Madras High Court
Bharat Sanchar Nigam Ltd vs Union Of India on 16 June, 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.06.2011

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THE HONOURABLE MR.JUSTICE K.CHANDRU

W.P.Nos.21520, 21782 and 21783 of 2010 and
M.P.Nos.1,1,1 and 2 of 2010

Bharat Sanchar Nigam Ltd.,
Chennai Telephones,
Rep. By its Chief General Manager,
No.78, Purasawalkam High Road,
Chennai 600 010. ...Petitioner in
W.P.No.21520/2010

Bharat Sanchar Nigam Ltd.,
Tamil Nadu Circle,
Rep. By its Chief General Manager,
No.80, Anna Salai, Chennai 600 002. ...Petitioner in
W.P.No.21782/2010

Bharat Sanchar Nigam Ltd.,
Southern Telecom Region (Maintenance)
Rep. By its Chief General Manager,
No.11, Link Road, Ganapathy Colony,
Guindy, Chennai 600 032. ...Petitioner in
W.P.No.21783/2010

Vs.

1.Union of India,
Rep. By Secretary to Government,
Ministry of Labour and Employment,
New Delhi.

2.Employees' Provident Fund Organisation,
Rep. By Regional Provident Fund Commissioner II
Employees' Provident Fund Organisation,
37, Royapettah High Road, Chennai 600 014.

3.The Regional Provident Fund Commissioner II,
Employees' Provident Fund Organisation,
37, Royapettah High Road,
Chennai 600 014. ...Respondents 1 to 3 in

all the WPs

4. N.J.P.Shilohu Rao

5. P.Kannan

6. K.Senthil Kumar

7. V.S.Chokkalingam

8.S.Jaikumar

9.K.Sandeep ....Respondents 4 to 9 in W.P.No.21520/2010

10.Surinder Kumar

11.S.S.Karthikeyan ...Respondents 4 and 5 in W.P.Nos.21782 and 21783/2010 Writ Petitions preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorari, to call for the records in CC-II/TN/RO/CHN/50452, 50267 and 50267/Regl/2010 respectively on the file of the third respondent and quash the impugned order dated 01.09.2010 passed by the respondent therein.

For Petitioners : Mr.Manoj Sreevatsan (in all Wps) For Respondents : Mr.P.V.Sudakar, CGSC for R1 (in all Wps) Mr.Vibhishanan for R2 and R3 (in all Wps) Ms.V.Srividya for R4,R5,R6 and R9 (in W.P.No.21520/2010) Mr.V.P.Raman for R4 and Ms.C.S.Monica for R5 in (W.P.Nos.21782 & 21783/2010) C O M M O N O R D E R In these three writ petitions, the question that arises for consideration is whether the pre-induction training period undergone by the petitioners in the Bharat Sanchar Nigam Limited (for short BSNL) is covered for the purpose of deducting subscription towards Employees Provident Fund in terms of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short EPF Act)?

2.When the third respondent had conducted an Adalat in respect of provident fund matters during January, 2010, some of the contesting respondents who are working either as Junior Telecom Officers or Junior Accounts Officers, made a grievance that their training period was not counted for the purpose of coverage under the Act and therefore, they were aggrieved by the non coverage. The said matter was taken for giving ruling by the third respondent in terms of Paragraph 26B of the Employees' Provident Fund Scheme, 1952. Under the said paragraph, if any question arises whether an employee is entitled or required to become or continue as a member or as regards the date from which he is so entitled or required to become a member, a decision of the Regional Commissioner was made final. But proviso to the said paragraph made that no such decision can be rendered

unless both the employer and employee were heard on the said issue.

3.After taking notice on the complaint projected by the contesting respondents, the Regional Provident Fund Commissioner gave notice to the parties. After hearing both sides, he has passed an order, dated 1.9.2010 and directed the contesting respondents and other similarly placed employees working in M/s.Chennai Telephones (BSNL) to be made as members of EPF Scheme and other schemes from the date on which the individuals joined or reported for their pre-induction training and that their contribution should be regulated accordingly. The contribution in respect of both employees and employer doe for that period was to be worked out and remitted immediately. In case, no remittance was done, the petitioner BSNL was informed that it will attract damages and consequential interest on delayed payment.

4.When the first writ petition came up on 23.9.2010, notice was directed to be taken by the official respondents and private notices were ordered to the contesting private respondents. Thereafter, the BSNL filed subsequent two writ petitions. In that cases also, similar orders were made on the same day. Pending the writ petition, it was recorded that for a period of two weeks, no coercive steps will be taken by the department. Aggrieved by the said order, one of the contesting respondent filed M.P.No.2 of 2010 seeking to vacate the interim direction. On behalf of the PF Department, a counter affidavit, dated 4.1.2011 was also filed in all the three writ petitions. The fourth respondent in W.P.Nos.21782 and 21783 of 2010 by name Surinder Kumar had filed a common counter affidavit, dated 20.11.2010 together with supporting typed set of documents.

