

IN THE HIGH COURT OF BOMBAY AT GOA

LETTER PATENT APPEAL NO. 2 OF 2008

Goa Tourism Development Corporation Ltd.,
Govt. of Goa.
Trionora Apts. Municipal Market Area
Panaji Goa.
Through its Dy. General Manager (Hotels)
Mr. A. T. Fernandes. ... Appellant

V e r s u s

1. Provident Fund Commissioner
Bhavishya Nidhi Bhavan
Pato, Panaji Goa.
2. The Employees Provident Fund
Appellate Tribunal,
New Delhi.
3. Mr. Upadhyay Gyan Prakash
C/o Hotel Jyoti International,
Richardson Apts., Flat No.2,
Fatorda, Margao Goa.
4. M/s Ruchira Caterers
Tourist Hostel, Mapusa,
C/o Hotel Satya Hira,
Near Maruti Temple,
Mapusa Goa.
5. Shri Ashwin Nayyar
Yatri Niwas, Miramar
C/o Nayyar Brothers
C-13, House No. 854,
D. B. Road, Miramar,
Panaji Goa.
6. Shri Vithal Gawas
Tourist Cottage Old Goa,
House No. 75, Khaute Bhat
Old Goa.

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7. Shri Naida T. S. Parkar,
Tourist Cottage Farmagudi,
House No. 145, Ward No. 4
Deuga Bhat, Ponda Goa.
8. Shri Elroy Fernandes
Tourist Cottage Colva
House No. 1304, Singolem,
Pansulam, Canacona Goa.
9. Shri Krishna S. Palkar
since deceased represented by
his legal representative
Smt. Radhika Krishna Palkar
wife of late Krishna Palkar,
House No. 141, Naikwada,
Calangute, Bardez Goa.
10. Shri Santa Kumar Oza
Lake Resort Mayem,
Mayem, Bicholim Goa.
11. Shri Pandurang Murajkar
Tourist Home, Pato, Panaji
5-1-24, Sonarbhat,
Verem, Bardez Goa.
12. Smt. Sujata Uday Shetgaonkar
Tourist Hostel Margao
3, Amit Apartments,
Alto Betim, Bardez Goa.
13. Smt. Josephine Pereira
Tourist Hostel, Panaji,
Panaji.

... Respondents

Mr. V. Palekar, Advocate for the appellant.

Mr. P. P. Singh, Advocate for the respondent no.1.

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**Coram:- F. M. REIS &
K. L. WADANE, JJ**

Date :- 25th March, 2015

ORAL JUDGMENT (Per K. L. Wadane , J)

The appellant aggrieved by the judgment and order dated 31.01.2008 passed by the learned Single Judge of this Court in Writ Petition No. 28 of 2006 has filed the above appeal.

2. The brief facts of the case may be stated as follows :

The appellant i.e. Goa Tourism Development Corporation is a Corporation registered under the Companies Act, 1956 having its office at Panaji and the appellant is engaged in the business of promoting tourism industry in the State of Goa.

3. The appellant owns buildings in the State of Goa wherein it is running hotel business. The shops in the said buildings are leased out by the appellant to the various licensees such as respondent nos. 3 to 13. The shops are leased out by public advertisement by inviting tenders. The lease period vary from one year to three years. On expiry of the lease period, there is change in the licensee depending upon the successful bidder. The licensee on succeeding in the tender obtained the required

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licensees under the various statutes. They procure their own material and sources, their requirement financial as well as manual as their own. Even the licensees are independent businesses. They only paid the licensee fees to the appellant and there is no interdependence or functional integrity between the appellant and respondent nos. 3 to 13. As such, they are not dependent on each other for running their business.

4. The respondent no.1 issued notice to the appellant for assessment of dues in respect of the employees employed by the licensees. The appellant objected to the same on the ground that the employee of the licensees does not come within the definition of the term "employee" and, therefore, the appellant is not the employer in respect of the licensees employees.

5. The respondent no.1 without considering the issue raised by the appellant proceeded to hold that the appellant were liable to pay the contribution in respect of the employees of the licensees on the basis of certain clauses in the license agreement.

