IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.10.2011

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THE HONOURABLE MR.JUSTICE K.CHANDRU

W.P.NO.26590 of 2003

and

W.P.M.P.No.32495 of 2003

M.R.F.Ltd.,

Eripakkam Village,

Nettapakkam Commune,

Pondicherry-605 106. .. Petitioner

Vs.

1.The Presiding Officer,

EPF Appellate Tribunal,

New Delhi.

2.The Assistant Provident Fund Commissioner

(Enforcement),

Office of the Regional Provident Fund,

Regional Office, Tamil Nadu Region,

No.37,Royapettah High Road,

Chennai-600 014. .. Respondents

This writ petition is preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorari to call for the records connected with the order dated 17.7.2003 made by the Appellate Tribunal case No.ATA 469(13)/02 on the file of the first respondent confirming thereby the order dated 11.9.2002 made by the second respondent and to quash the order dated 17.7.2003.

For Petitioner : Mr.Sanjay Mohan

for M/s.Ramasubramaniam and Associates

For Respondents : Mr.J.Sathya Narayana Prasad for R-2

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ORDER

The petitioner is the management of M.R.F.Limited having their factory at Eripakkam village, Nettapakkam Commune, Puducherry. In this writ petition, they have challenged the order passed by the Employees Provident Fund Appellate Tribunal, New Delhi, I.e., the first respondent herein made in ATA 469 (13)/02, dated 17.7.2003 confirming the order of the second respondent dated 11.9.2002.

2.The writ petition was admitted on 23.09.2003. Pending the writ petition, this court had granted an interim stay. On notice from this court, the second respondent has filed a counter affidavit dated 24.12.2005. Heard the arguments of Mr.Sanjay Mohan for M/s.Ramasubramanian and Associates, learned counsel for the petitioner and Mr.J.Sathya Narayana Prasad, learned Standing Counsel for second respondent.

3.By an order dated 11.9.2002, the second respondent had held that the petitioner establishment, which is covered by the provisions of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, has to cover the persons who are engaged in the name of apprentices. The order came to be passed on the basis of the report submitted by the Enforcement Officer of PF Department at Puducherry stating that apprentices are covered by the provisions of the EPF Act except those

apprentices who are employed under the provisions of the Apprentices Act, 1961 and those who are appointed under the Standing Order of the establishment. The amendment for including the apprentices came into effect on 1.6.1988. Since the petitioner company did not have any Standing Order certified at that time and in the absence of such Standing Orders, the persons employed by them as apprentices must be covered by the provisions of the EPF Act. The Enforcement Officer also informed that the trade union functioning in the petitioner establishment had complained on 29.9.2001 that more than 250 employees were employed as apprentices for more than 4-1/2 years at their Puducherry unit. Even though they were labelled as apprentices, they have been asked to do independent work beyond normal working hours and they were paid wages and not stipend. Therefore, by virtue of the power conferred under Section 7-A, the second respondent had directed the management to cover the apprentices as members of the provident fund. Challenging the same, the petitioner had filed an appeal under Section 7-I before the first respondent Tribunal.

4.In the appeal, they had stated that the Tyre manufacturing involved several processes and the workers have to work the sophisticated machineries. Hence training for such workers are necessary before they were made as regular workers. The petitioner company had already submitted draft Standing Orders for certification. In the absence of a certified standing order, the Model Standing Orders framed by the appropriate Government will apply in terms of Section 12-A of the Industrial Employment (Standing Orders) Act, 1946. When an enquiry was ordered by the second respondent, they could not appear. Subsequently, they had given the details of apprentices engaged by them. Therefore, they are not covered by the provisions of the EPF Act. The appeal was taken on file as ATA 469(13)/02 by the EPF Appellate Tribunal (R-1).

5.The second respondent has filed a counter statement, dated Nil (November, 2002), to which the petitioner has filed a rejoinder dated 25.2.2003. In the counter statement, the second respondent had contended that it was misnomer to call persons as apprentices since the petitioner union had made a complaint that these workers are made to work beyond 16 to 20 hours and are made to work more than 4-1/2 years. In respect of the Standing Orders, it was stated that there were no certified Standing Orders in the factory and that the model Standing Orders are not applicable on its own violation to any establishment unless they are redrafted and certified by the competent authority. They are not trainees. They are getting wages. Such persons are more than 200 during March 2002. There are only 158 regular workers and another 253 employees are employed through contractors. Since they constitute the major work force, it was misnomer to call them as apprentices.

6.In the rejoinder filed by the petitioner, it was stated that the Model Standing Orders will apply and therefore, the term Standing Orderfound under Section 2(f) will include Model Standing Orders also.

