



BOMBAY HIGH COURT
Hon'ble Mr. R.J. Kochar, J.
O.O.C.J. Writ Petition No. 379 of 1996
Decided on 14.3.2001

Gain Financial Consultants (Pvt.) Ltd. Bombay
vs.
Regional Provident Fund Commissioner, Bombay & Ors.

A. EMPLOYEES' PROVIDENT FUND AND MISCELLANEOUS PROVISIONS ACT, 1952 . Section 2(f), 'Employee' meaning of and section 7 A Determination of moneys due from an employer - Petitioner disputed its coverage under the Act from 1.5.1982 to January, 1986 on the ground that there were 17 employees during the said period whereas 4 persons were not employees but were working as consultants to render their expert services interviewing persons to be recruited by the petitioner - Hence these four persons cannot be Included for coverage of an establishment under the Act - The High Court held that the four persons (so called retainers) were employed for wages for the work of petitioner's establishment - All the components of 'employee' are present in their engagement and that as such they are employees of the petitioner - The petitioner was rightly covered under the Act. Para 3.

HELD

The retainers were working continuously every day for a considerable period. They were paid on vouchers a determined fee. They did not have their own establishment but they were required to move around whole day for the work of the petitioner's establishment. Para 4.

B. WORDS & PHRASES - Petitioners engaged for providing consultancy services - Will be treated employees under the Employee's Provident Fund & Miscellaneous Provisions Act, 1952.

CASES REFERRED:

- *Employees' State Insurance Corporation v. P.K. Mohammed (Pvt.) Ltd., 1995 (2) LLN 1208: 1996 LLR 108 (Ker. HC).*
- *Food Corporation of India v. The Provident Fund Commissioner & Ors., 1990 I CLR 20: 1990 LLR 64 (SC).*
- *M/s. Satish Plastics v. R.P.F. Commissioner, 1981 (2) LLJ 277 (Guj. HC).*

For Petitioners: Mr. K.M. Naik i/b M/s. Salgoonkar and Co.

For Respondent: Mr. H.V. Mehta, Advocate.

ORAL ORDER

R.J. KOCHAR, J: - 1. The petitioners have challenged three orders passed by the respondent, Provident Fund Commissioner dated 16th April 1992, 4th July, 1995 and 13th October 1995. The order dated 16th April passed by the competent authority pertains to an enquiry under Section 7(A) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short the Act), after issuing due notice to the petitioners. The enquiry was started after the visit by the enforcement Inspector to the establishment of the petitioner, between the period 1985 to 1986. From the report submitted by the enforcement inspector, it appeared to the authorities that the establishment had employed more than 19 employees in the month of April 1982 i.e., 17 regular employees and three retainers. On the basis of the aforesaid report of the enforcement inspector, the petitioners were summoned to appear before the competent authority on 12th February 1987 for enquiry under Section 7(A) of the Act. It appears from the affidavit and record that several opportunities were given to the petitioner establishment and it also appears that petitioners had appeared and produced documents in support of their case. Finally on the basis of the record, the petitioners establishment was held to be covered by the Act from 1st May, 1982 to January 1986. It may be clarified at this stage that the petitioners have voluntarily accepted the coverage from February 1986 onwards but they have disputed the coverage from the 1st May, 1982 till January 1986. 2. The main contention of the petitioners



is that in all there were 17 employees employed by them during the relevant period and therefore, they were not liable to be covered. There is no disputes that during that period there were four persons working for the petitioners as "retainers" viz., Shri R.C. Pres, Shri D. Bhatt and Ms. C. Shroff and Ms. B. Gazdar. Shri Naik, the learned Counsel for the petitioners, has fairly conceded the position that during the relevant disputed period of coverage, there were 17 regular employees and four persons who were appointed as retainers or consultants to work for the company. The learned Authority has given the details of such employment in its order in paragraph 8.4.3. It is revealed from the said undisputed record that all the aforesaid four persons were in fact doing the work of the company for reward or wages. They were paid monthly remuneration on vouchers. The period of such work by them is from April 1981 March 1983, from April 1982 to March 1983, from October 1982 to March 1983 and from July 1981 to March 1983 respectively. According to Shri Naik, though the aforesaid persons were working for the petitioner company, they were not regular employees employed by the company but they were only working as consultants to render their expert services of interviewing the persons to be recruited by the petitioners. Shri Naik has further submitted that these four retainers were not paid any other benefits which were paid to the other regular employees and therefore, according to Shri Naik, they cannot be excluded as regular employees of the petitioners company to cover its establishment under the Act.

