

(2012) 09 MAD CK 0211

Madras High Court

Case No: Writ Petition (MD) No. 9407 of 2012 and M.P. (MD) No. 1 of 2012

Vannan Pottavllal, Handloom
Weavers' Co-op. Society Ltd.

APPELLANT

Vs

Presiding Officer, Employees'
Provident Fund Appellate
Tribunal and Others

RESPONDENT

Date of Decision: Sept. 17, 2012

Acts Referred:

- Constitution of India, 1950 - Article 43
- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 7(A), 7(O)
- Tamil Nadu Co-operative Societies Act, 1983 - Section 1(3), 16, 2(22), 21, 23

Citation: (2013) 1 LLJ 241 : (2013) LLR 34

Hon'ble Judges: Vinod K. Sharma, J

Bench: Single Bench

Advocate: P. Chandra Bose, for the Appellant; V.S.V. Venkateshwaran, Advocate, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Vinod K. Sharma, J.

The petitioner has approached this Court with a prayer for issuance of a Writ in the nature of Certiorari, to quash the interim order ATA No. 113(13) 2003, directing the petitioner to deposit 25% of the ordered amount of Rs. 37,67,836 as pre-deposit u/s 7(O) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, dated 31.5.2012. The petitioner is a Co-operative Society registered under the Tamil Nadu Co-operative Societies Act. The Assistant Provident Fund Commissioner issued a notice to the petitioner calling upon them to deposit contribution of provident fund by treating the members of the Society to be the workers.

2. In response to the notice by the Assistant Provident Fund Commissioner, the petitioner took a stand that the members of the Society cannot be treated to be employees covered under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The Assistant Provident Fund Commissioner rejected the plea by holding that the members of the Society are employees, therefore, covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

3. The petitioner, being aggrieved by the order passed by the Assistant Provident Fund Commissioner, availed the remedy of statutory appeal before the Employees' Provident Fund Appellate Tribunal.

4. The petitioner also moved an application for exemption to deposit the amount u/s 7(O) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, due to the financial constraint, and also for the reasons that the impugned order was prima facie without jurisdiction, as it imposed the liability on the petitioner with regard to the weavers, who are the members of the Society and not its employees.

5. The request of the petitioner has been partly declined, the appeal was ordered to be entertained subject to deposit of 25% of the amount determined.

6. The learned counsel for the petitioner challenged the impugned order, primarily on the ground that besides the fact that the petitioner is not in a position to deposit the huge amount of 25%, the impugned order is prima facie not sustainable in law, as the Assistant Provident Fund Commissioner wrongly held the members of the Society to be the employees, though they are the members constituting a Society and entitled to share in profit, who not the paid employees of the Society.

7. In support of his contention, the learned counsel for the petitioner placed reliance on a judgment of the Hon'ble Division Bench of this Court in Q 793, Madathupatti Weavers Co-operative Production and Sales Society, Ltd., (represented by its [Q-793, Madathupatti Weavers Co-operative Production and Sales Society Ltd. Vs. Regional Provident Fund Commissioner and Others](#)), wherein, it has been held as under:

18. On merits, it is submitted that the appellant weavers co-operative society formed on the basis of one for all and all for one as a co-operative movement for the purpose of producing and selling the finished cloth. The members of the co-operative society cannot be construed as "employees" and the society also in turn cannot be construed as an "employer" and there is no such relationship between them. In the affidavit, it is stated that the society do not have looms of their own. The members, who are weaving through their own looms in their respective houses, are provided with yarn and they take yarn to their houses and they weave in their looms and bring it to the society as finished cloth. According to them, amount is paid for the cloth produced by them and there is no employer and employee or master and servant relationship between the members and the society. The society employed eight persons as their staff to maintain their records and other connected

work. All the members of the society are shareholders and they formed the Board of Management. They elect the President and Vice-President among themselves. They share the profits, if any, among themselves. Besides, it is stated that all shareholders, who are members do not get yarn regularly and weave the cloth, nor is there any time frame work. The society also does not exercise any supervising control over them.

19. The specific averments made in the affidavit are not denied in the counter-affidavit. Paragraph 4 dealing with this point states to the effect that the society has admitted that they supplied the raw materials to the weavers, who returned the finished goods back to the society. Thus, according to the counter, weaver workers were engaged in the business of the appellant society. They did weaving for the society and the society supplied yarn and paid the wages after receiving the finished cloth and sold them. There is no finding with reference to the nature of transaction except stating that the workers are doing business of the society.

