

(2014) 12 PAT CK 0035

In the Patna High Court

Case No : Civil Writ Jurisdiction Case Nos. 11001 and 20394 of 2010

Assistant Provident Fund Commissioner

APPELLANT

Vs

Sk. Nasiruddin Biri Merchants Pvt. Ltd.
 Sk. Nasaruddin
Biri Merchant Pvt. Ltd. Vs Regional Provident Fund
Commissioner (C and R)

RESPONDENT

Date of Decision : 09-12-2014

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B,
14B, 5E, 7A

Citation : (2015) 144 FLR 550 : (2015) 1 LLJ 521 : (2015) LLR 382 : (2015) 1
PLJR 797

Hon'ble Judges : Hemant Kumar Srivastava, J

Bench : Single Bench

Advocate : Prashant Sinha, Advocate, Shailendra Kumar Sinha and Surendra
Pandey, Advocate for the Appellant; Surendra Pandey, Prashant Sinha, Advocates
and Shailendra Kumar Sinha, Advocate for the Respondent

Judgement

Hemant Kumar Srivastava, J.—The above-said writ petitions were ordered to be heard together vide order dated 29-06-2012 and, accordingly, both the above-said writ petitions were heard together by this court.

2. CWJC No. 11001 of 2001 has been filed by Assistant Provident Fund Commissioner, Regional Office, Employees Provident Fund Organization (hereinafter referred to as applicant) against M/s. Sk. Nasiruddin, Bidi Merchants Pvt. Ltd. & Anr. (Hereinafter referred to as "respondent") whereas; CWJC No. 20394 of 2010 has been filed by respondent against the applicant.

3. The applicant has prayed in CWJC No. 11001 of 2010 for quashing the order dated 08-08-2008 passed by Employees Provident Fund Appellant Tribunal (hereinafter referred to as "Tribunal") in A.T.A. No. 906(3) of 2004 by which, the learned Tribunal quashed the order dated 12-10-2004 passed by the Regional Provident Fund Commissioner (C & R), Bihar, Patna through which, damages

under Section- 14-B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act") was quashed on the ground that there was no willful default on the part of the respondent No. 1 of the aforesaid writ petition as he was seeking legal remedies available to him under the law and, furthermore, for quashing the order dated 20-11-2008 passed by the Tribunal in the same A.T.A. No. 906(3) of 2004 by which and whereunder, learned Tribunal directed the applicant to refund the amount, which was recovered from respondent No. 1 of the aforesaid writ petition, pursuant to the order, passed under Section- 14B of the Act and also, for holding that the order dated 12-10-2004 passed by the Regional Provident Fund Commissioner as contained in letter No. 2425 was in accordance with law.

4. Similarly, respondent filed CWJC No. 20394 of 2010 for issuance of direction to the applicant to return an amount of Rs. 58,09623/- along with 18 % compound interest, which the applicant got transferred from State Bank of India.

5. The brief fact, which lies to file both the said writ petitions, is that respondent No. 1 of CWJC No. 11001 of 2010 is a manufacturer of Bidis. Regional Provident Fund Commissioner, Bihar, Patna issued notice under Section- 7A of the Act to the respondent for assessment of provident fund dues for the period from June, 1977 onwards. The aforesaid proceeding initiated under Section- 7A of the Act was challenged before this court in CWJC No. 4089 of 1988. Initially, this court stayed the operation of notice, issued under Section- 7A of the Act. The above-said writ petition was dismissed vide order dated 27-07-1989, holding that provisions of the Act are applicable in respect of home workers, engaged in rolling the Bidis of the respondents-establishment through contractors. The above-said dismissal order dated 27-07-1989 was challenged before the Hon''ble Supreme Court in SLP No. 10538 of 1989. The Hon''ble Apex Court also stayed the operation of assessment order till the identification of the workers made but in the meantime, Provident Fund Commissioner determined the amount due from the respondent and called upon it to deposit a sum of Rs. 66,84,930.50/- being employers'' and Employees'' contribution towards the provident fund from July, 1977 to August, 1986. Furthermore, by another order dated 18-12-1989, the respondent was called upon to pay a sum of Rs. 28,72,383.85/- The aforesaid two demands were also challenged by the respondent in two separate writ petitions i.e. CWJC Nos. 1114 & 1115 of 1990. However, SLP No. 10538 of 1989 was disposed off with observation that the question, involved could be settled by High Court in the proceeding pending before it, including the question who are the employees u/S 2(f) of the Act. Similarly, CWJC Nos. 1114 & 1115 of 1990 were also dismissed on 19-08-1992, as a result of which, a sum of Rs. 46,90,051/- out of total demand of Rs. 9557314.35/- was realized by the Provident Fund Commissioner. The order dated 19-08-1992 passed in above-said two writ petitions, was questioned before the Hon''ble Supreme Court in SLP No. 15312-13 of 1992 but the aforesaid SLP was, too, dismissed on 03-05-1993 with following observations:--

"The SLPs are dismissed. It is open for the petitioner to collect the names of Bidi workers, who work for them through their contractors and furnish the names of all the workers to the Provident Fund Commissioner. The Provident Fund Commissioner thereafter will verify these names and calculate the liability of the petitioner. On the basis of such verification, if any excess amount is found due from the petitioner, the Provident Fund Commissioner will recover such amount from the petitioner. On the other hand, if any amount is found due to the petitioner, the Provident Fund Commissioner will refund the same. The petitioner to furnish the name of the workers within six months from today."

