

HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 02.12.2011

+ WP(C) 86/2009

M/s Sevayan Medical & Research Centre Petitioner

Through : Mr. Abhay N Das, Advocate

-versus-

Assistant Provident Fund Commissioner & Anr Respondents

Through: Ms. Shrabani Chakraborty, Advocate

CORAM:-

HON'BLE MS. JUSTICE VEENA BIRBAL

Veena Birbal, J.

1. By way of this petition under Article 226/227 of the Constitution of India, petitioner is seeking quashing of the order dated 4th August, 2008 passed by the Employees Provident Fund Appellate Tribunal, New Delhi in Appeal No. A.T.A.No.562(3)/2005 and pursuant thereto show cause notice dated 23rd December, 2008 issued by the Recovery Officer and summons dated 29th December, 2008 issued by the Assistant Commissioner, Employees Provident Fund Organisation, Bhagalpur (Bihar).

2. The case of the petitioner is that petitioner establishment is a small medical care and research centre situated in Munger, Bihar catering to the basic medical needs pertaining to ladies and children's health. In all there are 11 employees and the number of employees has never crossed the

figure of 20 in its entire period of existence. In the month of June-July, 2004, the petitioner establishment was approached by the Interactor of Town High School, Munger and Deputy Director, Board of Practical Training Kolkata requesting the petitioner establishment to engage few Degree/Diploma/Technician (Vocational) students as apprentices and impart practical training to them as envisaged in the scheme of the Board. Petitioner agreed to their request and agreed to take a group of 12 students as apprentices under the Apprentices Act, 1961 selected by the Interactor and sponsored by the Board of Practical Training Eastern Region, Calcutta. Those 12 students were to be paid stipend as fixed under the scheme by the Board. The duration of the training was one year. They were also informed that they would be paid stipend as mandatory under the Apprentices Act, 1961 and no P.F./deductions were to be made for them.

On 18th January, 2005, the Enforcement Officers of the Provident Fund Commissioner, Bhagalpur visited the petitioner establishment and conducted inspection of the premises and asked for certain documents which were duly supplied by the petitioner. Thereafter, respondent no.1 issued an order dated 31st January, 2005 holding that there were 29 employees working in the establishment and demanded that employer's contribution be deposited in the office of respondent by 20th February, 2005. Petitioner disputed the order by contending that there were only 11 employees and made detailed representation to respondent no.1. On 9th March, 2005, respondent no.1 issued summons to the petitioner for appearance before it on 23rd March, 2005. The representative of petitioner establishment appeared before respondent no.1 on 23rd March, 2005 and contended that it has only 11 employees and 12 apprentices were trainees

and not their employees, as such Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act) was not applicable to it. On 18th April, 2005, respondent no.1 held that the apprentices receiving training are persons and therefore they will be regarded as 'person' to determine the applicability of the Act.

3. Petitioner assailed the said order before the Employees Provident Fund Appellate Tribunal, New Delhi i.e. respondent no.2 (hereinafter referred to as 'the Tribunal') in ATA 562(3)/2005. Notice was issued to respondent for 2nd September, 2005. However, no stay was granted for determination under section 7(1)(b) of the Act. Thereafter, petitioner moved an application for the grant of stay of determination process. The same was also dismissed by the Tribunal vide order dated 26th October, 2005. The said order was challenged by the petitioner by filing WP(C) 4926/2006 before this court. During the hearing of the said petition, attention of this court was drawn to the decision of the Supreme Court in **Regional Provident Fund Commissioner Mangalore Vs. Central Arecanut and Coca Marketing and Processing Coop. Ltd, Mangalore** reported at **2006(2) SCC 381** wherein it is held that 'Apprentice' engaged under the Apprentices Act or under the Standing Orders would be excluded from the definition of an "employee" under the Act. The said writ petition was disposed of by this court vide order dated 3rd April, 2006 with the direction that determination proceedings by the Regional Provident Fund Commissioner may go on. However, so far as the recoveries of amount pursuant to the final determination proceedings are concerned, the same shall not be effected without prior permission of the Employees Provident Fund Appellate

Tribunal before whom the appeal was pending. It was also directed that judgment of the Supreme Court relied upon by the petitioner shall be considered by the Tribunal at the time of adjudication of the appeal. It is stated that the aforesaid appeal was dismissed vide impugned order dated 4th August, 2008 without any reference to aforesaid judgment. Thereafter, show cause notice dated 23rd December, 2008 and summons dated 29th December, 2008 have been issued. Aggrieved with the same, present petition is filed.

