishment are all only workmen and whether such of those who are claimed to be apprentices are not really apprentices, but paid wages and engaged as either permanent or temporary workmen, and it is so transpires, it is well open to the respondent concerned to take further proceedings, but such a course would be available only in respect of future years and not for the years ending April, 1978, and as

covered by this writ petition. To this effect, this Writ Petition is allowed. No Costs.