Karnataka High Court
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Group 4 Securitas Guarding Ltd. vs The Regional Provident Fund ... on 30 October, 2003
Equivalent citations: 2004 (102) FLR 374, ILR 2004 KAR 2067
Author: V Shetty
Bench: P V Shetty, A J Gunjal
JUDGMENT

Vishwanatha Shetty, J.

1. The appellant in this appeal is a company incorporated under the provisions of the Companies Act and is engaged in the business of providing security services. It is claimed by the company that the registered office of the company is located at Delhi and it is carrying on its business activities throughout the country employing over 25,000 employees. The appellant is an establishment covered under The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'the Act'). The subject matter of dispute in this appeal relates to its Karnataka unit which is covered under code No. DL/12438.

2. In this appeal, the appellant has called in question the correctness of the order dated 7th June 2000 made in Writ Petition No. 45890 of 1999.

3. The facts in brief are as hereunder:

The Field Officer attached to the office of the Regional Provident Fund Commissioner (hereinafter referred to as 'the Commissioner') during routine inspection of the appellant noticed certain discrepancies regarding total bill raised for each month, the wages paid to its employees and the provident fund contribution deducted and remitted by the appellant to the statutory authorities. Therefore the Commissioner initiated proceedings against the appellant in exercise of the power conferred on him under Section 7A of the Act. After hearing the appellant and giving an opportunity to the appellant, the Commissioner by means of his order dated 22nd February 1999, a copy of which has been produced as Annexure-R1 to this appeal held that the appellant was in default in payment of provident fund dues as per the provisions of the Act and in the light of the said conclusion, directed the appellant to remit the arrears of provident fund contribution which was determined in a sum of Rs. 1,04,88,903.60 paise (Rupees One crore four lakhs eighty eight thousand nine hundred and three and paise sixty only). The Commissioner in the course of the order took the view that the appellant with a view to avoid its contribution towards provident fund has split the basic wages into basic wages, H.R.A. and other allowances which comprises of conveyance allowance and washing allowance. The said order was called in question by the appellant before the Employees' Provident Fund Appellate Tribunal (hereinafter referred to as 'the Tribunal'). The Tribunal by means of its order dated 13th September 1999, a copy of which has been produced as Annexure-A to this appeal, allowed the appeal and set aside the order passed by the Commissioner. The Tribunal took the view that the Commissioner was not justified in taking the view that the appellant has split the basic wages. Aggrieved by the said order, the Commissioner filed the Writ Petition out of which this appeal arises. The learned Single Judge, in the impugned order allowed the Writ Petition and remitted the matter for fresh consideration to the Commissioner. The learned Judge while remitting the matter for fresh consideration took into consideration the observation made by the Tribunal at paragraph 10 of the order, wherein the Tribunal has stated that in some cases it has taken the view that splitting of basic wages by way of H.R.A. and commissions and other allowances other than D.A. would amount to subterfuge to reduce the provident fund contribution. The learned Single Judge was of the view that once the Tribunal was of the view that in a given case, enquiry is required to be made whether the splitting up of basic wages under several heads like H.R.A., commissions and other allowances other than D.A. was intended to be a subterfuge to reduce the provident fund contribution, it should have remitted the matter for holding an enquiry to the Commissioner.