5.In normal circumstances, the petitioner will be directed to file an appeal in terms of Section 7A to the EPF Tribunal if an order is passed under paragraph 26B of the EPF Scheme. But, however without going into the said controversy, this Court heard the matters on merits.

6.The contention made by Mr.Mani Sreevatsan, learned counsel appearing for the petitioner was that pre-induction training given to persons cannot be said to be coming within the term Section 2(f). The said person is not employed for any wages and for doing any kind of work manually or otherwise and that he also cannot be described as an apprentice. He also submitted that the JTOs and JAOs were trained in any one of their training centers. They never made to perform any duty on site. Even the work done on site by the trainees are purely for the purpose of equipping such trainees with necessary skills to enable them to clear the tests that are conducted at the end of the training to make them fit for appointment as JTOs or JAOs and that the same cannot be called as duty. The stipend paid to them cannot be equated with the wages or salary of regular employees and it is only for personal maintenance of the trainees. It is not a compensation for any productive work done for their employer. They will have no lien over the post for which they had applied. In case they failed in the test at the end of the training, they will be straight-away discharged. The training programme is clearly covered by the codified guidelines. The authorities did not take note of the judgment of the Supreme Court in Employees State Insurance Corporation Vs. The Tata Engineering and Locomotive Company Ltd. reported in (1975) 2 SCC 835.

7.Controverting the said submission, Mr.V.P.Raman, learned counsel appearing for the fourth respondent in W.P.Nos.21782 and 21783 of 2010 submitted that the contesting respondents were

recruited in terms of the recruitment rules. They were provided pre-induction training for a period from 16.2.2004 to 23.05.2004. The training was under the control and supervision of the Tamil Nadu Circle of BSNL. After completion of the training, they were directed to be posed in the Southern Telecom Region. They had also executed a bond and that medical fitness was also obtained from them. The pre-induction training was conducted in three phases. The EPF contribution was paid for the second and third phases. The so-called stipend paid to them was linked with their pay scales. For the purpose of EPF under the EPF Scheme, when it was extended to the contesting respondent, joint undertakings between the petitioner BSNL and the contesting respondents were also executed. In that undertaking, it was jointly agreed that the contribution will be paid from the date of joining the pre-induction training period. It is also stated that the contesting respondents are employees within a meaning of Section 2(f) of the EPF Act and they are not apprentices in terms of the Apprentice Act, 1961. Since they were recruited directly as employees of BSNL and only directed to undergo training for the purpose of later posting, that period cannot be diverted from the period which came subsequent to the regular posting.

8.It was further stated that FR 9(6)(b)(2) clear states that the period of training will be treated as duty for the purpose of promotion, fixing increment, eligibility for departmental examination. It was further stated that the BSNL Employees' Gratuity Trust Rules provides for qualifying service. The definition of "qualifying service" as found in Rule 1(vii) reads as follows:

"Qualifying service" means the un-interrupted service rendered in the Company after completion of 18 years of age, excluding period of service rendered as apprentice or as casual but includes the period of training followed by regular appointment in the case of trainees. The period will also include service which was uninterrupted by authorized leave and cessation of work not due to any fault of the employee concerned."

In the context of the same, it was argued that there is no gain saying that the pre-induction training cannot be considered for the purpose of subscription of EPF Act.

9.Since the petitioners have referred to the judgment of the Supreme Court in Tata Engineering and Locomotive Company Ltd. case (cited supra) in support of their contentions as found in the affidavit, it is necessary to refer to the said judgment. That case arose out of Employees State Insurance Act (for short ESI Act). In the ESI Act, the definition of the term "employee" is found under Section 2(9). The Supreme Court has held that while the legislature has competence to enlarge the definition of the term "employee" even to include the apprentice, in the case of the ESI Act, the legislature did not make any amendment to include the term "apprentice" within a meaning of Section 2(9). The Supreme Court also took note of the fact that the term "workman" found under the Industrial Disputes Act, 1947 (for short ID Act) was cautiously worded and specifically included 'apprentices' also to come within the term under Section 2(s), but did not choose to do so in terms of Section 2(9) of the ESI Act. Therefore, the term "employee" under Section 2(9) will not include the apprentice. In paragraphs 8,10 and 11, the Supreme Court had observed as follows:

