MANU/MH/1741/2011

Equivalent Citation: [2012(133)FLR537], (2012)IILLJ173Bom, 2011LLR953

IN THE HIGH COURT OF BOMBAY

CAJ W.P. No. 1984/2011

Decided On: 06.07.2011

Appellants: **The Regional Provident Fund Commissioner, Mumbai**
Vs.
Respondent: **M/s. Syndicate Overseas Pvt. Ltd.**

Hon'ble Judges/Coram:
Hon'ble Mr. K.K. Tated, J.

Counsels:
For Appellant/Petitioner/Plaintiff: Mr. Deepak Rai i/b Mr. Suresh Kumar, Advocate

For Respondents/Defendant: Mr. S.C. Naidu with Mr. N.P. Dalvi i/b M/s. C.R. Naidu and Co. Advocates

JUDGMENT

K.K. Tated, J.

1. Heard the learned counsel for the parties.

2. Rule.

3. By consent rule is made returnable forthwith. Matter is taken up for final hearing at the stage of admission.

4. By this petition under articles 226 and 227 of the Constitution of India, petitioner Regional Provident Fund Commissioner challenges the order dated 20.10.2010 passed by the learned Presiding Officer, Provident Fund Appellate Tribunal in Appeal ATA No. 697(9) of 2008 allowing respondent original appellant's appeal against the order passed by Provident Fund Appellate Authority under section 7A of the Employees Provident Fund and Misc. Provisions Act, 1952 directing the respondent to deposit the dues towards the contribution of Provident Fund on the wages paid to the Karigar.

A few facts of the matter are as under:

5. The Assistant Provident Fund Commissioner issued summons dated 6-10-2006 to the respondent Company Galling upon them to remit the provident fund pension fund and insurance fund contribution and administrative charges towards provident fund and insurance fund due for the period from May 2003 to August 2006 in accordance with the provisions of Employees' Provident Fund and Misc. Provisions Act, 1952.

6. Pursuant to the said summons, the respondent appeared before the Authority and filed their say. The respondent contended before the Authority that Provident Fund Authority is not liable to pay on Karigar charges as the same are paid to the Contractor who are specialized in a particular work. Not agreeing with the submissions made by respondent company, the learned Assistant Provident Fund Commissioner Sub-Regional Office, Kandivali (West) by its order dated 31.1.2007 passed an order under section 7A of the said Act, 1952 holding that the respondent company is liable to pay provident fund, family pension fund and insurance fund contribution and administrative charges towards Provident Fund and Insurance Fund for the period March 2003 to August 2006 on karigar charges. He calculated the total amount due and payable by the respondent to the tune of Rs. 6,83,255

7 . Being aggrieved by the said order under section 7A of the said Act, 1952, respondent original company preferred review petition under section 7B of the said Act. The said review petition was rejected by the learned Assistant Provident Fund Commissioner, Kandivali (West) by its order dt. 18.5.2007 on the ground that the respondent filed the same after a period of limitation i.e., 45 days from the date of making of the order under section 7A of the said Act. The said order in review petition was challenged by the respondent company before this court in Writ Petition No. 1349 of 2007. In the said writ petition, this court directed Authority to decide the review petition on own merits. After remand, the Asstt. Provident Fund Commissioner decided review application on 30.6.2006 and held that the respondent company was liable to pay the sum of Rs. 10,87,5407 towards the contribution of Provident Fund. The provident fund authority rejected the respondent's contention that provident fund is not payable on karigar charges.

8. Being aggrieved by the order dt. 30.6.2008, the petitioner preferred appeal before the Appellate Tribunal. The Appellate Tribunal held that the karigar charges cannot be treated as a basic wages as defined under section 2(b) of the said Act, and therefore, respondent was not liable to pay Provident Fund contribution on the amount paid towards karigar charges. The appellate authority held that the karigar charges were generally paid to the person who had done finishing work. Therefore, the same could not be treated as basic wages.

9 . Feeling aggrieved, the petitioner preferred present Writ Petition against the impugned order dated 20.10.2010.