4. Sri Kasturi, learned Senior Advocate appearing along with Sri Mohan Kumar challenging the correctness of the order passed by the learned Single Judge submitted that the learned Single Judge has failed to consider that since the basic pay, H.R.A. and other allowances was agreed upon between the appellant and its employers, it is not permissible for the Commissioner to come to the conclusion that basic wage is split for the purpose of avoiding employer's contribution to the provident fund. In other words, it is his submission that once an agreement is arrived at between the employer and the employee with regard to the wage structure, it is not permissible to the Commissioner to go into the question as to whether the employer has split the wages for the purpose of avoiding contribution to the provident fund. In support of his submissions, he referred to the decisions of the Hon'ble Supreme Court in the case of BRIDGE AND ROOFS CO. LTD. v. UNION OF INDIA AND ORS, of the Delhi High Court in the case of USHA SALES LTD. v. REGIONAL PROVIDENT FUND COMMISSIONER, NEW DELHI AND ANR., 1980 (1) LLN 452 and of the Madras High Court in the case of SOUTHERN ALLOY FOUNDRIES (P) LTD. MADRAS v. REGIONAL COMMISSIONER, EMPLOYEES PROVIDENT FUND & FAMILY PENSION SCHEME, TAMIL NADU & PANDICHERRY STATES, 56 FJR 46 and in the case of E.I.D. PARRY(INDIA) LTD. v. REGIONAL COMMISSIONER, EMPLOYEES' PROVIDENT FUNDS, TAMIL NADU AND ANR., 1984 (1) LL Notes 527

5. However, Smt. Nandita Haldipur, learned Counsel appearing for the Commissioner while strongly supporting the order passed by the learned Single Judge pointed out that in the impugned order, the learned Single Judge having only remitted the matter for fresh consideration to the Commissioner, there is absolutely no justification for this Court to interfere against the said order. While refuting the contention of Sri Kasturi that the structure of basic pay has been settled between the parties and it is not open to the Commissioner to go into that question she pointed out that under Section 7A of the Act, the Commissioner is entitled to conduct an enquiry and decide the question whether the splitting up of the pay by the employer to its employees has been done only with a view to avoid payment of contribution to the provident fund or not. It is her further submission that the Commissioner is conferred with the power to lift the veil and find out what exactly is the nature of transaction or the terms set out in the contract of employment entered into between the employer and its employees. She also pointed out that the Act being a beneficial legislation intended to protect the interest of the labour so that they may be provided with reasonable retirement benefits, the Court while considering the question whether power is conferred on the Commissioner to lift the veil and go into the question with regard to the nature of the contract entered into between an employer and employee, the Court has to take a view which is in furtherance of the object of the legislation and which would protect the employees as against the management. It is her submission that if such a view is not taken, it would result in serious injustice to the employees who in the very nature of their status are not in a position to bargain with the employers. It is her submission that in none of the decisions relied upon by the learned Counsel for the appellant, the courts have not taken the view that the Commissioner has no power to go into the question as to whether the splitting up of basic wages under several heads is only a subterfuge adopted by the employer. In support of her submissions, she also relied upon the decision of the Hon'ble Supreme Court in the case of SHREE CHANGDEO SUGAR MILLS AND ANR. v. UNION OF INDIA AND ANR., 2001 (1) LLJ Pg. 698

6. Having elaborately heard the learned Counsel appearing for the parties, the only question that would arise for consideration in this appeal is as to whether the order impugned passed by the learned Single Judge is liable to be interfered with by us in this appeal.

7. In our view there is no merit in this appeal. In this connection, it is useful to refer to the observation made by the learned Single Judge which reads as follows:

"On that ground, it held that the whole of the impugned order was unsustainable and appeal was allowed. It is relevant to refer to para 10 of the order which reads as follows:

"In some appeals I have held that HRA and commissions and allowances other than D.A. are not the part of the basic wages but if split of the wages under these heads is only a subterfuge to reduce the PF contribution then the 7A authority has jurisdiction to probe into the reality of the fact and if he finds that his split is only a

subterfuge then he can determine the PF dues after clubbing all these heads of wages as basic wages. In this case it docs not appear that there is some subterfuge. The department if really interested in welfare of the workers then they should treat the security personnel as the direct employees of the establishments and fix the liability of paying PF contribution on the principal employer."

Having come to this conclusion the appeal was allowed and the impugned order was set aside.

4. The learned Counsel for the petitioner submitted that in view of this observation, the Appellate Authority should have remanded the matter giving opportunity to the petitioners to hold an enquiry in the light of the observations made above. This submission has some force. The Authority, as indicated above, has come to the conclusion that certain enquiries would be required in this case and should have remanded the case to the petitioner to hold an enquiry in regard to those facts."