20. Co-operation means work together. But, in law, it has a specific meaning of "working together". The co-operative movement has a history of social development and weavers societies have a role in the freedom movement of our country for self-reliance in the production and distribution of the textile needs of our country. The law relating to co-operative and credit is regulated. Article 43 of the Constitution of India as one of the Directives mandates the State of endeavour to promote cottage industries on an individual or co-operative basis in rural areas. The respondents have not applied the basic issues involved prior to or during the determination. There appears to be an undue haste, lack of openness in consideration with fair opportunity and to cover the society under the Act.

21. The Tamil Nadu Co-operative Societies Act, 1983 for short "Societies Act" is a consolidated law for making provisions for organisation, management and supervision of co-operative societies in Tamil Nadu. The object is to provide for orderly development of co-operative movement in accordance with co-operative principle such as open membership, democratic management,...distribution of surplus...self help and mutual aid...so as to bring about improvement in better method of production...a weaver society has been defined u/s 1(3) of the societies Act as follows:

Registered society which has its principle object the production of handloom cloth or fabrics or cloth through, or with the help of its members and marketing the same and includes any registered society which has as its principal object the provision of facilities for the operation of a weavers society.

A member means a person joining in the application and a person admitted to membership. Thus a member of co-operative weaver society joins with the object of production and with its help to market the same. There is a marked and clear

distinction between a member and a staff or worker of the society. Section 16 empowers the Registrar to classify the societies with reference to the objects, membership, etc. Section 21 of the Societies Act deals with the qualification of membership of society provided he/she does not suffer the disqualification u/s 23 of the Societies Act. One of the disqualification factors is paid officer or servant of society. Chapter VIII deals with paid officers and servants of the society including appointment, removal set. Rule 14 of the Tamil Nadu Co-operative Societies Rules, 1988 deals with conditions of service of paid officers and servants of societies. Therefore, if the members are paid employees, they would have been (covered under the relevant provisions of the Societies Act and procedure for employment service conditions should have been followed. In a weavers society of this nature, there is very little (sic) scope of members becoming as workers, unless otherwise proved. Members carrying on weaving may also be doing the connected business of the society, but that will not be sufficient to say that they are the employees of the society.

22. The Supreme Court in [Regional Director, Employees" State Insurance Corporation, Trichur Vs. Ramanuja Match Industries](#), dealing with the E.S.I. Act held that in order that some one may be an "employee" within the definition, he has to be employed for wages. The concept would bring in a contract of employment. The position of a partner qua the firm is not that of master and servant or employer and employee which concept I involves an element of subordination, but that of equality. Though the Supreme Court dealt with the case of partnership firm in order to bring a partner as an employee, there must be a contract of employment and mere payment of remuneration would not be sufficient to bring the status of an employee. In the same judgment, it is held that though the provisions of the Employees" State Insurance Act is beneficial statute, it has to be liberally construed, the Court cannot travel beyond the scheme of statute.

23. The Supreme Court in [Food Corporation of India Vs. The Union of India and Others](#), dealing with the question whether headload workers engaged by contractor in loading and unloading operations at Railway Station are employees of Food Corporation of India, held that there must be an agreement which will show that the appellant was the real employer of the headload workers through contractors.

24. Justice Sri K.G. Balakrishnan (as he then was) speaking for the Division Bench of the Kerala High Court in [E.S.I. Corporation Vs. Vattiyoorkavu H.W. Co-operative Society](#), , has after going through the definition of employees in the Employees" State Insurance Act went into the crucial point whether any wages paid to the members of the society, found that by the nature of the functioning of the society, it appears all the members of the society share the profit according to the quantity of the finished products and the price of the yarn is collected from the members. It cannot be said that the members of the society were working as employees and were earning therefrom. It was found that members of the society are not workers

of the society; that they were self-employed and that they share the profits and therefore, the Employees' State Insurance Act will not cover them.