7.The Tribunal held that there are more than 250 people are engaged for more than 4-1/2 years and they are also drawing wages. Further, they are made to work independently even beyond the normal hours of work on over time basis. They are the major work force in the production process of the petitioner factory. Therefore, they cannot be termed as apprentices. Saying so, the appeal was rejected

by the first respondent Tribunal. Aggrieved by the same, the present writ petition came to be filed as noted already.

8.The contention raised by the petitioner was that the Tribunal had failed to appreciate the fact that the Standing Orders provides for engagement of apprentices and the Act excludes the apprentices, if they are either apprentices under the Apprentices Act, 1961 or allowed to be employed under the Standing Orders of the Company. Even earlier the workmen had raised an industrial dispute. As to whether they are trainees or not, the matter was argued before this court. Finally, as against the order passed by the learned Judge, the matter was taken on appeal. In the appeal, an interim stay was granted.

9.The second respondent has filed a counter affidavit, dated 25.12.2005. In the counter affidavit, once again they had re-emphasised that the Model Standing Orders are not applicable and that they did not have their own certified standing orders. Therefore, the apprentices engaged by them are also employees under Section 2(f) of the EPF Act.

10.The first question that arises for consideration by this court is whether the respondents were right in stating that the model standing orders applicable to the petitioner establishment at Puducherry can be taken as the standing order referred to in Section 2(f) of the EPF Act so as to exclude the apprentices engaged by them from the coverage under the Act?

11.It must be noted that the Standing Order submitted by them for certification was still pending at the time when the impugned order came to be passed. Section 12A of the Industrial Employment (Standing Orders) Act, 1946 contains a non obstante clause wherein and by which it is stated as follows:

12A.Temporary application of model standing orders.- (1)Notwithstanding anything contained in sections 3 to 12, for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending with the date on which the standing orders as finally certified under this Act come into operation under section 7 in that establishment, the prescribed model standing orders shall be deemed to be adopted in that establishment, and the provisions of section 9, sub-section (2) of section 13 and section 13A shall apply to such model standing orders as they apply to the standing orders so certified. (Emphasis added)

12.The Central Government had also framed the Industrial Employment (Standing Orders) Central Rules, 1947 by an order dated 18.12.1946. Under Rule 1(2), the Standing Orders are made applicable to Union Territories. Admittedly, the petitioner establishment is having their factory at Puducherry and are covered by the Model Standing Orders framed by the Central Government till such time the certification is done in respect of their establishment.

13.Mr.Sanjay Mohan, learned counsel appearing for the petitioner submitted that subsequently the Standing Orders have been certified in respect of the petitioner establishment on 11.6.2003

permitting to keep them for 42 months as apprentices. The Model Standing Orders framed by the Central Government under Schedule I defines the term apprenticeunder MSO 2(g), which reads as follows:

(g)An apprenticeis a learner who is paid an allowance during the period of his training.

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 Ordersof 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 employeeas per Section 2(f) of the Act.

16.But, significantly, the Model Standing Orders did not provide any fixed period for engagement of apprentices. The Model Standing Order 2(g) framed by the Tamil Nadu State Government provides for maximum of three years for engaging the apprentices. Therefore, the petitioner management cannot be heard to contend that they have unlimited right of engaging the services of workers in the garb of apprentices. The authority constituted under Section 7-A of the EPF

Act has got power to go behind the term of appointment and to find out whether they were really engaged as apprentices. The authority under Section 7A can go behind the term of appointment and can come to a conclusion whether the workmen are really workmen or apprentices. Merely because the petitioner had labelled them as apprentices and produces the orders of appointment, that will not take away the jurisdiction of the authority from piercing the veil and see the true nature of such appointments.

17.This Court in Management of Reynolds Pens India Pvt. Ltd. Vs. The R.P.F.C.-II and another reported in 2011 Writ L.R. 549 dealt with the scope of the power exercised under Section 7A of the EPF Act and in paragraphs 32 and 33, it was observed as follows:

32.The said judgment of the Supreme Court was quoted and followed by the Bombay High Court in Gosalia Shipping Pvt. Ltd., Goa and another Vs. Regional Provident Fund Commissioner, Goa and another reported in 1997-II-LLJ 38 (Bom). In paragraph 11, the Bombay High Court had observed as follows:

"11....This Judgment of the Apex Court should conclude the matter. Therefore any settlement and the Award between the parties cannot be binding on an Authority under the Act who can arrive at a conclusion based on all materials available including settlements if any produced before him."