"8.Again we find that where the Legislature intends to include apprentice in the definition of a worker it has expressly done so. For example, the Industrial Disputes Act, 1947, which is a piece of

beneficial labour welfare legislation of considerable amplitude defines workman under Section 2(s) of that Act and includes apprentice in express terms It is significant that although the legislature was aware of this definition under Section 2(s) under the Industrial Disputes Act, 1947, the very following year while passing the Employees State Insurance Act, 1948, it did not choose to include apprentice while defining the word employee under Section 2(9) of the Employees State Insurance Act, 1948. Such a deliberate omission on the part of the Legislature can be only attributed to the well-known concept of apprenticeship which the Legislature assumed and took note of for the purpose of the Act. This is not to say that if the Legislature intended it could not have enlarged the definition of the word employee even to include the apprentice but the Legislature did not choose to do so.

10.We may, therefore, turn to the definition of employee under Section 2(9) of the Act. So far as it is material, Section 2(9) reads as follows:

Employee means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere.... It is clear that in order to be an employee a person must be employed for wages in the work of a factory or establishment or in connection with the work of a factory or establishment. Wages is defined under Section 2(22) and means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or layoff and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include....

11.From the terms of the agreement it is clear that apprentices are mere trainees for a particular period for a distinct purpose and the employer is not bound to employ them in their works after the period of training is over. During the apprenticeship they cannot be said to be employed in the work of the company or in connection with the work of the company. That would have been so if they were employed in a regular way by the company. On the other hand the purpose of the engagement under the particular scheme is only to offer training under certain terms and conditions. Besides, the apprentices are not given wages within the meaning of that term under the Act. If they were regular employees under the Act, they would have been entitled to additional remuneration such as daily allowance and other allowances which are available to the regular employees. We are, therefore, unable to hold that an apprentice is an employee within the meaning of Section 2(9) of the Act. (Emphasis added)

10.The said judgment was pronounced on 08.10.1975. Subsequent to the said judgment, the Parliament had amended Section 2(9) of the ESI Act by Central Act 29/1989 with effect form 20.10.1989. In that amendment, it was stated that all apprentices, except the apprentices engaged under the Apprentice Act, 1961, are covered by the provisions of the Act. Therefore, the said judgment can have no relevance for coverages after 20.10.1989. Similarly, the definition of the term

"employee" under Section 2(f) of the EPF Act was also amended. Under Section 2(f)(ii), the term "employee" includes person engaged as an apprentice but not being an apprentice engaged under the Apprentices Act, 1961. The amendment was made by the Central Act 33/1988 with effect from 1.8.1988. Therefore, after these two amendments, the definition of the terms "employee" found in the ESI Act and EPF Act are in paramateria with each other. Even assuming that in the traditional sense, the contesting respondents during the period of pre-induction training cannot be described as employees by the extended definition, but as per the definition of the term "employee", they are also covered. That was why the Supreme Court in Tata Engineering and Locomotive Company Ltd. case (cited supra) had stated that the legislature can always enlarge the definition of the term "employee" and can include "apprentices" also under the definition.

11.The definition being wide enough to cover the pre-induction training. It must also be noted that among the training period, for the second and third phases, the petitioners BSNL covered the contesting respondents for the purpose of the Act and that there is no reason why they should not be covered even for the first phase of training. As rightly contended by Mr.V.P.Raman, the fundamental rule took note of the training given before the regular appointment as "duty". In the joint agreement, the BSNL and the employees have agreed to cover the training period for the purpose of EPF.

12.The gratuity rule also provides for taking note of the said period as qualifying service for the purpose of granting gratuity. Therefore, it is too late for the BSNL to contend that the pre-induction training cannot be considered for the purpose of EPF Act. This Court vide its judgment in Sree Mangayarkarasi Mills (P) Ltd. Vs. The Assistant Provident Fund Commissioner reported in 2011 (1) CTC 851 has held that an apprentice, who is not apprentice under the Apprentices Act, is also covered by the EPF Act.

13.Therefore, there is no case made out to interfere with the impugned orders. Hence all the three writ petitions will stand dismissed. However, there will be no order as to costs. Consequently, connected miscellaneous petitions stand closed.

vvk To

1.The Secretary to Government, Union of India, Ministry of Labour and Employment, New Delhi.

2.The Regional Provident Fund Commissioner II Employees' Provident Fund Organisation, Employees' Provident Fund Organisation, 37, Royapettah High Road, Chennai 600 014.

3.The Regional Provident Fund Commissioner II, Employees' Provident Fund Organisation, 37, Royapettah High Road, Chennai 600 014