

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.04.2019

CORAM :

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.A.No.271 of 2012
and M.P.No.1 of 2012

M/s.M.R.F. Ltd.
Eripakkam Village,
Nettapakkam Commune,
Pondicherry - 605 106.

.. Appellant/Petitioner

vs.

1.The Presiding Officer,
EPF Appellate Tribunal,
New Delhi.

2.The Asst. Provident Fund Commissioner
(Enforcement),
Office of the Regional Provident Fund
Regional Office, Tamil Nadu Region
No.37, Royapettah High Road,
Chennai - 600 014.

..1st & 2nd Respondents/
/1st & 2nd Respondents

Writ Appeal filed under Clause 15 of Letters Patent Act against the order dated 18.10.2011 passed in W.P.No.26590 of 2003 presented to this Court under Article 226 of the Constitution of India praying for the issue of Writ of Certiorari to call for the records connected with the order dated 17.07.2003 made by the Appellate Tribunal Case No.ATA 469 (13)/02 on the file of the first Respondent confirming thereby the order dated 11.09.02 made by the second Respondent and to quash the order dated 17.07.03.

For Appellant :Mr.Sanjay Mohan
for M/s.S.Ramasubramaniam and Associates

For Respondents:R1(Tribunal)
M/s.V.J.Latha (For R2)

JUDGMENT

(Judgment of this Court made by T.S.Sivagnanam,J.)

This appeal by the Management is directed against the order passed in W.P.No.26590 of 2003 dated 18.10.2011. The Management filed the writ petition challenging the order passed by the first respondent Tribunal dated 17.07.2003 which confirmed the order passed by the second respondent, namely, the Assistant Provident Fund Commissioner (Enforcement), Chennai dated 11.09.2002.

2.The appellant Management were issued with a notice under Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the PF Act"). The proposal made in the notice is to the effect that the second respondent had reasons to believe that the appellant Management failed to furnish the prescribed returns required to be submitted in respect of their establishment which is a factory at Pondicherry which was established in the year 1988 covered under the PF Act and the scheme framed thereunder from the date of appointment of employees said to be apprentice and/or have failed to remit the contribution as well as the Employees Deposit Linked Insurance Fund Contributions and administrative charges towards the Employees' Provident Funds and the Employees Deposit Linked Insurance Fund in accordance with the law from the date of appointments of employees said to be apprentices. Thus the appellant Management was informed that the Regional Provident Fund Commissioner, Tamil Nadu and Pondicherry in accordance with Section 7A of the PF Act proposes to determine the amount due from the appellant under the provisions of the said Act and the scheme framed thereunder.

3.The second respondent directed the authorized representative of the Management to appear in person on 22.04.2002 at 11.00 am and give evidence and to produce all relevant records including the the records such as attendance register, membership eligibility register, cash book and vouchers, payment register/pay bills and any other document necessary for ascertaining attendance, payments, etc. and all these records were from the date of the appointment of the employees said to be apprentices. This proposal in the show cause notice emanated from and out of the prima facie opinion formed by the second respondent that those who were employed by the appellant Management as apprentices were not apprentices but they were regular workmen. In response to the said notice, the appellant Management initially sought for adjournment and subsequently appeared for the enquiry and submitted that the apprentices are not workmen and they have model standing orders which is made applicable and the proposal made in the notice is

incorrect. The second respondent by order dated 11.09.2002 referred to the report of the Enforcement Officer, Pondicherry and the complaint received from the Workers' Union and held that it is evident from the information furnished by the appellant that there is no certified Standing Orders existing in the establishment and as such the employees' termed as apprentices 'be enrolled as members of the Fund from the date of joining in the establishment. This order was put to challenge before the first respondent Tribunal. The Tribunal by order dated 17.07.2003 dismissed the appeal filed by the appellant Management and confirmed the order passed by the second respondent, the original authority. These orders were put to challenge in the writ petition which was dismissed by the impugned order.

