

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

CWP No. 5333 of 2011(O&M)
Date of decision : May 14 2015

M/s Calcutta Constructions Company

..... Petitioner

Versus

Regional Provident Fund Commissioner and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Harsh Aggarwal, Advocate
for the petitioner.

Mr. Rajesh Hooda, Advocate
for respondent No.1.

Mr. Dinesh Kumar, Advocate
for respondent No.3.

Mr. K. S. Mamrat, Advocate for
Mr. Rupinder Khosla, Advocate
for respondent Nos. 2 and 5.

1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

Amit Rawal,J (oral).

The challenge in the present writ petition is to the orders dated 3.9.2001 (Annexure P-6) whereby assessment has been made under Section 7-A against the petitioner, order dated

21.12.2001 (Annexure P-7) whereby the application filed under Section 7-O seeking exemption from depositing 75% of the amount has been dismissed, order dated 22.3.2002 (Annexure P-9) whereby the appeal has been dismissed for non-deposit of 75% of the assessed amount, order dated 16.9.2010 (Annexure P-14) whereby the review application of the petitioner has been dismissed.

Learned counsel for the petitioner submits that the petitioner is a Contractor and had undertaken various contracts with Punjab State Electricity Board (hereinafter called as 'the PSEB')- Establishment for maintenance of the machinery of the PSEB-establishment.

It is a matter of record that the petitioner-company executed a man power supply contracts involving the contract of job. The Provident Fund Commissioner raised a demand under Section 7-A to the petitioner and as well as to PSEB for not depositing of the contribution of the employees. On the basis of the plea submitted by the petitioner as well as PSEB the then Regional Provident Fund Commissioner passed an assessment order of ₹55,10,742/- and directed the petitioner and as well as Guru Gobind Singh Super Thermal Plant to deposit the assessed amount jointly and severally, failing which the proceedings was subject to an action under Section 7-G shall be initiated against the establishment and the principal establishment for recovery of the assessed amount by attaching their accounts. The said order for initiation of proceedings was subject to an action under Section 7-Q and 14-B of Employees Provident Fund and Misc. Provisions Act, 1952 (hereinafter called as 'the Act').

The said order was assailed by the PSEB by filing an appeal before the authority and the appellate authority on 20.11.2000 remanded the matter to the Provident Fund Commissioner to pass an order afresh. The Provident Fund Commissioner vide order dated 3.9.2001 after discussing the rival submissions of the parties and as well as the various contracts placed on record came to a conclusion that it is the petitioner who has to pay the contribution and not the PSEB. The said order was assailed by the petitioner-corporation by filing an appeal moved by the applicant under Section 7-O of the Act. The application under Section 7-O was dismissed vide order dated 21.12.2001 (Annexure P-7) and therefore the appeal was also dismissed vide order dated 22.3.2002 (Annexure P-9) and in November, 2002 a review application was filed by the petitioner which came to be adjudicated by the appellate authority vide order dated 16.9.2010 (Annexure P-14).

Mr. Harsh Aggarwal, learned counsel for the petitioner in support of his grounds taken in the present writ petition referred to the definition of employer and employee as enshrined under Section 2 (e) and (f) of the Act as well as Section 2(c) of the Contract Labour (Regulation & Abolition) Act, 1970. Section 2(e) and (f) are extracted hereinunder:-

e) “employer” means-

i) in relation to an establishment; which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the

legal representative of a deceased owner or occupier under clause (f) of sub section (1) and section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

ii) in relation to any other establishment, the person, who or the establishment which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, director or managing agent.

(f) “employee” means any person who is employed for wages in any kind or 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 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.

“2 (c) Contribution” means a contribution payable in respect of a member under a scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies;

By reading the aforementioned Section he has

attempted to draw a distinction that it is the PSEB-establishment which has the ultimate control over the affairs and therefore as per para 30 of the Scheme it is establishment which has to make the contribution in the first instance and deposit with the provident fund authorities and thereafter the liability of the contractor arises to deduct the contribution from the salary of the employees and by adding the equal amount has to deposit with the PSEB as and when the demand is raised.

He has also referred to the judgment of this Court in **Regional Provident Fund Commissioner Vs. M/s Ropar Thermal Plant (GGSTP) PSEB and another 2013 (1) PLR 395** as well as the judgment of the Madras High Court in **Enfield India Ltd. Vs. Regional Provident Fund Commissioner, 2003(3) SCT 863** to contend that in cases of contractor it is the establishment who is liable to pay the amount of provident fund on account of the employees who are employed through contractors and not the contractor. He has referred to para 10 of the judgment of this Court and para 9 of the judgment of Madras High Court. The same are extracted hereinafter respectively:-

“10. As far as the contention raised by learned counsel for respondent establishment regarding the mens rea and harshness of penalty levied in my view the same is misconceived and deserves to be rejected. The plea that the respondent establishment had filed an application for issuance of code numbers for its contractors may not be a valid plea. A plea that the amount of provident fund on account of employees employed through

contractors was not the responsibility of the establishment, is not tenable. Para 30 (3) of the Scheme provides that it shall be responsibility of the principal employer to pay both the contributions payable by himself in respect of employees employed directly by him and also in respect of employees employed by or through a contractor and also administrative charges. The respondent establishment could not deny the liability for deposit of provident fund dues till such time code number was allotted to the contractors. Once there was default in payment of contributions under the Scheme and the damages had been levied in terms of the provisions provided under the Act as per rates prescribed in the Scheme, plea of harshness cannot be permitted to be raised.”