6. The appellant therefore filed an appeal before the Provident Fund Appellate Tribunal. The learned Tribunal held that the appellant are liable to comply with the provisions of the

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Employees' Provident Funds Act, 1952 in respect of the licensees employees relying upon the clause 10 of the license agreement which ensures that the licensee shall comply with all the statutes that may be applicable to them. The appellant therefore filed the Writ Petition before the learned Single Judge of this Court and the learned Single Judge vide judgment and order dated 31.01.2008 pleased to dismiss the appeal of the appellant upholding the findings of the Appellate Tribunal. Therefore, the present appeal.

7. We have heard Mr. V. Palekar, learned counsel appearing for the appellant and Mr. P. P. Singh, learned counsel appearing for respondent no.1. With the help of the learned counsel appearing for both the sides, we have perused the records. After hearing both the sides and upon scrutiny of the record, the following point arises for our determination.

<u>POINT FOR DETERMINATION</u>	<u>FINDING</u>
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Whether the evidence on record is sufficient to hold that the appellant is the principal employer and the respondent nos. 2 to 13 are the employees within the meaning of definition of Section 2(e) and (f) of the Act ?	No.
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8. Mr. V. Palekar, learned counsel appearing for the appellant has argued that the appellant is having various premises

which are let out to the respondent nos. 3 to 13 for promoting the activities/business of tourism in the State of Goa. By referring the contents of the lease agreement, Mr. V. Palekar, learned counsel appearing for the appellant has argued that the relation between the appellant and the respondent nos. 3 to 13 are lessor and lessee respectively but in any way it cannot be construed that the appellant is a principal employer/employer and the respondent nos. 3 to 13 are the employees and, therefore, the appellant is not liable to pay the contribution as per the provisions of the Employees' Provident Funds and Misc. Provisions Act, 1952 (herein after referred to as "the said Act"). According to Mr. Palekar, there is no evidence on record to show that the business activity of the respondent nos. 3 to 13 are controlled by the appellant for the purpose of making profit nor there is evidence to show that some amount earned by the respondent nos. 3 to 13 go to the appellant. Therefore, in absence of such evidence inferences drawn under the said Act by the learned Single Judge are incorrect. Therefore, the judgment and order needs to be set aside.

9. As against this, Mr. P. P. Singh, learned counsel appearing for respondent no.1 has argued that the appellant run the business of catering through the respondent nos. 3 to 13 and

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respondent nos. 3 to 13 are working/acting in a capacity as a contractor. Therefore, the appellant is a principal employer and the respondent nos. 3 to 13 are the employees in view of the provisions of the said Act. By referring the terms and conditions of the lease agreement, Mr. Singh, learned counsel appearing for respondent no.1 has argued that the appellant has direct control over the activity/business of the respondent nos. 3 to 13. Therefore, the relation between the appellant and the respondent nos. 3 to 13 is clearly established as employer and employees and the labourers/workers working in the unit of the respondent nos. 3 to 13 are engaged through a contractor i.e. respondent nos. 3 to 13. Therefore, according to Mr. Singh, the appellant is liable to pay the contribution and the learned Single Judge of this Court has rightly held the appellant responsible to pay the contribution.

10. We have gone through the order passed by the respondent no.3 while making the inquiry under Section 7-A of the Act. So also the findings recorded by the respondent no.2 and the learned Single Judge of this Court. Looking to the observations of the above authorities, we are of the opinion that they are impressed upon the terms and conditions of the agreement particularly the Clause 10 by which they inferred that the appellant is having control over the entire activity/business of the

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respondent nos. 3 to 13 and respondent nos. 3 to 13 have engaged the workers in the capacity as a contractor but we are of the opinion that the material placed on record is insufficient to establish the relation between the appellant and respondent nos. 3 to 13 as employer and employees because the title of the document i.e. agreement between the appellant and respondent no.3 appears to be started with the word " Agreement of leave and license" and from the perusal of the contents of the document, it appears that the respondent no.3 has agreed to pay a sum of Rs.9000/- per month to the appellant by way of license fees. Therefore, prima facie, it appears the relation between the appellant and respondent no.3 as a licensor and licensee.