4. The learned counsel for the petitioner has contended that the petitioner is a medical care and research Centre located in Munger District of Bihar. The number of its employees has never exceeded 20 since its existence. In June-July, 2004, on the special request of Board of Practical Training, Eastern Region, Kolkata (under the Ministry of Human Resource Development), the petitioner had engaged 12 trainees as apprentices for imparting them the practical as envisaged in the scheme of the Board. It is contended that apprentices were separately engaged under the Apprentices Act and the stipend was being paid to them as fixed under the scheme of the Board. It is contended that duration of the training was one year. The said apprentices were never the employees of the petitioner and could not have been counted for the purposes of applicability of the Act. It is contended that on the inspection conducted by the team of Assistant Provident Fund Commissioner, Bhagalpur all the relevant documents were shown and despite that the apprentices have been taken as employees of the petitioner, as has been held by the respondent no.1 vide its order dated 18.04.2005 and the Act has been made applicable on the petitioner. The contention of the petitioner is that 12 persons who were being engaged as apprentices for

imparting practical training could not have been counted in the total strength of employees for the purposes of applicability of the Act. It is contended that under the definition of Section 2(f) of the Act, a person engaged as an apprentice under the Apprentices Act, 1961 or under the Standing Orders of the establishment has been excluded for the purpose of applicability of the Act. In support of his contention learned counsel has relied upon **Regional Provident Fund Commissioner, Mangalore v Central Areacanut & COCA Marketing and Processing Coop. Ltd, Mangalore: (2006) 2 SCC 381.**

5. It is further contended that earlier directions were given by this court in WP(C) 4926/2006 to the Tribunal to consider the aforesaid judgment. No reference was made to the aforesaid judgment by the Tribunal in the impugned order dated 04.08.2008 passed by it and no reasoning is given as to why the said judgment is not applicable to the facts of the present case. It is contended that impugned order is illegal and contrary to the law and is liable to be set aside.

6. On the other hand, the stand of the respondent is that the impugned order is legal and valid in all respects and does not call for any interference by this court. It is contended that in view of the provisions of section 1(3) of the Act, all the persons engaged in the establishment are to be counted for the purpose of extending the provisions of the Act and accordingly all the persons engaged have been counted and the provisions of the Act are made applicable.

7. In order to decide the rival contentions between the parties, it is appropriate to refer to the following provisions of the Act:-

“Section 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 I 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.”

“Section 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;

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

The word ‘persons’ mentioned under section 1(3) of the Act is not defined under the Act. Section 2(f) of the Act defines “employee” which includes any person employed by or through a contractor in or in connection with the work of the establishment or engaged as an apprentice. At the same time, the said definition specifically excludes from the definition of ‘employee’ any person being an ‘apprentice’ engaged under the Apprentices Act, 1961 or under the Standing Orders. The above proposition specifically excludes an ‘apprentice’ engaged under the Apprentices Act from the definition of employee. For the purpose of applicability of the Act, it is clear that for being counted as an employee, a person who is engaged as an ‘apprentice’ under the Apprentices Act, 1961 will be excluded.

8. The Supreme Court in **Regional Provident Fund Commissioner, Mangalore v Central Areacanut & COCA Marketing and Processing Coop. Ltd, Mangalore** (*supra*) has held that an apprentice engaged under the Apprentices Act or under the Standing Orders is excluded from the said definition of “employee”. The relevant paras of the judgment are reproduced as under:-

“13. In the case at hand, trainees were paid stipend during the period of training. They had no right to employment, nor any obligation to accept any employment, if offered by the employer. Therefore, the trainees were “apprentices” engaged under the “Standing Orders” of the establishment.