The observation made by the Tribunal referred by the learned Single Judge also indicates that the Tribunal in one sentence has come to the conclusion that the finding recorded by the Commissioner that there was subterfuge is not justified. In our view, the said conclusion reached by the Tribunal is totally perverse and arbitrary in law. The Commissioner in the course of his order has come to the conclusion that the splitting up of the wages was a subterfuge and to come to that conclusion he has taken into account the minimum wages fixed to the employees who carry on similar work in other industries. The minimum wages fixed in other industries to the employees who carry on similar work is Rs. 1,450/-. No doubt, it is true as contended by Sri Kasturi that so far as this industry is concerned, the minimum wage has not yet been fixed. But the fact remains that on the basis of the minimum wage fixed for the employees who carry on similar work in other industries, the Commissioner has come to the conclusion that 50 per cent of the wage fixed as basic wage is totally unjustified and in the light of that conclusion he has held that payment of 25 per cent as H.R.A. and another 25 per cent as other allowances which comprises of washing and conveyance allowance also must be treated as a basic wage. It is not in dispute that the pay of an employee in the appellant-establishment is not split by virtue of any settlement arrived at between the management and the labour. The pay was fixed comprising of basic wage, H.R.A. and other allowances by virtue of an order of appointment issued by the appellant to its employees. When in all other similar industries, the minimum wage fixed is Rs. 1,450/-, if the Commissioner has taken into account the said minimum wage as the basis to come to the conclusion that the appellant has split the basic wages and fixed 50 per cent of the minimum wages as the wage required to be paid to the employees by the appellant and has split the remaining 50 per cent by way of H.R.A. and other allowances, we are of the view the said conclusion cannot be held to be either arbitrary or perverse. Therefore, it was not permissible for the Tribunal to interfere against the order passed by the Commissioner. The decisions relied upon by the learned Counsel for the appellant have only taken the view that it is not open to the Commissioner to modify the pay structure fixed in the settlement arrived at between the management and the labour. However, the decisions cited have not considered the question that in the absence of any settlement arrived at between the management and the labour, the pay fixed by the management to its employees can be enquired into by the Commissioner in exercise of the power conferred on him under Section 7A of the Act to decide whether the wages fixed is a subterfuge to avoid its contribution to the provident fund or not? In our considered view, as rightly pointed out by the learned Counsel for the Commissioner, the Commissioner in exercise of the power conferred on him under Section 7A is entitled to go into the question whether the splitting of the pay by the employer to its employees is a subterfuge intended to avoid payment of its contribution to the provident fund. Clause (b) of Sub-section 7A of the Act confers power on the Commissioner to determine the amount due from any employer under any provision of the Act, and for the said purpose he is also conferred with the power of conducting such enquiry as he may deem necessary. Sub-section (2) of Section 7A of the Act further confers on the Commissioner who conducts the enquiry under Sub-section (1), the same powers as are vested in a Court under the Code of Civil Procedure for trying a suit in respect of (a) enforcing the attendance of any person or examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses. In our view, the power conferred on the Commissioner to determine the amount due from an employer under the provisions of the Act must be understood as conferring power on him to go into