4. We have heard Mr. Sanjay Mohan, learned counsel for M/s. S. Ramasubramaniam and Associates, learned counsel for the appellant and M/s. V. J. Latha, learned Standing Counsel for the second respondent.

5. On a perusal of the order passed by the second respondent dated 11.09.2002, it is seen that the order proceeds solely on the basis of the report submitted by the Enforcement Officer of the respondent organization. The said Officer has reported that according to Section 2(f) of the PF Act, "employee" means any person who is employed for wages in any kind of work and includes any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 or under the standing orders of the establishment. Further, it was stated that persons engaged by the appellant as apprentices with effect from 01.08.1988 are not apprentice engaged under the Apprentices Act and the establishment does not have any approved standing orders as on the date of such appointments. Thus, the Enforcement Officer reported that in the absence of approved standing orders, the Model Standing Order enacted under the Industrial Disputes Act, 1947 will have no role to play and according to the Model Standing Orders in respect of industrial establishment not being industrial establishments in coal mines, an apprentice is a learner who is paid an allowance during the period of training. After referring to the said report, the second respondent refers to a complaint dated 29.09.2001 received from the President of the Workers Union, wherein there is an allegation that about 250 employees are being exploited and they are working for more than 4-1/2 years in the appellant Unit at Pondicherry and though they have been termed as apprentices by the Management, they are drawing wages, they are allowed to work independently and beyond normal working hours on overtime basis and overtime wages were paid and they are the major force in the production. After referring to the said complaint, the second respondent has passed the following order:

"I heard the arguments of the employer and gone through the reports of the Enforcement Officer. It is evident from the information furnished by the employer that there is no Certified Standing Order existing in existence in the Establishment. As such the employees termed as 'apprentices' be enrolled as members of the Fund from the date of their joining in the establishment."

6. In fact the above is the only finding recorded by the second respondent to justify his stand that the apprentices engaged by the appellant are not apprentices but are to be treated as regular workmen. This conclusion has been arrived at by the second respondent only on the basis that there is no Certified Standing Orders existing in the appellant establishment. It is not worthy to point out that though there is a reference to the report of the Enforcement Officer of the organization and the complaint of the President of the Workers Union, the findings rendered against the Management is only on the basis that there is no Certified Standing Orders in the establishment. To be noted that the consistent case of the appellant Management is that the Model Standing Orders were made applicable and there were no Certified Standing Orders. Therefore, the question is to be whether the appellant could have been non-suited on the said ground. We need not labour much on this aspect since the learned Single Bench while dismissing the writ petition has rendered the following finding in favour of the Management. At this juncture, it would be beneficial to refer to the said finding rendered by the learned Single Bench in the impugned order, which reads as follows:

"14. Therefore, there is no doubt that the petitioner can employ apprentices. If such apprentices are permitted to be employed under the Standing Orders, then they cannot be employees within the meaning of Section 2(f) of the IESO Act. Therefore, to that extent, both respondents are wrong in stating that in the absence of certified Standing Orders, the Model Standing Orders cannot be applied for excluding such apprentices. This is especially when Section 12A of the Act states that the Model Standing Orders are deemed to be adopted in that establishment as noted above and it also starts with a non obstante clause.

15. This question has been squarely answered by the Supreme Court in the case relating to Regional Provident Fund Commissioner, Mangalore v. Central Arecanut & Coca Marketing And Processing Coop. Ltd., Mangalore reported in (2006) 2 SCC 381 and in paragraphs 12 to 14, it was observed as follows:

12. In the present case, admittedly the Standing Orders were not at the relevant point of time certified. Therefore, in terms of

Section 12-A of the Standing Orders Act, the model standing orders are deemed to be applicable. Section 2(f) of the Act defines an employee to include an apprentice, but at the same time makes an exclusion in the case of an apprentice engaged under the Apprentices Act or under the Standing Orders. Under the model standing orders an apprentice is described as a learner who is paid allowance during the period of training.

