

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: February 18th, 2016
Date of decision: March 10th, 2016

+ W.P.(C) 3099/2011

SUMMER FIELDS SCHOOLPetitioner
Through: **Mr. Harvinder Singh, Advocate.**

versus

REGIONAL PROVIDENT FUND COMMISSIONERRespondent
Through: **Mr. Arvind Kumar Verma,**
Advocate.

CORAM:
HON'BLE MR. JUSTICE VED PRAKASH VAISH

J U D G M E N T

1. By way of present petition under Article 226 of the Constitution of India the petitioner seeks quashing of impugned order dated 08th March, 2011 passed by Employees' Provident Fund Appellate Tribunal, New Delhi (EPFAT) in Appeal bearing ATA No.6(16)2008 whereby the appeal filed by the petitioner against the order dated 30.11.2007 passed by Assistant Provident Fund Commissioner under Section 7A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act') was dismissed.

2. The facts germane for adjudication of the present petition are summarized below: -

(i) The petitioner, Summer Fields School is covered under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and the Employees' Provident Fund Scheme, 1952 framed thereunder and is regularly paying contribution as per Section 6 of the Act.

(ii) Vide notice dated 29.08.2006 the proceedings under Section 7A of the Act were initiated by the Assistant Provident Fund Commissioner, Faridabad against the petitioner in respect of failure to extend Provident Fund benefits towards the Bus drivers and Bus conductors employed by the transport contractor.

(iii) The petitioner sent reply to the said notice stating that the transport contractor is an independent contractor having their own staff employed by contractor at its own convenience and therefore the drivers and conductors employed by the bus contractors are not covered within the definition of employees as defined under Section 2(f) of the Act.

(iv) Vide order dated 30.11.2007, Assistant Provident Fund Commissioner held that the transporter employees are entitled to benefit of provident fund and the petitioner was directed to pay the dues in respect of drivers and conductors for the period April, 1998 to June, 2006 and determined the provident fund liability to the tune of Rs.12,52,793/-.

(v) Against the said order, the petitioner filed an appeal bearing ATA No.6(16)2008, which was dismissed by the Presiding Officer, Employees' Provident Fund Appellate Tribunal vide impugned order dated 08th March, 2011.

(vi) Feeling aggrieved by the said order, the petitioner has preferred the present petition.

3. Learned counsel for the petitioner contended that the petitioner was not given reasonable opportunity to present its case before the Appellate Authority causing grave injustice to the petitioner.

4. Learned counsel for the petitioner further submitted that the impugned order was passed without identifying the name of employee and deciding the eligibility of the same under the Employees' Provident Fund Scheme. It was also submitted that in the absence of record of transporter regarding the drivers and conductors the quantum of provident fund contribution cannot be determined.

5. Learned counsel for the petitioner also urged that the petitioner School calls for tenders for hiring buses on contract for specified period at a particular rate per kilometer and it is the independent contractor/ transporter who engages driver and conductors for the said buses. The petitioner neither possesses any control or supervision over the said drivers and conductors nor does the petitioner pay for their wages and salaries.

6. *Per contra*, learned counsel for the respondent urged that an agreement has been entered into between the transporter and the petitioner School, wherein the transporter was paid lump sum

transportation charges and the same was not on trip basis. It was also submitted that as per said agreement all the bus drivers and conductors shall be entitled to provident fund from their date of joining but neither the petitioner nor the transporter have enrolled them as members of provident fund.

7. Relying upon judgment in '**Royal Talkies, Hyderabad vs. Employees' State Insurance Corporation**', AIR 1978 SC 1478, learned counsel for respondent further submitted that the bus drivers and conductors were employees of the petitioner as there exists casual connection between the establishment and the work of the said employees.

8. I have heard learned counsel for both the parties and perused the material on record.

9. Before examining the merits of the present case, it is necessary to consider the definition of 'Employee'. The term 'Employee' has been defined in Section 2(f) of the Act which reads as under: -

“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].”

10. From a bare perusal of the provisions of Section 2(f) of the Act, it is clear that a person would be treated as an employee only if he directly or indirectly gets his wages from the employer. It is also clear that two conditions, amongst others, are to be satisfied i.e. (i) the employees should be working in or in connection with the work of the establishment; and (ii) their wages are to be paid directly or indirectly by the employer through the contractor.

11. The issue for consideration in the present case is whether the petitioner exercises any control and supervision over the drivers and conductors engaged by the contractor and if yes, what is the nature of supervision and control required to attract the provisions of Section 2(f) of the Act.