11. Looking to the terms and conditions of the lease agreement, it appears that the caterer i.e. respondent no.3 has agreed to pay the security deposit, electricity, water charges etc. He further agreed to keep the restaurant open from 6.00 a.m. to 11.00 p.m. and to provide good quality food, to display the rates and to keep the premises clean. On failure of such, the appellant reserves its right to procure the food and drinks from outside and supply the same to the guests and the expenses incurred will be recovered from the caterer. Looking to these terms and conditions, the learned Single Judge of this Court has observed

that the appellant has direct control over the business activity/business running by the respondent nos. 3 to 13. But in our opinion the appellant is a Tourism Corporation and object of which is to promote the activity of tourism in the State of Goa and for promoting such activities if such conditions are imposed upon the respondent nos. 3 to 13 in order to maintain the reputation of the Tourism Department that does not mean that the appellant has direct control over the respondent nos. 3 to 13 and their employees. To conclude the relation between the appellant and respondent nos. 3 to 13 some additional material is needed by which one can reach to the conclusion regarding the relation between the parties.

12. From the record, it is seen that though the respondent nos. 3 to 13 were served in the proceedings before the respondent no.1 but unfortunately they have not submitted any documents clarifying the position that the respondent nos. 3 to 13 are the employees of the appellant. Therefore, whatever inferences drawn by the learned Single Judge of this Court and the authority under the Act are on the basis of certain terms and conditions as enumerated in the lease agreement.

13. Next aspect in the matter which needs to be looked

into is about the allotment of the Code number to the appellant and the respondent nos. 3 to 13. The Code number allotted to the appellant is GOA/10152/H and according to Mr. V. Palekar, under that Code the respondent nos. 3 to 13 are not covered. Therefore, the appellant is not liable to pay any contribution. Looking to the controversy between the parties, from the record it is not clear under the Code of appellant i.e. GOA/10152/H, the respondent nos. 3 to 13 are covered or otherwise. It was possible for the respondent no.1 to secure such information as per the powers given to it under the provisions of Section 7-A(2) of the said Act.

14. From the observations made by the learned Judge of this Court, it appears that the present appellant is held to be principal employer and the respondent nos. 3 to 13 are held to be employees/contractor. But looking to the definition of the employee as contemplated in Section 2(f) of the Act, there is no evidence on record to show that the appellant used to pay the wages to the employees directly or indirectly. On the contrary, it is clear from the record that the respondent nos. 3 to 13 i.e. licensees are paying certain amount in view of the license fees. Considering the arguments advanced by both the sides and evidence on record, we are of the opinion that the material placed on record is insufficient to hold that the appellant is a principal

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employer and the respondent nos. 3 to 13 are its employees/contractors. To determine such relation further evidence is required and parties have to lead such evidence. If they do not lead such evidence, then the respondent no.1 under the strength of the powers vested in it in view of the provisions of Section 7-A (2) of the said Act can collect necessary information from the parties and then decide the matter for which inquiry/matter needs to be remanded to the respondent no.1 for disposal in accordance with law.

15. In this connection, the Apex Court in the judgment reported in **(2010) 11 SCC 537** in the case of **Managing Director, Hassan Cooperative Milk Producer's Society Union Limited V/s Assistant Regional Director, Employees' State Insurance Corporation**, has held at paras 24, 25, 26 and 27 thus :

“24. We shall assume, to test the validity of the contention, in favour of ESI Corporation that workers engaged by the contractor (immediate employer) for transportation of milk have been employed in connection with the work of the principal employer and these employees, thus, qualify under first substantive part of Section 2(9). But as stated in Royal Talkies that merely being employed in

connection with the work of an establishment, in itself, does not entitle a person to be an "employee"; he must not only be employed in connection with the work of the establishment but also be shown to be employed in one or the other of the three categories mentioned in Section 2(9). Are these workers covered by any of these categories ?