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."

7. The respondent Organization has not filed any appeal against the impugned order passed in the writ petition and therefore, they cannot assail the correctness of the said finding. Thus going by the decision of the learned Single Bench, the reasons assigned by the second respondent in the order dated 11.09.2002 has been held to be bad in law. The appellant had canvassed these issues before the first respondent Tribunal in the appeal filed by them. However, we find that the Appellate Tribunal while considering the appeal has not touched upon the said issue, presumably because the Tribunal was aware of the legal position. However, the Tribunal was swayed by the allegation made in the complaint given by the President of the Workers Union. We say so because the language employed by the Tribunal in Page No.8 of its order is verbatim the extract of the complaint given by the President of the Workers Union. The Tribunal would have been well within its jurisdiction to take note of the complaint, had there been evidence before it which ought to have been placed before the original authority, namely, the second respondent. Unfortunately, the Workers Union did not take any such stand before the original authority, namely, the second respondent. That apart, none of the workmen apprentices who were engaged by the appellant Management challenged their status of employment either during the proceedings initiated under the PF Act or earlier or subsequently. In such circumstances, the only conclusion that can be arrived at is to

hold that the order passed by the Tribunal is not sustainable as the finding rendered by the Tribunal is not supported by any evidence.

8.The learned Single Bench pointed out that the Model Standing Orders did not provide any fixed period for engagement of apprentices. Further, it proceeded to hold that merely because the Management called them as apprentices, that will not take away the jurisdiction of the authority from piercing the veil and see the true nature of such appointments. There can be no quarrel over such proposition. Unfortunately in the instant case, the original authority did no such exercise of piercing the veil to find out as to what is the true status of the concerned apprentice. In such circumstances, the legal position cannot be applied in the abstract and has to be considered on the facts available before the concerned authority or the Tribunal. Further, the learned Single Bench has recorded that the findings recorded based on the report of the Enforcement Officer as accepted by the Assistant Provident Fund Commissioner, the second respondent and confirmed by the first respondent Tribunal cannot be interfered by the Writ Court under Article 226 of the Constitution of India. It is true that the legal position being in a writ petition under Article 226 of the Constitution of India the factual matrix cannot be re-adjudicated or re-appreciated and all that can be looked into whether there is any perversity in the finding of the Tribunal. However, in the instant case the original authority, namely, the second respondent did not record any finding of fact and if the second respondent had to accept the report of the Enforcement Officer, the said report should have been made available to the appellant Management well in advance, evidence should have been recorded since the proceedings under Section 7A of the PF Act is akin to judicial proceedings since sub-section (2) of Section 7A confers powers on the Officer conducting the inquiry under Section sub-section (1), the same powers as vested in a Court under the Code of Civil Procedure, 1908 for trying a suit in respect of enforcing the attendance of any person or examining him on oath, requiring the discovery and production of documents, receiving evidence on affidavit and issuing commissions for the examination of witnesses. Thus, in terms of sub-section (2) of Section 7A of the PF Act, the proceedings shall be deemed to be a judicial proceedings within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code.

9.As already pointed out, the second respondent did not proceed based on the complaint given by the President of the Workers Union and verbatim took the report of the Enforcement Officer. In the report, the Enforcement Officer has only stated that in the absence of Certified Standing Orders, the persons

