Automotive And Allied Industries Pvt. ... vs Regional Provident Fund Commissioner ... on 16 December, 1993

Equivalent citations: (1990)95BOMLR740, [1994(68)FLR642], (1999)IIILLJ165BOM

JUDGMENT

M.L. Pendse J.

1. The appellant company was incorporated on January 23, 1948 and the founder members were D. S. Kalyanpur and his two brothers J. S. Kalyanpur and Original respondent No. 2 S. S. Kalyanpur. One Ambala Patel was also a founder member but retired in the year 1954. D. S. Kalyanpur was Governing Director of the company till his demise in the year 1956. The entire share holding of the appellant company was held by the members of Kalyanpur family. The registered office and Bombay Sales Office of the company is situated in Bombay. In the year 1950 the company opened a branch office at Madras and original respondent No. 2 was appointed to manage the affairs of Madras office. The company also set up a factory at Lonavala to manufacture grease nipples, grease guns, oil guns etc., and the distribution of these articles in the Southern States i.e. Tamil Nadu, Andhra Pradesh, Karnataka and Kerala was entrusted to original respondent No. 2 In addition to being a director and in control of the company, original respondent No. 2 entered into an agreement with the company whereby original respondent No. 2 was shown as an employee entitled to draw a monthly remuneration of Rs. 450/- with effect from August 1, 1957. It is not in dispute that in addition to the salary respondent No. 2 was entitled to a commission of 2% on the annual net sales of the Madras Branch of the company. The agreement of employment was terminable by three months' notice in writing by the other party. Though the agreement was to remain in operation for a duration of one year, the agreement was neither renewed nor terminated.

2. In or about year 1976 difference arose between respondent No. 2 and other Directors of the company and in pursuance thereof on December 15, 1976 the company addressed a letter calling upon respondent No. 2 to resign as a Director. The company also served three months' notice upon respondent No. 2 and terminated appointment as a Director in charge of Madras office. Respondent No. 2 on December 31st, 1976 instituted Suit No. 27 of 1977 in the City Civil Court, Bombay, against the company to challenge the removal as a Director and termination of service as a Director in charge of Madras office. Another Suit being Suit No. 306 of 1977 was filed on January 20, 1977 for a mandatory injunction requiring the company to register the transfer of certain shares from the name of respondent No. 2 to the names of his three sons. During the pendency of the suits, the parties reached compromise and consent terms were drawn on March 2, 1977. The consent terms inter alia provided that respondent No. 2 ceased to be a Director of the company and so also the shareholder. Respondent No. 2 gave up his claim to be a Director in charge of Madras office. The company agreed to pay to respondent No. 2 Rs. 15,000/- towards gratuity and in addition a sum of Rs. 10,000/-. The company also agreed to pay pension at the rate of Rs. 750/- per month. In addition the company agreed to pay Rs. 4850/- being the amount of salary, conveyance allowance

and house rent allowance, Rs. 1500/- towards the unpaid holiday allowance and Rs. 2,425/- being the salary in lieu of leave of one month claimed by respondent No. 2. The company further agreed to pay Rs. 1,411.65 p. towards the balance of the commission for the year ending July 31, 1976. The company in the consent terms accepted that respondent No. 2 had paid Rs. 30,000/- which were deposited in the bank as fixed deposit. Clause 8 of the consent terms reads as follows :-

> "Agreed and declared that amount payable by the defendant to the plaintiff in the manner hereinabove provided for are in full and final settlement and satisfaction of all claims of the plaintiff against the defendants including claims for compensation for loss of office or otherwise howsoever".

Respondent No. 2 in pursuance of the consent terms agreed to withdraw the two suits filed in the City Civil Court and Company Petition No. 1073 of 1977 filed in this Court against the company and the Directors. In accordance with the consent terms, the suits and the proceedings were withdrawn and respondent No. 2 received payments.

3. It seems that after receipt of the payments under consent terms, respondent No. 2 moved Regional Provident Fund Commissioner, Bombay, claiming that the company was liable to deposit the provident fund in respect of the service rendered by respondent No. 2 to the company as an employee. In pursuance of the representation. On October 6, 1977 the Regional Provident Fund Commissioner addressed a letter to the company pointing out that the company should have enrolled and paid the amount in respect of services of respondent No. 2. In answer to the letter, the company informed the Regional Provident Fund Commissioner that respondent No. 2 was a former Director of the company and was not entitled to provident fund benefit. The contention raised by the company was accepted by the Commissioner and the proceedings were dropped. Respondent No. 2 thereupon approached Secretary, Ministry of Labour, New Delhi, with a request to review the order passed by the Commissioner and the Legal Advisor to the Secretary informed the Commissioner that respondent No. 2 should be treated as an employee. The Assistant Commissioner, Regional Provident Fund, then issued a fresh notice dated August 24, 1978 to the company directing to enroll respondent No. 2 as a member of the fund with effect from January 5, 1965. The company protested on various grounds and also pointed out that the decision cannot be taken without prior notice and hearing to the company. The company called upon the Commissioner to pass order under Section 7(a) of the Act. The Provident Fund Commissioner thereupon gave hearing to the company and respondent No. 2 and the Regional Provident Fund Commissioner passed order dated December 11, 1985 holding that respondent No. 2 was an employee and the company is liable to enroll respondent No. 2 a member of the fund with effect from January 1, 1965.