25. It is not the case of any of the parties nor is there any evidence to show that the persons who did loading and unloading were directly employed by the appellants. Section 2(9)(i) is, therefore clearly not attracted as it covers the workers who are directly employed by the principal employer. As a matter of fact, the thrust of the arguments centred round clause (ii) of Section 2(9). This clause, requires either (a) that the person to be an employee should be employed on the premises of the factory or establishment, or (b) that the work is done by the person employed under the supervision of the principal employer or his agent on work which is ordinarily part of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment. The expression "on the premises of the factory or establishment" comprehends presence of the persons on the

premises of the factory or establishment for execution of the principal activity of the industrial establishment and not casual or occasional presence.

26. We shall again assume in favour of ESI Corporation that for the purposes of loading and unloading the milk cans, the truck driver and loaders enter the premises of the appellants but mere entry for such purpose cannot be treated as an employment of those persons on the premises of the factory or establishment. We are afraid, the said expression does not comprehend every person who enters the factory for whatever purpose. This is not and can never be said to be the purpose of the expression. It has to be held that the persons employed by the contractor for loading and unloading of milk cans are not the persons employed on the premises of the appellants' establishment.

27. Now, the next question is, can these workers, in the facts and circumstances of the case, be said to be working under the supervision of the appellants. It is appropriate to refer to a decision of this Court in [C.E.S.C. Limited and Others v. Subhash Chandra Bose and Others. In](#) that case, the question that fell

for consideration was, whether on the facts found, the right of the principal employer to reject or accept work on completion, on scrutinising compliance with job requirements, as accomplished by a contractor, the immediate employer, through his employees, is in itself an effective and meaningful "supervision" as envisaged under Section 2(9) of the 1948 Act. The majority view explained : (SCC p. 454, para 14)

"14.In the textual sense 'supervision' of the principal employer or his agent is on 'work' at the places envisaged and the word 'work' can neither be construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all times and at each and every step of the work. A harmonious construction alone would help carry out the purpose of the Act, which would mean moderating the two extremes. When the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinise the quality thereof and to detect faults therein, as also put to timely remedial measures by

directions given, finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for the purposes of Section 2(9) of the Act. It is the consistency of vigil, the proverbial 'a stitch in time saves nine'. The standards of vigil would of course depend on the facts of each case. Now this function, the principal employer, no doubt can delegate to his agent who in the eye of law is his second self, i.e., a substitute of the principal employer. The immediate employer, instantly, the electrical contractors, can by statutory compulsion never be the agent of the principal employer. If such a relationship is permitted to be established it would not only obliterate the distinction between the two, but would violate the provisions of the Act as well as the contractual principle that a contractor and a contractee cannot be the same person".

Taking note of the said observations, we find that the principles laid therein have not been examined by the learned Single Judge as referred to herein above while passing the impugned order and as such it would be appropriate that the

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matter be taken up a fresh in the light of the observations made herein above.

16. Mr. V. Palekar, learned counsel appearing for the appellant however points out that as the factual aspect would have to be re-examined, it would be appropriate to remand the matter to the learned Commissioner which is not objected by the learned counsel appearing for the respondent no.1.

17. In view of the above, we pass the following :

O R D E R

(i) Appeal is partly allowed.

(ii) The impugned order dated 31.01.2008 passed by the learned Single Judge of this Court and orders passed by the authorities below including the Appellate Tribunal and the Commissioner are quashed and set aside. The matter is remanded to the learned Commissioner to consider the Inquiry under Reference No. GOA/10152 ENF/1332/1639 after hearing the parties a fresh.

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(iii) The amount deposited in this Court shall continue to be deposited before this Court and the same shall be invested in fixed deposit initially for a period of one year and same shall be renewed from time to time.

(iv) Liberty to the parties to file an appropriate application for withdrawal of the amount after final adjudication of the proceedings before the Commissioner.

(v) All the contentions of the parties are kept open.

(vi) The appeal stands disposed of accordingly.

K. L. WADANE, J

F. M. REIS, J

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