12. The Hon'ble Supreme Court in '**Dharangadra Chemical Works vs. State of Saurashtra**', AIR 1957 SC 264, while considering the definition of 'workman' in Section 2(s) of the Industrial Disputes Act, 1947, observed as under: -

“14.The principle which emerges from these authorities is that the *prima facie* test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at page 23 in *Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.*, and Another [1947] 1 A.C. 1, 23, “The proper test is whether or not the hirer had authority to control the manner of execution of the act in question”.

13. This line of reasoning was followed by the Supreme Court in the case of '**Chintaman Rao & Anr. vs. State of Madhya Pradesh**', **1958(2) LLJ 52**, with regard to the definition of "worker" as appearing in Section 2(1) of the Factories Act, 1948.

14. As per the definition under the Employees State Insurance Act, 1948, in cases where employees are hired by or through an immediate employer, an employee to qualify as an employee of the principal employer must work (a) on the premises of the establishment, or (b) under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on or incidental to the purpose of the establishment.

15. While dealing with the interpretation of the words "in connection with" occurring in the definition of "employee" in Section 2(9) of the Employees State Insurance Act, 1948, the Hon'ble Supreme Court in the case of **Royal Talkies, Hyderabad & Ors. vs. Employees' State Insurance Corporation, AIR 1978 SC 1478**, held that the operations of keeping a cycle stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre. All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. It is sufficient if it is incidental to it. A thing is incidental to another if it merely appertains to something else as primary. The Hon'ble Supreme Court further held: -

"15. The primary test in the substantive clause being thus wide, the employees of the canteen and the cycle stand may be correctly described as employed in connection with the work of the establishment. A narrower construction

may be possible but a larger ambit is clearly imported by a purpose-oriented interpretation. The whole goal of the statute is to make the principal employer primarily liable for the insurance of kindred kinds of employees on the premises, whether they are there in the work or are merely in connection with the work of the establishment.”

16. The issue is no more *res integra* in view of law laid down by this Court in ‘**Springdales School and Ors. vs. Regional Provident Fund Commissioner & Anr.**’, **2006 LLR 47**, wherein it was held as under: -

“4. Reading of the aforesaid clauses would make it clear that the petitioners were to pay the said transporter the charges for the bus hired on the basis of distance of each trip. These buses were hired for this purpose. The hire charges were to be paid by tenth of each following month on submission of bills by the transporter in this behalf on or before third of every month. It is also stipulated in the agreement that the aforesaid rates payable by the petitioners to the transporter could be considered for enhancement in case there is any increase in the diesel costs imposed by the Government from time to time. The charges were to be paid for 10 months and thus excluding two months when the school shall remain closed. It thus becomes abundantly clear that payment of charges by the petitioners to the respondent is connected with the trips made by bus. It has no causal connection that the employees which were to be employed by the transporter for running the bus, namely, driver conductor or cleaner etc. It was for the transporter to provide any such staff at a particular post at his discretion and the petitioners had no say in the same nor any such term is provided in the agreement. There is no stipulation in the agreement about payment of wages by the transporter to his staff. Furthermore, the transporter was supposed to provide bus service in the morning and afternoon to the school for the purpose of bringing the students and teachers to the school and thereafter dropping them back at their residence. The transporter was free to make use of those buses for any other purpose for the rest of the day. It would even enter into such contract with any other establishment.

5. In the impugned order, the RPFC has observed that the employees employed by the transporter shall be deemed to be the employees of the petitioners and would be treated as employee covered within the meaning of section 2(f) of the PF Act. This section reads as under: -

“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, -

(iii) employed by or through a contractor in or in connection with the work of the establishment;

(iv) 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].”

6. In view of the facts noted above, I am afraid any of these conditions are satisfied in the present case. An employee would be treated as working in or in connection with the work of the establishment if it can be ascertained that he is discharging his duties exclusively related to the work of the establishment. Furthermore, as already pointed out above, in so far as the petitioners are concerned, they were simply giving hire charges which had no causal connection of even remote connection with the payment of wages by the transporter to its employees. The difference would become apparent when compared with a contract which is in the nature of security contract and in an agreement between the employer and the contractor, contractor is to provide security personnel at the establishment of the principal employer. In such contracts, the employee would be deployed at the premises of the principal employer and the agreement generally includes payment in terms of per employee deployed signifying wages which are paid by the employer through the contractor.”

17. In the instant case, an agreement dated 08.05.2006 was executed between the petitioner-School and M/s. Samiksha Enterprises (Transporter). A copy of said agreement was placed on record before the EPFAT. The said agreement was effective from 1st April, 2006 to 31st March, 2007. The relevant clauses of the agreement are reproduced as under: -

“2(a). That the Transport undertakes to provide NINE buses (FOUR double trips and FIVE single trip) along with drivers or drivers and conductors under his direct employment and supervision, as per the terms and conditions of this agreement and according to the requirement of the School as communicated by the School in writing from time to time to the Transporter, for the purpose of commuting children and the staff from their residence to the School and back. One of Two big buses may decreased or increased as per variation of strength of the students. Transporter will ensure that the conductor of their bus provides all the help to the children at the time of embusing and debusing and during journey children are in the bus.