14. Above being the position, it cannot be said that the 45 trainees concerned were employees in terms of Section 2(f) of the Act. In other words, an apprentice engaged under the Apprentices Act or under the Standing Orders is excluded

from the definition of an “employee” as per Section 2(f) of the Act.”

9. Earlier the petitioner had challenged the order dated 26th October, 2005 whereby the Appellate Authority had refused to stay the determination proceedings against the petitioner by filing WP(C) 4926/2006. In the said petition, petitioner has referred to the aforesaid judgment of the Supreme Court. This court while disposing of the said petition has observed that the submission of the petitioner was to be considered by the Appellate Tribunal at the time of adjudication in the appeal. This court vide order dated 3rd April, 2006 passed the following order:-

“XXXX XXXX XXXX XXXX

I have heard the learned counsel for the parties. My attention has been drawn to the pronouncement of the Apex Court reported at 2006(2) SCC 381 entitled ***Regional Provident Fund Commissioner, Mangalore vs Central Arecanut & Cova marketing and Processing Coop Ltd*** whereby the apex court held that the apprentices engaged under the apprentices Act would be excluded from the definition of employees under the Employee Provident Fund & Miscellaneous Provisions Act, 1952. This submission is to be considered by the Appellate Tribunal at the time of adjudication in the Appeal. Be that as it may, in my view ends of justice would met if the determination proceedings are permitted to go on. Undoubtedly, proceedings will take time just as adjudication in the appeal before the Appellate Tribunal. However, the record is presently available with the parties may not necessarily be available on account of passage of time.

This writ petition is therefore disposed of with the direction that the determination proceedings by the Regional Provident Fund Commissioner may go on.”

9. It may be noticed that in the impugned order dated 4th August, 2008, the said judgment has not been considered by the Appellate Authority and the following order was passed, which is as under:-

“3. Heard the counsel for the appellant and APFC, Bhagalpur for the respondent. Clause (a) of Sub-section 3 of section 1 of the Act provides that the Act would apply to every establishment which is a factory engaged in any industry specified in schedule 1 and in which 20 (Twenty) or more persons are employed. To attract the provisions of the act it would be sufficient if an establishment is having strength of 20 or more persons. The word person is not defined under the Act whereas the expression ‘Employee’ is defined under Section 2(f) of the Act. It implies that the word person used in section 1(3)(a) is to be interpreted in a wider sense so that all the persons the human beings engaged in this establishment are to be counted for the purpose extending the provisions of the Act. The word ‘persons’ used in Section 1(3)(a) cannot be considered by any stretch of imagination as an employee as defined under section 2(f) of the Act. Accordingly, in this establishment there were more than 20 persons in the month of October, 2004 and accordingly the establishment fall within the ambit of the Act. There seems to be infirmity in the order passed by A.P.F.C Bhagalpur. Accordingly the appeal is dismissed. The file be sent to record room. Copy of the order be sent to both the parties.”

10. The stand of petitioner before the respondents as well as before this court throughout has been that there are apprentices in the establishment who are receiving training under the Apprentices Act, 1961 and they are not the employees within the meaning of the Act, as such the Act is not applicable

on petitioner. Perusal of the impugned order and record shows that respondents have not gone to the extent of examining whether the apprentices engaged by the petitioner are apprentices within the meaning of the Apprentices Act, 1961. It is not the stand of respondents that such a stand has been taken malafide by the petitioner to escape from the applicability of the Act. It has been simply held by respondents that since persons engaged are more than 20, so the Act is applicable. There is no finding by the Tribunal or by the Commissioner as to whether the apprentices, alleged to have been engaged by the petitioner, are apprentices under the Apprentices Act.

In view of the above discussion, the impugned order dated 4th August, 2008 is set aside and the matter is remanded back to respondent no.2 with the direction to determine the same and thereafter decide the applicability of the Act, if any, on the petitioner. Parties shall appear before the Tribunal on 23.12.2011.

A copy of this order be sent to the Tribunal forthwith.

The writ petition stands disposed of in the above terms.

VEENA BIRBAL, J.

December 2, 2011
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