the question as to whether the wages have been split under various heads as a subterfuge to avoid the contribution by the employer to the provident fund. Depriving such a power to the Commissioner, in our view, would negate the very object of the Act, and the Court cannot be oblivious to the fact situation that the labour on account of its incapacity to bargain with the management on account of its immediate need to secure employment to sustain itself and other social and historical problems may not have serious objections for any attempt made by the management to avoid the provisions of any labour legislation. Therefore, in a matter like this, while we are clear in our mind that the power conferred on the Commissioner to determine the amount due by an employer under the provisions of the Act to the employees, also confers the power is to decide, whether the wages have been split under several heads as a subterfuge to avoid the contribution to the provident fund under the Act. In a matter like this, if there could be two views with regard to the power of the Commissioner, the Court should take a view keeping in mind that the Act in question being a beneficial legislation and intended to protect the interest of the labour, the Commissioner, is entitled to go into the question whether the splitting up of the basic wages payable to the employees under several heads like wages and allowances is really a subterfuge to avoid provident fund contribution under the Act. Therefore, we have no hesitation to reject the contention of Sri Kasturi that once the pay structure is agreed upon between the appellant and its employees, it is not permissible for the Commissioner to go into the nature of the pay structure to determine, whether it is a subterfuge adopted by the management to avoid its contribution to the provident fund. It is also necessary to point out that the Act compels both the employer and the employees to contribute to the provident fund. Therefore, when the Provident Fund Act also compels the employees to contribute to the fund, it may also be convenient for the employees to agree with the employers for splitting of the pay payable to them under several heads reducing the quantum of wages. If such a thing is allowed to take place, it would jeopardize the interest of the employees as the contribution required to be made to the provident fund which is intended to be utilized by the employees at the fag end of their career would get reduced.

8. Now, we may refer to the decisions relied upon by Sri Kasturi only to show that none of the decisions relied upon by him has any application to the facts of the present case. In the case, of Usha Sales Ltd. (supra), the Court proceeded on the basis the Commissioner in that case proceeded to inquire as to whether the salary or wages agreed in the contract of employment of the employees were fair wages or not. In the light of the wages revised from time to time under various settlements and awards. In fact, the observation made in the said decision indicates where the plea of subterfuge is raised, the Commissioner has the power to go into that question. In this connection, it is useful to refer to the observation made by the Delhi High Court in the case of Usha Sales Ltd. (supra) at paragraph 15 of the judgment, where it is observed as follows:

"..... Further the plea of subterfuge would have been tenable if it could be demonstrated that the commission payable to the employees was so fixed that a minimum of a specified sum would be payable to each employee irrespective of the work done by him. That is not so. The Commissioner also seems to have confused production bonus with commission. In production bonus there need not be a base. We further find that the Commissioner has ignored the fact that salaries payable to various categories of employees have been revised from time to time under settlements and awards. What the Commissioner seems to have been completely oblivious of is that salaries or wages are fixed on the basis of letters of appointment or contracts of service. The whole approach of the Commissioner was to enquire, whether the salary or wage stipulated in the contracts of employment of the employees of the petitioner were fair wages or not fair wages. His reference to the Minimum Wages Act is, to us, incomprehensible as nothing has been placed on record to show that minimum wages have been fixed under the Minimum Wages Act for any of the categories of employees of the petitioner. Reference to the Minimum Wages Act was thus wholly irrelevant. The Commissioner has really applied a rule of thumb in including whole or part of the commission in the wages for purposes of computation of the amount that was to be contributed by the petitioner. As we have said earlier, the approach of the Commissioner appears to have been to fix fair wages rather than determine the question before him that commission was being paid as subterfuge for basic wages."

In the case of Southern Alloy Foundries (P) Ltd., (supra), the Madras High Court was considering the question whether the Commissioner could go into the fairness of the wage fixed in the backdrop of fixation of wages under various settlements entered into between the employer and employees. Similar is the decision in the case of E.I.D. Parry (India) Ltd. (supra). In the said case, the Court took the view that flat ad hoc allowance paid to all employees under a settlement cannot partake the character of basic wages and does not attract liability for contribution under the Employees' Provident Fund Act. In the case of BURMAH SHELL OIL STORAGE & DISTRIBUTING COMPANY OF INDIA LTD., NEW DELHI v. THE REGIONAL PROVIDENT FUND COMMISSIONER, DELHI AND ORS., 1980 Lab. I.C. 1129 the Delhi High Court took the view that the mode of payment made by the employer to its employees could be in the nature of a present made and normally a present is a gratuitous one and it is being paid only to those who are in service on a particular day etc.