10. The learned counsel for the petitioner submitted that the order passed by the Appellate Tribunal was against justice, equity and good conscience and the same was liable to be set aside. He submits that the Hon'ble Tribunal failed to appreciate that the respondent establishment was entrusting the job work to karigar agency as piecemeal job continuously to avoid payment of provident fund contribution. He further submits that during the course of hearing under section 7B of the said Act, respondent company failed to produce relevant documents to show that provident fund contributions were not payable on karigar charges. He further submits that respondent failed to produce any documentary evidence to show that they used to engage contractors/agencies for carrying but specialized job work and paid karigar charges to them. The teamed counsel for the petitioner further submits that the learned Presiding Officer has not considered the definition of employee under section 2(f) of the Act. He submits that as per definition of 'employees' any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of establishment and who gets his wages directly or indirectly from the Employer, and, the same is covered by Provident Fund Act. He submits that in the present case, though the respondent was engaging contractors / agencies to carry out their specialized work, the workers who are doing the said specialized work were getting wages from respondent through their contractor and therefore, the relationship of employer and employee develops between respondent and workers who are doing the said work.

11. On the basis of these submissions, the learned counsel for the petitioner submits that the impugned order passed by learned Presiding Officer of Appellate Tribunal dated 20.10.2010 is liable to be set aside.

12. On the other hand, the learned counsel for respondent original company vehemently opposed the present Writ Petition. He submits that the appellate authority rightly held that the karigar charges were not covered by the definition of basic wages as defined under section 2(b) of the said Act and therefore, there were no question of interfering with the well reasoned judgment of the appellate authority. He further submits that the Appellate Tribunal rightly held that the karigar charges were generally paid to the person who did some finishing work.

13. The learned counsel for the respondent company states that karigar charges are paid to the companies, firms or agencies who are able to provide expert and special services, which are in the nature of value addition to the product manufactured by the respondent, lie submits that the outside agencies undertake to perform specialized work for which they have the requisite machinery and resources.

14. He submits that the respondent company is engaged in the trading and export of ready made garment and not manufacturing unit. They are -getting garment manufacturing from outside agencies and make payment to those establishments and deduct TDS from the bills. They are engaged in stitching trousers, shirts, T-shirts, ladies tops etc. These garments are on line jobs carried on sewing machines. Respondent company, after sewing the garment depending on the job order and specification of the customer, sends it for specialized work such as embroidery/printing/knitting. The said work is performed by the outside agencies, which specialize in the said work. He submits that they produced before the authority, following documents to justify their case that karigar charges are not covered under the definition of 'basic wages':

(a) the payment made and debited under head of account "Karigar Charges" were paid to outside agencies;

(b) the outside agencies were separate, independent and distinct entities having no connection with the respondent company;

(c) the outside agency carried out the work in their own premises using their machinery resources, material, transportation, labour, establishment charges and profit;

(d) the respondent company had no supervision or control over the work carried out by the outside agencies in their premises;

(e) the contract between the respondent company and the outside agencies were on 'principal-to-principal basis';

(f) the semi-finished products of the company were sent 10 the outside agencies under gate pass;

(g) the concerned outside agency would carry out the work as per specification and return the goods under Challan:

(h) the goods after the process was carried out and received by the respondent were checked, verified and accounted; (i) the outside agencies would raise invoice/ bills for the services rendered;

(j) the respondent company discharged the invoices/bills by making payment vide Cheque after deducting TDS;

(k) Duplicate copy of TDS Certificates with all relevant particulars of the outside agency concerned established an independent, arms-length principal-to-principal contract.

15. He submits that the bare reading of these documents clearly establishes that the payments made and debited under the Head of Account 'karigar charges' were paid to the outside agencies and not employees within the meaning of section 2(f) of the said Act and the said payment does not constitute basic wages within the meaning of section 2(b) of the said Act.