Feeling aggrieved by the said order, the company preferred Writ Petition No. 403 of 1986 under Article 226 of the Constitution on the original side of this Court. Two contentions were raised before the learned Single Judge to challenge that legality of the order. The first contention was that respondent No. 2 was not an employee but was a Director and an employer. The second contention was that even assuming that respondent No. 2 was an employee, in view of the consent terms arrived at, respondent No. 2 had received all the payments due in full and final settlement and it is not permissible to seek fresh claims in respect of the provident fund. The learned Single Judge, by

the impugned Judgment dated August 30, 1991, rejected both the contentions and dismissed the petition. The order passed by the learned Single Judge is under Challenge.

4. Shri Talsania, learned Counsel appearing on behalf of the appellant company, did not seriously dispute that respondent No. 2 was an employee. It cannot be debated that a person can work in two capacities as a Director and as an employee. The fact that respondent No. 2 was accepted as an employee in reflected in the consent terms reached between the parties in the two suits filed in the City Civil Court. A mere perusal of the consent terms makes it clear that the company agreed to pay diverse amounts to respondent No. 2 towards his employment. The payment of gratuity amount, the payment of salary, the payment of leaving travel concession, the payment of pension clearly indicates that the company did not dispute the character of service rendered by respondent No. 2 as an employee. In the face of these circumstances, Shri Talsania could not seriously dispute that respondent No. 2 was an employee. The principal contention urged by the learned Council is that respondent No. 2 by entering into consent terms had given up all the claims in respect of the employment and, therefore, he is no entitled to demand the provident fund by approaching Commissioner and compelling the company to enroll respondent No. 2 as member of the fund. In our judgment, the contention urged on behalf of the appellants is of considerable merit and deserves acceptance.

Clause 8 of the consent terms, which is set out hereinabove, clearly provides that amounts were received by respondent No. 2 in full and final settlement and satisfaction of all the claims against the company for loss of office or otherwise howsoever. The ambit of clause 8 is extremely wide and takes in its sweep every claim arising out of the employment. The trial judge held that the claim for payment of provident fund arises out of statutory provision and the statutory claims cannot be given up by consent terms. We are afraid, we cannot share the view of the learned Single Judge. The payment of provident fund is ensured by the provisions of the Employee Provident Fund and Miscellaneous Provisions Act, 1952. An employer is required to contribute towards the provident fund membership of the employee in cases where the establishment is covered by the provisions of the Act. It is not in dispute that the company was covered by the provisions of the Act with effect from January 1, 1965. In the present case respondent No. 2, who was an employee, was also a Director of the company along with his two real brothers. The company never contributed any amount towards the alleged claim of respondent No. 2 as an employee of the company. Respondent No. 2 was in charge of Madras factory and had paid contribution in respect of other employees but not in respect of his employment. It is obvious that respondent No. 2 did not make contribution because respondent No. 2 always treated himself as an employer and that agreement of employment was merely for some incidental purpose. The termination of employment as well as the directorship gave rise to the litigation and respondent No. 2 entered into consent terms. The perusal of consent terms leaves no manner of doubt that respondent No. 2 conceded his right to continue as a Director and secured every benefit arising out of the alleged employment. As a part of the overall settlement it was always open for respondent No. 2 to give up the claim in respect of the provident fund and there is no rule o flaw which prescribes that a beneficiary cannot give up or surrender his claim even though it arises out of statutory provision. In our judgment, the trial Judge was clearly in error in concluding that provident fund being statutory provision, it was not open for the parties to contract out of statute. Shri. Shah learned Council appearing on behalf of the legal representations of

respondent No. 2 who died during the pendency of this appeal, submitted that Clause 8 of the consent terms merely provides that respondent No. 2 will not make any claim against the company but that will not disentitle respondent No. 2 to make claim against the Provident Fund Commissioner. The submission overlooks that the claim is made against the company and is sought to be recovered through the agency and of the Provident Fund Commissioner.

The amount is not sought from the Provident Fund Commissioner de hors the company. Shri. Shah then submitted that the company had not sought any exemption from payment of the provident fund in respect of respondent No. 2 in accordance with Section 17 of the Act. The submission overlooks that it is not the claim the company that the Central Government had granted exemption to the company in respect of contribution of provident fund due to respondent No. 2. The claim was given up by respondent No. 2 by entering into consent terms. Shri Shah then submitted that respondent No. 2 was not aware that he was an employee at the time of the entering into consent terms and consequently, entitled to the provident fund. The submissions only required to be stated to be rejected. As mentioned hereinabove, there is intrinsic evidence reflected in the consent terms that both the parties were fully conscious that respondent No. 2 was an employee and benefit in respect of that employment was conferred by consent terms.

5. Shri Shah finally submitted that it was not within the understanding of both the parties at the time of entering into consent terms that the claim as regards provident fund is given up by respondent No. 2. It is not possible to accede to the submission. The clear wording of Clause 8 of the consent terms leaves no manner of doubt that respondent No. 2 gave up all the claims against the company by the words "or otherwise howsoever". In our judgment, respondent No. 2, after taking advantage of the consent terms, cannot turn around and start making claim in respect of provident fund by approaching Provident Fund Commissioner. It is not open for respondent No. 2 to blow hot and cold and the principle of appropriate and reprobate is clearly attracted. In our judgment, Provident Fund Commissioner was in error in calling upon the company to enroll respondent No. 2 as a member of the fund.

6. Accordingly, appeal is allowed and Judgment dated August 30, 1991 passed by learned Single Judge in Writ Petition No. 403 of 1986 is set aside and petition is made absolute in terms of prayer (a). In the circumstances of the case, there will be no order as to costs.

7. The amount deposited by the appellants shall be refunded along with interest accrued, if any, to the appellants.