25. A learned Judge of the Punjab and Haryana High Court in [Punjab Khadi Mandal Vs. The Regional Provident Fund Commissioner and Another](#), has, held that under similar circumstances, there is no master and servant relationship in that case, the Mandal is an institution with the object of promoting Khadi and in order to fulfill the object, cotton yarn is provided to the weavers and then they come to the contractor. The weavers take the raw material and prepare the Khadi cloth and return the Khadi cloth to the society, which pay the remuneration to the weavers on the basis of the work done by them. The Regional Provident Commissioner held that the weavers are working in connection with the work of the establishment and therefore, they are covered under the Act. The learned Judge, after considering the definition and provisions, held that from a combined reading of Rules 2(a) and 2(f), it is clear that there must be relationship of master and servant between the employer and the employee. Unless the requisite control of the master over the servant is there, the relationship of master and servant cannot be said to be existing. They are not compelled to take the yarn and to do the work. It is entirely the discretion of the members and the weavers to offer to work. There is no evidence to show any kind of supervision or control. The learned Judge distinguished the judgment in [P.M. Patel and Sons and Others Vs. Union of India \(UOI\) and Others](#), that the test for determining the relationship of master and servant lay in 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 that servant was to do but also the manner in which he should do it. The significant feature of the judgment lies in the observation of the Supreme Court in [Shri Birdhichand Sharma Vs. First Civil Judge Nagpur and Others](#), that in the case of beedi industry, the right of rejection of beedies if they did not come up to the proper standard was evidence of supervision and control exercised by the manufacturer. But, in the present case, there is no question of rejecting of the cloths or supervision over the weavers and there is no question of compelling them to do the work. Further, the society is a non-profitable organisation to help the poor weavers to have their own cotton loom in their own houses and share their profits through a co-operative venture. We, therefore, agree with the view taken by the learned Judge in relation to the relationship of the members with the society.

26. A Division Bench of the Kerala High Court in [Regional Director, E.S.I. Corporation Vs. Sarathi Lines \(P\) Ltd.](#), has held that merely because it is legally possible for a Director or Managing Director to function in the capacity of an employee, it does not mean that in all cases a Director or Managing Director who receives remuneration has necessarily to be treated as an employee. It has to be established that either under the provisions of articles of association or of separate agreement there was contract of employment between the company and the Managing Director or the Director. In our case, admittedly, there is no contract pleaded or evidence produced to show that there is employer and employee relationship.

27. A Division Bench of our High Court in [South India Surgical Company Vs. The Regional Director, Employees" State Insurance Corporation, Madras-34](#), dealing with the coverability of E.S.I. Act, held that it has been seen whether the appellant was exercising any supervisory control over the workers or they were operating as an independent contractor and it was further held that the contractual relationship is a sine qua non-for holding that there is a relationship between the employer and the employee.

28. On behalf of the respondent, a reference was made to the judgment of a Division Bench of the Kerala High Court in [Kunnathunad C.C. Coop. Society Vs. Regional Director, ESIC](#), . That was a case where the society itself engaged in the manufacturing process employing its own members for wages. That society is distinct from its members. Hence, the society employing its members for wages in the manufacturing process is liable to be covered under the Act. In that case, the members work in the premises of the society for the wages paid by the society and in the light of expression "wages" u/s 2(22) of the Act to mean all remuneration paid by the society being distinct legal entity from its members and of the members work for wages for the society, they are employees. There is no such finding with materials in our case.

29. Yet another reference was made to the judgment of a Division Bench of our High Court in [Madras Government Servants Co-operative Society Ltd., Madras Vs. Employees" State Insurance Corporation, Madras](#), where a question arose whether a co-operative society engaged in financing its members would be a "shop" and would come within the meaning of the E.S.I. Act. This judgment has no application to the facts of the present case.

30. In [Pondicherry State Weavers" Co-operative Society Vs. Regional Director, Employees" State Insurance Corporation, Madras](#), a Division Bench of our High Court held that there is no bar for the society employing its members and there being a contract of an employment between the society and its members, then the members so employed should be taken to have two independent capacities, one as a member of the society and the other as an employee of the society. Under these circumstances, the Division Bench has held that there can be a contract of employment which is established in that case.

31. The judgment of the Supreme Court in [P.M. Patel and Sons and Others Vs. Union of India \(UOI\) and Others](#), , is a case where workers were employed in the business of manufacture and sale of beedies, there is a control and supervision retained by the employer. The Supreme Court held that the home workers received the raw materials, roll the beedies at home and deliver them to the manufacturer subject to the right of rejection clearly shows the requisite degree of control and supervision for establishing the relationship of master and servant between the home workers and the manufacturers. That is not the case here. On the contrary, it is pointed out that the members of the society have their own looms in their residence and they do

their work along with their family members and there is no supervision and time frame work, etc. There is absolutely no question of master and servant-relationship between the members and the society.