16. In support of his submission, he relies on judgment in the matter of Sandeep Dwellers Pvt. Ltd., Nagpur v. Union of India, through Secretary, Ministry of Labour, New Delhi and Ors. reported in 2006 III CLR. 748. In that case, this High Court held that for covering the employer under Provident Fund Act, the employee must be shown to be performing the regular work in or in connection with the establishment of the employer. Para 8c of the said judgment reads as under:

C. Another question is whether site workers & contractor's worker can be treated as covered under P.F. Act. Division Bench of Orissa High Court in case between Executive Engineer National Highway Division v. Original Provident Fund Commissioner i.e. 1988 L.I.C. 690 considers the question whether labour working under Contractor can be treated as employees under Section 2(f) of P.F. Act. Both the Hon. judges constituting Division Bench have delivered separate but concurring judgments. However it is to be noticed that here the Works Department of Orissa Government has been held to be not an "industry" under Section 2(j) of Industrial Disputes Act after applying the principles laid down by Hon. Apex Court in MANU/SC/0257/1978 : AIR 1978 SC 548 i.e. Bangalore Water Supply and Sewerage Board v. A. Rajappa. In paragraph 12 of the report it is also found that contractor had not employed employees on behalf of State for execution of work as an agent and agency, if in existence, was only to the limited extent of production of desired result entrusted to such contractor on payment of money. It has been therefore held that there cannot be any element of existence of relationship of employer and employee between the Government on one hand and the employees employed by such contractor on the other. Discussion by other Hon. judge in this respect in paragraph 19 also reveals similar application of mind and result. The Hon. judge has observed that provisions of Act and The Scheme do not appear to be workable in relation to petitioner as the very purpose of getting the work executed through the agency of contractor by the State or other bodies is to avoid the day-to-day complications or botherations of finding out labours, materials and time for day-to-day supervision. However, this Hon. Judge has expressed his unwillingness to enter into detail discussion in relation to Section 2(j) aspect of the matter. The discussion itself shows that ii is basically the question of arrangement or contract between principal employer and such contractor and there cannot be any definite finding recorded without having the facts on record. Both the learned Counsel have relied upon various judgments of Hon. Apex Court to point out the tests evolved to find out the relationship of employer and employee. Some of the cases are already referred to above in the judgment. But in view of recent judgments mentioned below, I find it unnecessary to comment in more detail on this issue. Said judgments are Hon. Apex Court reported at MANU/SC/0100/2004 : AIR 2004 SC 1639 between Workmen of Nilgiri Cooperative Marketing Society v. State of Tamil Nadu, MANU/SC/0893/2003 : 2004 (1) SCC 126: AIR 2004 SC 969 between Ramsingh v. Union of India. It is not necessary to refer to them at length because necessary facts in present case are yet to crystallise.

The first judgment i.e., in case of Nilgiri Cooperative Marketing Society considers the entire case-law in the point and the tests evolved are mentioned from paragraph 34 onwards. In paragraph 35 it is observed:

> 35. In a given case it may not be possible to infer that a relationship of employer and employee has come into being only because some persons had been more or less continuously working in a particular premises inasmuch as even in relation thereto the actual nature of work done by them coupled with other circumstances would have a role to play.

Observations in paragraphs 37 and 38 are also important and they read:

> 37. The control test and the organization test, therefore, are not the only factors which can be said to decisive. With a view of elicit the answer, the Court is required to consider several factors which would have a bearing on the result: (a) who is appointing authority, (b) who is the pay master; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job, e.g., whether, it is professional or skilled work; (g) nature of establishment; (h) the right to reject.

38. With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests wherefore it may be necessary to examine as to whether the workman concerned, was fully integrated into the employer's concern meaning thereby independent of the concern although attached therewith to some extent.

In latter judgment i.e., Ramsingh v. Union of India, (supra) the important observations are in paragraphs 15 and 16:

> **15.** In determining the relationship of employer and employee, no doubt 'control' is one of the important tests but is not to be taken as the sole test. In determining the relationship of employer and employee all other relevant/acts and circumstances are required to be considered including the terms and conditions of the contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole 'test of control'. An integrated approach is needed. 'Integration' test is one of the relevant tests. It is applied by examination whether the person was fully integrated into the employer's concern or remained apart from and independent of it. The other factors which may be relevant are - who has the power to select and dismiss, to

pay remuneration, deduct insurance contributions, organize the work, supply tools and materials and what are the 'mutual obligations' between them (See Industrial Law - Third Edition by I.T. Smith and J.C. Wood - at pages 8 to 10).