3. On the other hand, Shri Mehta, the learned Counsel for the respondents has submitted that the petitioners were given sufficient opportunity and hearing before they were covered under the Act. Shri Mehta has pointed out from the record that the petitioners had attended the hearing before the authority and had also produced documents which were considered by the competent authority. Shri Mehta has further pointed out that being aggrieved by the first order dated 16th April 1992 the petitioners had filed a review application. The authority reviewed its order once again and dismissed the review by its order dated 4th July 1995 after considering the record afresh. The third impugned order appears to be the demand notice dated 13th October, 1995 which is as a result of the order passed under Section (7-A) of the Act. Shri Mehta has, therefore, submitted that the grievance of the petitioner that no hearing was given to them is totally baseless. Shri Mehta has further submitted that the so-called retainers were included as the employees of the petitioner company as they were employed by the petitioner company for its regular work and therefore, under the definition of the employee they could not be included from the coverage of the Act. Shri Mehta has further relied upon a judgment of the division bench of Gujarat High Court in the case of *M/s. Satish Plas tics v. R.P.F. Commissioner*, reported in 1981 (2) LLJ 277. Justice Thakkar (as he then was) has analysed the definition of the employee and has held that the definition is wide enough to keep within its sweep a person permitted to work at his own residence as well and that there was no bar under the definition to work outside the premises of the establishment. The division bench has disregarded the label put by the employer and has laid down the following tests to be applied to answer the question whether the person employed was an employee or not as follows: -

(i) Was he doing the work for monetary payment?

(ii) Was the work done by him the work of the establishment or had a nexus with such work?

(iii) Was the payment made wages, in the sense of being remuneration for the physical or mental effort in connection with such work?

(iv) Was the work such that it had to be done as directed by the establishment or under its supervision and control to the extent that super vision and control are possible having regard to the specialized nature of the work or the skill needed for its performance?

(v) Was the work of such a nature and character that ordinarily a master-servant relationship could exist and but for the agreement styling it as a contract common practice and common sense would suggest a master-servant bond?

(vi) Was the relation indicative of master-servant status in substance having regard to the economic realities irrespective of the nomenclature devised by the parties?

(vii) Was he required to do the work personally without the liberty to get it done through some one else?

The division bench has further concluded as under: -

"Thus a master-servant relationship exists and parties cannot make it a different relationship by applying the label of contract. An employee called by any other name remains an employee for the juridical relationship does not depend on the nomenclature devised in order to defeat the law. And law will not countenance as slap in its face by its non-respectors who choose to flout it by disingenuous and circuitous devices. If entry is prohibited, it is prohibited, regardless of whether one effects it through the front door or the back



door. We are, therefore, of the opinion that the Regional Provident Fund Commissioner was perfectly justified in negativeing the plea that Natverlal was not an employee within the meaning of S. 2(f) of the Act. The first contention urged on behalf of the petitioner firm must, therefore, be repelled".

I am in respectful agreement with the ratio laid down by the learned Judge of the Gujarat High Court. The definition of the employee is crystal clear to include even the so-called retainers of the petitioners company. All the components of employee are present in the engagement of the retainers. They were employed for wages for the work of the establishment. The learned Authority has reproduced the appointment orders while considering the case of the so-called relationship. Even from the said appointment order, it is very clear that their employment cannot be excluded from the definition of the employee.

4. Shri Naik has relied upon the following judgment in support of his contention: -

(i) 1995 (2) LLN 1208 : 1996 LLR 108 (Employees' State Insurance Corporation v. P.K. Mohammed (Pvt.) Ltd.)

(ii) 1990 I CLR 20 : 1990 LLR 69 (SC) (Food Corporation of India v. The Provident Fund Commissioner & Ors.)

In the case of Employees' State Insurance Corporation, the facts before the division bench of the Kerala High Court were totally different. The persons who were engaged by the establishment for their consultancy services were not roaming around for their work but the employers were approaching them in their office to get their consultation. Those consultants have their own independent establishment. In these circumstances, the Kerala High Court has held that such consultants could not be called employees. **In the present case, the petitioners have engaged the retainers continuously every day for a considerable period. They were paid on vouchers a determined fee. They did not have their own establishment but they were required to move around whole day for the work of the petitioner's establishment.**

5. In the case of Food Corporation of India, (supra) the facts and the ratio of the judgment are totally different from the facts in the present case. It does not, therefore, in any way assist Shri Naik.

6. I, therefore, do not find any merits or substance in the petition. The same is therefore, dismissed with no order as to costs. Rule is discharged.

If you have any questions, feel free to reach out on WhatsApp – Jay Shah – +91 9167121333

Reference - LLR