5. That the Transporter will be exclusively responsible and liable for making all the payments from his/ it's own account (except school shall arrange to pay Maximum Rs.88500/- (Rupees Eighty Eight Thousand Five Hundred only) per month for above said buses for the FOL (Fuel, Oil and Lubricant) directly to the supplier against bill to be provided by the transporter) in respect of the Permit fees including the renewal charges, Taxer Tax, Insurance Charges for obtaining the comprehensive insurance policy including the renewal fee in respect of the buses provided by him/ it and/ or for any challan, fine, penalty or punishment which may be imposed on him/ it due to violation of any of the law(s) or the rule(s) framed thereunder while executing the Said Services during the tenure of this agreement.

7(a). That the Transporter shall be solely responsible, at his own cost and expenses, for payment of salary/ wages and all other statutory allowances/ benefits and for providing all facilities under the applicable Law(s) and the Rules framed thereunder to his/ it's drivers/ conductors/ staff who are deputed by him/ it for execution of the Said Services and shall ensure that provisions of any applicable laws e.g. ESI, EPF, Minimum Wages Act are not violated during the tenure of the agreement/ contract.

(b). The Transporter undertakes to pay and deposit all applicable statutory dues/ contributions in time e.g. PF, ESI, etc. with the appropriate authority/ agency/ office/ dept. from his/ it's own account and to file all and/ or any statutory returns/ forms/ statements under different Acts/ Rules as applicable from time to time, in respect of the buses/ drivers/ conductors/ staff provided/ deputed by it. The Transporter has agreed that in case of it's failure to file any statutory return/ form/ statement or deposit any statutory dues/ contributions in time, as explained, the Transporter will be solely liable and responsible for all and/ or any consequences of whatever nature, whether civil or criminal, arising out of any such default made by him/ it and shall keep the School indemnified in this regard. The School shall in no way be liable and responsible for the default of the Transporter in this respect.

8. The Transporter has agreed and assured that no dispute or demand will be raised by his/ it's drivers/ conductors/ staff against or on the School or it's officers and has undertaken that in case the School or it's officers are dragged/ involved in any court of law/ in any litigation by any of his/ it's drivers/ conductors/ staff then the Transporter will take all necessary and appropriate steps for withdrawing such claims/ demands/ disputes by it's drivers/ conductors/ staff and shall resolve the same without involving the School or it's officers in any manner, financially or otherwise. The Transporter has undertaken to pay/ compensate the School or it's officers, the cost and expenses incurred by the School or it's officers in respect of contesting/ defending such claims/ demands/ disputes, if

any, and in case if the School or it's officers are made liable to pay any amount by way of any penalty/ damages/ compensation on account of any court order, the Transporter will identify/ compensate the same fully.”

18. From a perusal of the terms and conditions of the aforesaid agreement, it is evident that the transporter had agreed to provide buses on rental services to the petitioner-School. The terms and conditions of the agreement nowhere stipulate any condition that the drivers and conductors would be employees of the establishment. It was only the transporter/contractor who had to provide the buses with driver. In the present case, there was no relationship of master and servant. There is no provision in the agreement, whereby the establishment had kept any supervisory control over the drivers or to pass any instructions/directions to the drivers of the transporter. The judgment in **Springdales School's** case (supra) is applicable to the facts and circumstances of the present case.

19. The findings of learned EPFAT is based on the report of the Enforcement Officer wherein it was found that an agreement has been made between the petitioner and the transporter from April 1998 to 2006-07 and the petitioner is liable to pay the transporters lump sum charges. However, the said Enforcement Officer's report has not been placed on record.

20. In the light of the aforesaid discussion, the petition is allowed and the impugned order dated 08.03.2011 passed by the Employees' Provident Fund Appellate Tribunal, New Delhi in ATA No.6(16)2008 and order dated 30.11.2007 passed by Assistant Provident Fund Commissioner are set aside. No order as to costs.

21. It was pointed out by learned counsel for the petitioner that pursuant to order dated 30.11.2007 passed by Assistant PF Commissioner; the petitioner has deposited some amount. The respondent is directed to refund the amount deposited by the petitioner pursuant to order dated 30.11.2007 passed by Assistant PF Commissioner within thirty days, failing which the respondent shall be liable to pay interest @ 9% per annum with effect from today till the date of payment.

(VED PRAKASH VAISH)
JUDGE

MARCH 10th, 2016
gm