16. Normally the relationship of employer and employee does not exist between an employer and Contractor and servant of an independent Contractor. Where, however, an employer retains or assumes control over the means and method by which the work of a Contractor is to be done it may be said that the relationship between employer and the employee exists between him and the servants of such a Contractor. In such a situation the mere fact of formal employment by an independent Contractor will not relieve the master of liability where the servant is, in fact, in his employment. In that event, it may be held that an independent Contractor is created or is operating as a subterfuge and the employee will be regarded as the servant of the principal employer. Where a particular relationship between employer and employee is genuine or a camouflage through the mode of Contractor is essentially a question of fact to be determined on the basis of features of relationship, the written terms of employment, if any and the actual nature of the employment. The actual nature of relationship concerning a particular employment being essentially a question of fact, it has to be raised and proved before an industrial adjudicator. Conclusion Nos. 5 and 6 of the Constitution Bench decision of this Court in Steel Authority of India (supra) are decisive for purposes of this case which read as under: MANU/SC/0515/2001 : AIR 2001 SC 3527."

What is the regular work of the establishment of petitioner will therefore be required to be ascertained first and thereafter how he is parting away with it in favour of any contractor and how he is placed in relation to proposed beneficiary under the scheme i.e., employee will be required to be verified. What is exact role played by such intermediaries will also be important. This will require verification of written contracts if any, other documents in relation to payments, receipts etc. maintained by petitioner, his contractor, sub-contractors, petty contractors. Therefore this again is a question which will have to be answered after scrutinizing the records and evidence made available in an inquiry under Section 7A of P.F. Act. There cannot be any panacea applicable in this respect.

The emphasis according to petitioners is not only on the nature of work but also about joining the establishment of employer which is or which can be covered under P.F. Act. The employee must be shown to be performing the regular work in or in connection with the establishment of employer. However, according to them, that alone has not been, held to be enough and such worker must be shown to have joined such establishment at least for some period and in that case only he can be covered under the 1952 Scheme "from the date of joining". Here it is not in dispute that establishments of the petitioners are already covered under P.F. Act. Question is whether a worker whether on site or otherwise, of petitioner employed directly or indirectly briefly can be treated as part of establishment of petitioner or can he be treated as part of establishment of a contractor who deputes him to said site and if he cannot be associated either with petitioner or such contractor, whether he is to be ignored even though he has performed work of regular nature of establishment of petitioner. This can be found out by applying "control test" or "integration test" as has been laid down by Hon. Apex Court in judgments in case of Nilgiri Cooperative Society (supra) or in case of Ramsingh (supra). It cannot be ruled out that there may be contractors undertaking only specialized jobs like electrification, plumbing, interior decoration etc. and these contractors may simultaneously work on different sites of more than one establishment like that of present petitioners and depute their skilled labour to such sites & rotate them depending upon need. Here, the tests mentioned by Hon. Apex Court above will have to be invoked to find out whether there is employer-employee relationship between petitioner and such worker/employee. But when such employee who frequently changes his employer/contractor and therefore, either himself does not accept an obligation or on whom there is no obligation to report for duty every day, if he can be identified reached, benefit of coverage can be extended to him. Considering human tendency, it is not possible to presume that any worker would generally not like stability or continuity of work. But still if there exist such worker, in absence of proper scheme under P.F. Act to keep his track, it is difficult to establish his identity and to deliver the benefit to him. But then the provisions of Section 2(f) are very clear in this respect and the moment ingredients thereof are satisfied, the worker becomes employee employed for wages in establishment of petitioner and insistence upon some continuity is therefore unwarranted. Therefore, there need not be lasting bond or relationship of employer and employee between parties casting obligation upon employee to report for duty as per directions of/ his employer on next day. By performing work which is of regular nature and of establishment of any of the Petitioners, or other work in connection with such regular work which is routinely available with petitioner, an employee who has so worked even for a single day can be said to have joined his employment and establishment. For said definition-clause "joining" is not a question of intention to be examined in the light of material on record. There may be some difficulty in establishing employee's identity or in making benefits reach to him but that cannot halt the implementation of P.F. Act. Unless and until the P.F. department makes provision like his enrollment with some central board and puts obligation upon all contractors and employers to provide work only to such registered workers, such situation cannot be taken care of. Preparation of any scheme in this respect may be very difficult on account of the very nature of working of system as it is mostly illiterate villagers who come to towns & cities in search of such manual work. Any person ready and willing to work offers himself for such manual work and is hired by needy person or contractor 6b this part of activity of making the work available to employee is neither organized nor regulated by any law. If condition of registration of workers is imposed, a new migrant to city or needy labour may find it difficult to earn livelihood. Not only this, any worker may later work at house of any person for the repairs etc. for doing private work and get paid directly through house owner. In that event he will not be working in any establishment & hence not covered by P.F. Act. The options investigated into by 134 CBT meeting of respondents also assert necessity of taking appropriate steps in this direction. Hence, there is emphasis on identity of worker in cases where evasion of P.F. deduction is detected and past arrears are required to be worked out and recovered. While investigating and examining records of contractors or builders or subcontractors or of petty contractors engaged by Petitioners, the P.F. department in process of identifying the workers may be in position to link a particular worker to any one of them because of continuation of such worker under him for some time. Such worker, if facts support, may then be treated as employee of that establishment (other than that of petitioner) by examining the situation in the light of "integration test" and "control test" on various other factors as laid down by Hon. Apex Court. Then if other conditions are satisfied, such employee may be entitled to coverage from date of joining that establishment. Such particular contractors or builders or sub-contractors or of petty contractors in that event can be made accountable for deductions of such employee/worker or site worker depending upon the agreement between them & Petitioner. Even if this little stability or saving becomes possible for such freelance worker/employee, that will also farther the cause of P.F. Act.