9. In this case, it is clear that by virtue of the agreement entered with the Thor Power Systems, the petitioner becomes the employer for the workmen engaged in the contractor firm and the petitioner himself admits that Thor Power Systems is exclusively doing work for the petitioner. That being so, as rightly contended by the respondent, there is legal obligation on the part of the petitioner and the action of the respondent is strictly in accordance with the law and it is sustainable. Further, in this case, it is also significant to note that through the establishment, Thor Power Systems, is having separate entity and its employees are appointed by the contractor, the workmen of the said establishment are exclusively doing work for the petitioner and hence they are entitled to provident fund benefits on par with employees of the petitioner since the petitioner is the principal

employer. Therefore, from all the above, I am of the view that the respondent rightly held that the employees of the contractor firm are employees of the petitioner only as per the definition, since they were doing the work of the petitioner. Therefore, it is a clear case where the position of the employees engaged by the Thor Power Systems are squarely falling within the ambit of Section 2 (f) of the Act and termed as employees of the petitioner-establishment. Thus, it is the strong contention of the respondent that the order of the respondent is strictly in accordance with the Act and it is maintainable. It is also contended by the respondent that the petitioner has an alternative remedy under Section 26-B of the Scheme of 1952 and without exhausting the same the petitioner has approached this Court. In the facts and circumstances of the case, I am of the clear view that there is every force in the above contentions made by the respondent.”

From the pith and substance of the ratio decidendi culled out in the aforesaid cited authorities, is based on the facts and circumstances of each case, it has held that so long so the code number is not allotted to the contractor it is the liability of the establishment to pay the provident fund on account of the employees employed by the contractor and thus in essence, it is the liability of the establishment to pay and not that of the contractor to pay contribution.

Mr. Rajesh Hooda, learned counsel appearing on behalf the Provident Fund Commissioner submits that the order dated 3.9.2001 (Annexure P-6) and 16.9.2010 (Annexure P-14) have

been passed after examining the contents of contracts placed on record and on going through the terms and conditions of the contract a categoric finding has come that it is the petitioner-contractor who is liable to pay the provident fund on account of the employees employed by him.

He further submits that the petitioner-contractor has also been given a separate code number and wages were also paid by him. Thus, there was relationship of employer and employee between them.

Mr. K. S. Mamrat, learned counsel appearing on behalf of respondent Nos. 2 and 5 also adopted the argument submitted by Mr. Rajesh Hooda, learned counsel for respondent No.1.

Mr. Dinesh Kumar, learned counsel appearing on behalf of respondent No.3 has also drawn attention of this Court to order dated 20.11.2000 (Annexure P-5) and undertaking furnished by the Contractor to pay the contribution/provident fund on account of the employees employed by him and despite furnishing the undertaking the petitioner-contractor has not discharged the liability except deposit of ₹20 lacs.

I have heard learned counsel for the parties, appraised the paper book and as well as provisions of law with their able assistance and the judgments cited at Bar.

I am of the view that there is no merit in the present writ petition. The plea raised in the writ petition is wholly misconceived. The question posed before this Court to be

answered is as to whether it is the contractor who has to pay the provident fund on account of the employees employed by him or the PSEB i.e. establishment.

On going through the plain language of Section 2 (e) and (f) it envisages that the employer means in relation to an establishment, the person who is the '*authority*' which has the ultimate control over the affairs of the establishment would be the employer or not. The definition of employee has to be read in conjunction with the definition of employer and as per the definition of employer (supra) the employee would mean a person who is employed for wages in any kind or work, manual or otherwise in or in connection with the work to an establishment, and getting his wages '*directly*' or '*indirectly*' from the employer.

In the instant case, it is a matter of record that all the employees/workers employed by the contractor were paid salary by the petitioner-contractor. The petitioner-contractor has also been allotted a separate code number. Thus the plea that it is the establishment who has the control over the affairs of the Company thus is liable to pay contribution of the employees falls flat on the face of the petitioner-contractor. Even going by the language of para 30 of the Scheme as referred to by the appellate authority in the order under challenge dated 16.9.2010 it reveals that it is the employer who in the first instance avail the contributions paid by himself and also on behalf of the employees employed by him '*directly*' or '*indirectly*' and thereafter the employee employed by the employer or his contractor shall recover the contribution payable by

such employees. The aforementioned provisions envisages the situation where the contractor has not been allotted code number, for the reasons that in such situation the employee should not be made to suffer.

Here the expression “employer” leaves no manner of doubt that it is the contractor who had employed the workers and deputed at the premises of the establishment to maintain the machinery installed at the premises of the PSEB and thus the contractor was also being paid the charges in lump-sum by the PSEB. Thus the pith and substance of the language of para 30 ex facie reveals that it is the employer who has to make the contribution at the first instance. This Court also had an occasion to deal with this situation in the judgment in **Regional Provident Fund Commissioner Vs. M/s Ropar Thermal Plant (GGSTP) PSEB's cse (supra)** where the contractor had not been given the code number. It is till such time till the code number was not allotted it is the establishment who shall pay.

The instant case is not of such kind as it is a conceded position that the petitioner-contractor has been allotted the code number.

In view of what has been explained above, it is the petitioner-contractor which has relationship of employer and employee and the PSEB i.e. the establishment has no control over the service conditions of the employees employed by the contractor, therefore could not be held liable for making the contribution on account of the employees employed by the petitioner-contractor.

The impugned orders are thus upheld and the writ petition is dismissed.

(AMIT RAWAL)
JUDGE

May 14 , 2015
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