employed have to be treated as workers and not apprentices. There was no material before the second respondent to disbelieve the terms and conditions of the apprenticeship in terms of the order dated 12.03.2002. What was required to be noted by the second respondent is that the apprenticeship training is an on-job training so as to enable the apprentice to equip himself and acquire multi skill operation and dexterity in carrying out various jobs based on which, his suitability and satisfactory completion of training will be assessed by the appellant Management. Thus, in the absence of evidence to the said effect, we are of the view that the finding recorded by the Writ Court that there has been a finding of fact recorded by the second respondent is not sustainable. Furthermore, the learned Single Bench has rejected the writ petition on the ground that the workmen were not party to the proceedings by the appellant Management. Admittedly, the proceedings under Section 7A of the PF Act was initiated by the second respondent. Therefore, it is the second respondent who has to include in the proceedings the parties whom they deem it proper and necessary. The appellant Management was aggrieved by the order passed by the second respondent and they filed an appeal before the first respondent Tribunal and they cannot be faulted for not having impleaded the workers in the proceedings when the original authority which initiated the adjudication proceedings failed to do so. Therefore, we find that the appellant could not have been non-suited on the said ground as the original authority never impleaded the Workers Union as party to the proceedings or they were summoned to attend the enquiry which was called for by the second respondent.

10.M/s.V.J.Latha, learned Standing Counsel for the second respondent placed reliance on the decision of the Hon'ble Supreme Court in the case of The Regional Provident Fund Commissioner (II), West Bengal vs. Vivekananda Vidyamandir and others [Civil Appeal Nos.6221 of 2011 and batch] dated 28.02.2019. In the said case, the Court had analyzed the factual position and took into consideration the various types of allowances which was paid to the teachers and rendered the finding. As we have held that in the instant case there is no factual finding recorded by the original authority and therefore, the decision of the Hon'ble Supreme Court will not render any support to the stand of the respondent Department. Further, it is argued by the learned counsel that the so called apprentices have been paid overtime wages, bonus, etc. It is relevant to note that under Section 2(1) of the Factories Act, 1948, the term "worker" has been defined in the following terms:

"2(1)."worker" means a person employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not

in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process or the subject of the manufacturing process, but does not include any member of the armed forces of the Union."

11. Under the provisions of the Industrial Disputes Act, 1947, the term "workmen" has been defined under Section 2(s) in the following terms:

"2(s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person--

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

12. The subtle yet marked difference in the definition of 'worker' as defined in the Factories Act and 'workmen' under the Industrial Disputes Act is of relevance to the case on hand. The definition of worker does not exclude any category of persons employed in the factory whereas under the Industrial Disputes Act, the persons working in the managerial cadre have been excluded from the definition of workmen. Thus, if an apprentice is made to work beyond the normal working hours, it goes without saying that he is entitled for additional wages or overtime wages which are paid to the normal workmen. Thus, we are of the considered view that the learned Writ Court erred in dismissing the writ petition, though it rendered a finding in

favour of the appellant Management and held that the second respondent as well as the first respondent Tribunal were wrong in stating that in the absence of Certified Standing Orders, Model Standing Orders cannot be applied for excluding such persons.

13. In the light of the above discussion, we are of the considered view that the order passed in the writ petition calls for interference. Accordingly, the writ appeal is allowed and the order passed in the writ petition is set aside and consequently, the order passed by the first respondent Tribunal confirming the order passed by the second respondent are quashed. No costs. Consequently, connected miscellaneous petition is closed.

14. M/s. V.J. Latha, learned Standing Counsel for the second respondent organization submitted that liberty should be granted to the Department to proceed afresh. This contention does not merit consideration as the lis before us in this appeal is only with regard to whether the appellant Management is required to pay contribution for the apprentices for the period from 1998 to 2002. Furthermore, we are not here to adjudicate any proceedings beyond the lis and therefore, we cannot make any observations or grant any liberty to the Department.
cse

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Presiding Officer,
EPF Appellate Tribunal, New Delhi.
2. The Asst. Provident Fund Commissioner
(Enforcement),
Office of the Regional Provident Fund
Regional Office, Tamil Nadu Region
No.37, Royapettah High Road,
Chennai - 600 014.

+1cc to Mr. V.J. Latha, Advocate, SR.No.35255

+1cc to Mr. S. Ramasubramaniam, Advocate, SR.No.34996

W.A.No.271 of 2012

and

M.P.No.1 of 2012

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