17. On the basis of these submissions and the authority the learned counsel for respondent company vehemently submits that there is no substance in the present Writ Petition and the same is liable to be set aside. There is no question of interfering with the finding of Appellate Authority in Appeal No. AIA 697(9) of 2008.

18. I have gone through the papers and the compilation produced by both the parties and the authority cited by the learned counsel for the respondent company.

19. It is to be noted that admittedly, the respondent company proved that in a proceeding before the Asstt. Provident Fund Commissioner, they produced xerox copies of TDS certificates showing the amount paid by them towards the karigar charges to the company agency or authority, invoices issued by companies and authorities showing that they received the karigar charges of the work done by contractors employee. Though these documents are produced before the Authority, the authority failed to issue summons to these contractors, agencies calling upon them to explain whether the workers who are doing the work with respondent are engaged by them. Even the authority failed to issue summons to these companies, agencies for verifying the facts whether really they undertook the work on piecemeal basis without following the procedure. The Provident Fund Authority passed an order under sections 7A and 7B of the Act holding that the respondents are liable to pay provident fund contribution on karigar charges also. Though the Apex Court in the matter of FCI v. Provident Fund Commissioner and Others reported in 1990 CLR SC 20 held that the Commissioner should exercise all his powers to collect all evidence and collect all material before coming to proper conclusion and that is the legal duty of commissioner. It would be failure to exercise the Jurisdiction particularly when the party to the proceeding request for evidence from a particular person. Inspite of these well settled principles of law, petitioner authority failed to issue summons to the respondents contractor, companies on the basis of xerox copies of TDS certificates and vouchers placed on record by the respondent company to know the genuineness of those transactions. Therefore, it cannot be held that the respondent company failed to produce sufficient evidence on record to enable the authority to carry out investigation calling upon the agencies, companies to whom they were paying karigar charges.

20. Considering the definition of employee and basic wages as defined in the said Act, it is crystal clear from the facts and circumstances of the present case that the amount paid by respondent companies and agencies towards karigar charges, cannot attract payment of provident fund. Even the authority cited by respondent of Bombay

High Court in the case of Sandeep Dwellers Pvt. Ltd., Nagpur v. Union of India, through Secretary; Ministry of Labour, New Delhi and Ors. (Supra), the court categorically held that there must be relationship of employer and employee to attract the provisions of Provident Fund Act.

21. Considering the above mentioned facts and circumstances, I do not find any reason to interfere with the well reasoned order passed by the learned Presiding Officer of Appellate Tribunal in Appeal ATA No. 696(9) of 2008.

22. Hence, petition is rejected. No order as to costs.