33.The question as to the authority under Section 7A can go into the question as to whether certain items can come within the term "basic wags" and he can lift the veil to determine the issue has also been considered by the Supreme Court in Rajasthan Prem Krishan Goods Transport Co. Vs. Regional Provident Fund Commissioner reported in (1996) 9 SCC 454. The Supreme court in paragraph 6 of its judgment had observed as follows:

"6....Now, this finding is essentially one of fact or on legitimate inferences drawn from facts. Nothing could be suggested on behalf of the appellant as to why could the Regional Provident Fund Commissioner not pierce the veil and read between the lines within the outwardliness of the two apparents. No legal bar could be pointed out by the learned counsel as to why the views of the Regional Provident Fund Commissioner, as affirmed by the Central Government, be overturned."

18.Further this court vide its judgment in Sree Mangaiyarkarasi Mills (P) Ltd. Vs. The Assistant Provident Fund Commissioner and others reported in 2011 (1) CTC 851 has held that in case of apprentices who were paid bonus, the management cannot be heard to contend that he is not a worker. In order to get over the said decision, Mr.Sanjay Mohan contended that the fact that the petitioner are paying over time wages to their apprentices will not make them non apprentices. Under the Factories Act, they are bound to pay over time wages to whoever is engaged in the production line beyond normal working hours. But, in the present case, the finding of the authority is not only based upon payment of over time wages alone, but the authority's order as confirmed by the Tribunal clearly states that substantial section of workers are employed as apprentices and they are engaged in production line.

They were also paid over time wages as monthly salary and not stipend. It is misnomer to call them as trainees. This finding of fact recorded on the basis of the report of the Enforcement Officer as accepted by the Assistant Provident Fund Commissioner and confirmed by the EPF Appellate Tribunal cannot be interfered with by this court under Article 226 of the Constitution. Hence there is no case made out.

19.One other point that must be noted is in such matters it should not be left to the petitioner management preferring an appeal and contending that certain persons employed by them are not employees under Section 2(f) of the EPF Act. In such cases, the workmen concerned also should be made parties either indirectly or their union must be heard on the issue. This is especially when a Trade union in the petitioner had made complaint to the authorities about the non coverage of the so-called apprentices. In this context, it is necessary to refer to a decision of the Supreme Court which arose under the ESI Act. The Supreme Court in Fertilizers and Chemicals Travancore Limited v. Regional Director, Employees' State Insurance Corporation reported in (2009) 9 SCC 485 in paragraphs 7 to 10 had held as follows:

7.The rules of natural justice require that if any adverse order is made against any party, he/she must be heard. Thus if a determination is given by the Employees' Insurance Court that the persons concerned are not the employees of the petitioner, and that determination is given even without hearing the persons concerned, it will be clearly against the rules of natural justice. It may be seen that Section 75 of the Act does not mention who will be the parties before the Insurance Court. Since the determination by the Insurance Court is a quasijudicial determination, natural justice requires that any party which may be adversely affected or may suffer civil consequences by such determination, must be heard before passing any order by the authority/court.

8.In our opinion, wherever any petition is filed by an employer under Section 75 of the Act, the employer has not only to implead ESIC but has also to implead at least some of the workers concerned (in a representative capacity if there are a large number of workers) or the trade union representing the said workers. If that is not done, and a decision is given in favour of the employer, the same will be in violation of the rules of natural justice. After all, the real parties concerned in labour matters are the employer and the workers. ESI Corporation will not be in any way affected if the demand notice sent by it under Sections 45-A/45-B is quashed.

9.It must be remembered that the Act has been enacted for the benefit of the workers to give them medical benefits, which have been mentioned in Section 46 of the Act. Hence the principal beneficiary of the Act is the workmen and not ESI Corporation. ESI Corporation is only the agency to implement and carry out the object of the Act and it has nothing to lose if the decision of the Employees' Insurance Court is given in favour of the employer. It is only the workmen who have to lose if a decision is given in favour of the employer. Hence, the workmen (or at least some of them in a representative capacity, or their trade union) have to be necessarily made a party/parties because the Act is a labour legislation made for the benefit of the workmen.

10.In the present case the workmen concerned were not made parties before the Employees' Insurance Court, nor was notice issued to them by the said court. Also, the order of the Employees' Insurance

Court dated 4-2-1993, relevant portion of which we have quoted, is not a very happy one as no proper determination has been made therein as to whether the workmen concerned are the employees of the appellant and whether they are entitled to the benefit of the Act.

Therefore, in the absence of the workmen being made as parties the writ petition filed by the petitioner is liable to be rejected on this ground also.

20.Accordingly, the writ petition will stand dismissed. No costs. Consequently connected miscellaneous petition stands closed.

18.10.2011

Index : Yes

Internet : Yes

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To

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(Enforcement),

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