9. In the case of M/s Bridge and Roofs Co. Ltd. (supra) relied upon by Sri Kasturi, the only question that came up for consideration before the Hon'ble Supreme Court was whether production bonus payable is a part of basic wage within the meaning of Section 2B of the Act. It was held that production bonus was an amount of incentive and would, therefore, not be the wage. In the said decision, the Hon'ble Supreme Court did not go into the question whether it is permissible for the Commissioner to conduct an enquiry with regard to the splitting of pay structure by an employer is in the nature of subterfuge adopted by the employer to avoid its contribution to the provident fund. Therefore, the said decision is also of no assistance to Sri Kasturi. However, we are of the view that it would be useful to refer to the observation made by the Hon'ble Supreme Court in the case of Shree Changdeo Sugar Mills (supra). The Court while considering the question whether the ad hoc payment made under a settlement would not be a basic wage or not, the Court took the view it would be a basic wage and further observed that the employers' agreement with the employees not to deduct provident fund contribution does not discharge the employer of his obligation in law to make the payment. At paragraph 12 of the judgment the Court observed as hereunder:

"12. Mr. Sharma lastly submitted that the Settlement dated December 2, 1995 clearly provided that there were to be no deductions, except Union's contribution of 7%. He submitted that even though the appellant company could not deduct Provident Fund from the wages paid to the employees they are now being made liable to pay to the 2nd respondent even the employee's share. He submitted that, even if it is held that the appellant company is liable to pay Provident Fund, they should not be made to now contribute the employee's share as they could not and have not deducted the same from the wages paid. We are unable to accept this submission also. It is the duty of the employer to contribute. The employer's agreement with the employee, not to deduct does not discharge the employer of his obligation in law to make payment. The term of the settlement which provides that there shall be no deduction only means that the appellant company has agreed to take on this liability also."

(emphasis supplied)

Therefore, any agreement entered into between the appellant and its employees for splitting of the amount payable by the employer to its employees for the service rendered by them, cannot take away the power of the Commissioner under Section 7A of the Act to look into the nature of the contract entered into between the appellant and its employees and to decide that splitting up of the pay payable to the employees under several heads is only a subterfuge to avoid payment of contribution by the employer to the provident fund. Further, the decision of the Hon'ble Supreme Court in the case of RAJASTHAN PREM KRISHAN GOODS TRANSPORT CO. v. REGIONAL PROVIDENT FUND COMMISSIONER, NEW DELHI AND ORS., supports our view that it is open to the Commissioner to lift the veil and read between the lines to find out the pay structure fixed by the employer to its employees and to decide the question whether the splitting up of the pay has been made only as a subterfuge to avoid its contribution to the provident fund. In the said case, the question that came up for consideration before the Commissioner was whether two entities of the appellant could be considered as one entity to make the provisions of the Act applicable. In that context, the Hon'ble Supreme Court approved the finding of the Commissioner that two entities of the appellant in the appeal

before the Supreme Court could be treated as one entity for the purpose of the Act. At paragraph 6 the Court observed thus:

"6. The finding recorded by the Regional Provident Fund Commissioner is that there is unity of purpose on each count inasmuch as the place of business is common, the management is common, the letterheads bear the same telephone numbers and 10 partners of the appellant are common out of the 13 partners of the third respondent. The trucks plied by the two entities are owned by the partners and are being hired through both the units. The respective employees engaged by the two entities when added together, bring the integrated entities within the grip of the Act; so is the finding. 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."

(emphasis supplied)

10. In the light of what is stated above, if the learned Single Judge has after taking into consideration the order passed by the Tribunal as well as the Commissioner, set aside the order passed by the Tribunal and remitted the matter for fresh consideration to the Commissioner, we do not find any justification to interfere against the said order in exercise of our appellate power.

11. In the light of the discussion made above, this appeal is liable to be rejected. Accordingly, it is rejected with a cost of Rs. 5,000/-.