8. The Writ Petition is opposed by the learned counsel appearing on behalf of the fourth respondent on the following submissions:

It is submitted that this petitioner is filing petition one after another since 1997 onwards, deliberately to drag on the proceedings. It is submitted that the para C of para 2 is not at all correct. It is submitted that since the establishment was engaging more than 300 employees it was covered under this Act from 13.10.1997 onwards. It is submitted that a due enquires proceedings was conducted and 7A orders has been passed on 3.12.1997 to pay a sum of Rs. 37,67,836 with the total knowledge of this petitioner and the submissions of the handloom officer cum Secretary of the establishment. It is submitted that after passing of the 7A order this petitioner has filed one Revision petition, which was not in legal format and without any evidence to prove the facts. Therefore, the Revision had to be rejected. It is submitted that thereafter the petitioner has filed one writ petition before Hon"ble High Court of Madras in W.P. No. 8324/98 which was also dismissed on 27.12.2002 with a liberty to file the statutory appeal before the Appellate Tribunal.

It is submitted that the petitioner accordingly has also filed Appeal before the Appellate Tribunal and that appeal has also been dismissed for non-prosecution, the petitioner deliberately have failed to prosecute the same. The failure of the Appeal before the Appellate Tribunal by the petitioner under 7(I) of the EPF Act is due to the purposeful and callous attitude of the petitioner. The Hon"ble Tribunal also has held its finding as to the nature of the petitioner "is not interested to pursue the case". In this matter though the petitioner has received notice on 13.5.2003 for a hearing on 22.7.2003 the petitioner establishment deliberately have failed for the appearance and canvassing the same before the Tribunal. The reason set forth by the petitioner that his counsel has expired is not a valid ground for non-conducting of the case before the Tribunal.

It is submitted that this petitioner thereafter has filed one writ petition before the Hon"ble Madurai Bench of Madras High Court in W.P. No. 4069 of 2011 and this Hon"ble Court was pleased to allow the writ petition by permitting the petitioner to file Appeal before the Appellate Tribunal by condoning 2 years period of time taken by this petitioner.

It is submitted that the Para F of 2 is also not at all correct. The Hon"ble Tribunal at the initial stage need not look into various aspects of the case. It is submitted that for each and every appeal "the pre deposit is a mandatory one and this Tribunal is empowered for a claim of 75% but in this case this Hon"ble Tribunal has directed only 25% as a pre-deposit and the 25% of the pre-deposit is very correct and it is legally sustainable. The various points raised by the petitioner have to be looked

into only at the final decision of the Appeal.

It is submitted that the various citations referred by the petitioner is not at all applicable to this present case.

It is submitted that the petitioner can not blow hot and cold at the same time. This Tribunal was pleased to condone the delay and has admitted the Appeal and further, the Tribunal has also stayed the operation of the impugned order also. It is submitted that while accepting the interim orders it is highly mandatory on the side of the petitioner to abide by the order on its full. Hence, this petitioner is estopped from accepting the half of the order and not accepting the remaining half of the order. It is submitted that the various grounds raised by the petitioner is also not at all correct and it is also liable to be dismissed.

9. It is true that this Court in exercise of Writ jurisdiction does not normally interfere with the discretionary order passed by the quasi-judicial authority, but, at the same time, the exercise of writ jurisdiction is not a complete bar, when the order under challenge is patently arbitrary and shows non-application of mind.

10. It is a case where the third respondent has passed an order u/s 7(A), by going into the facts and recorded a totally arbitrary finding that a member of the Society is to be treated to be an employee, in the absence of any proof of wages or salary being paid to him.

11. The Employees' provident funds are only applicable to the employees appointed by the Society and not to the members of the Society, who, in fact, are the owners of the Society holding share in the Society.

12. It is held by this Court that the member of a Society merely because of his capacity as member cannot be said to be an employee. The order of the third respondent, therefore, suffers from patent illegality on the face of it. Therefore, this was a fit case where the first respondent should have permitted the petitioner to file an appeal without pre-deposit.

13. Consequently, the Writ Petition is allowed, and the impugned order is set aside. The first respondent is directed to decide the appeal on merits without insisting on any deposit.

14. It is made clear that the observation made in this order is only a prima facie view and may not be taken to be the final opinion on the merits of the case. The appellate authority shall be free to decide the case on merits and in accordance with law, without reference to observations of this Court. Consequently, the connected miscellaneous petition is closed. No costs.