6. As stated above, the SLP filed against the orders passed in CWJC Nos. 1114 & 1115 of 1990 was dismissed by the Apex Court and after dismissal of the SLP, the respondents furnished the particulars of home workers, said to be engaged by the contractors to the establishment of applicant for final determination of its liability under Section- 7A of the Act and the applicant assessed the PF dues under Section- 7A of the Act for the period from June, 1977 to March, 1988 and for the period from April 1988 to March 1993. A claim was made by the respondent for waiver of payment of Employees' contribution for the period from October 1985 to March 1993 on the ground that he had not been able to collect the same. The aforesaid claim was disallowed by the authorities. The total liability was assessed at Rs. 1,45,25,848/- and out of which, respondent deposited Rs. 6,11,716/-. The Regional Provident Fund Commissioner issued a certificate for recovery of remaining amount. The above-said action of the Regional Provident Fund Commissioner was challenged by the respondent before this court in CWJC No. 9880 of 1994, which was allowed vide order dated 29-02-1996, quashing the order and notice of Regional Provident Fund Commissioner. The order dated 29-02-1996 passed by learned Single Judge in CWJC No. 9880 of 1994 was challenged before Division Bench of this court in Letters Patent Appeal No. 403 of 1996. The Division Bench of this court quashed the order dated 29-02-1996 passed by learned Single Judge in CWJC No. 9880 of 1994 vide judgment dated 12-12-1997 reported in Central Provident Fund Commissioner and Another Vs. S.K. Nasiruddin Beedi Merchant Ltd., . The above-said judgment dated 12-12-1997 passed by learned Division Bench in LPA No. 403 of 1996 was challenged before the Hon'ble Apex Court in Civil Appeal No. 4285 of 1998 which, too, was dismissed vide order dated 30-01-2001 reported in S.K. Nasiruddin Beedi Merchant Ltd. Vs. Central Provident Fund Commissioner, . After dismissal of the above-said Civil Appeal No. 4285 of 1998, the respondent deposited the entire assessed amount but the applicant initiated a proceeding under Section- 14B of the Act and lastly, imposed damages of Rs. 58,09,623/- upon the respondents vide order dated 12-10-2004 passed by Regional Provident Fund Commissioner, Bihar, Patna on account of delayed payment of provident fund dues. The aforesaid order dated 12-10-2004 passed by Regional Provident Fund Commissioner (C & R), Bihar, Patna was challenged by the respondent before the Tribunal in A.T.A. No. 906(3) of 2004 which was allowed by the Tribunal, quashing the order dated 12-10-2004 passed by Regional Provident

Fund Commissioner (C & R), Bihar, Patna on the ground that there was no wilful default on the part of the respondent in remittance of provident fund dues but due to stay order, passed by different courts, time-to-time, the respondent could not remit the provided fund amount in time and as soon as the litigation was over, the respondent immediately deposited the dues of provident fund. The above-said order of the Tribunal has been questioned before this court in present CWJC No. 11001 of 2010. After disposal of A.T.A. No. 906(3) of 2004, the respondents filed a petition before learned Tribunal for return of the bank amount, recovered by the organization of applicant in pursuant of order passed under Section- 14B of the Act. Learned Tribunal disposed off the above-said petition, passing impugned order dated 20-11-2008 directing the applicant to return the amount, recovered by it in pursuant of order passed under Section-14B of the Act. The order dated 20-11-2008 passed by learned Tribunal has also been impugned in the above-stated CWJC No. 11001 of 2010.

7. Learned counsel, appearing for the applicant, challenged the impugned orders submitting that the Tribunal quashed the damage amount imposed under Section- 14B of the Act on the ground that due to litigation and stay orders passed by court, the respondent could not deposit the provident fund amount in time and as soon as the legal right of the respondent was exhausted, he deposited the due amount but as a matter of fact, the above-said point was considered by Division Bench of this court in its judgment dated 12-12-1997 reported in Central Provident Fund Commissioner and Another Vs. S.K. Nasiruddin Beedi Merchant Ltd., wherein the Division Bench of this court held at paragraphs-15 & 16 of the above-said judgment as follows:

"Paragraph-15. All these lead us to conclude that the respondent in order to avoid the liability went on litigating before this Court and the Supreme Court. The assessment of liability was upheld for the first time by the dismissal of C.W.J.C. No. 4089 of 1988 on July 27, 1989. The demands made were again upheld by this Court by dismissal of two writ petitions, namely, C.W.J.C. Nos. 1114 and 1115 of 1990 by judgment and order dated August 19, 1992. The respondent again filed special leave petitions before the Supreme Court, but the special leave petitions were dismissed. Under these circumstances, it is very difficult to appreciate the plea of the respondent that it was bona fide seeking relief before the Court of law.

Paragraph-16. In our view, the mere fact that the respondent was seeking its remedy before a Court of law, is by itself no ground for holding that in the event of the respondent failing before the Court of law, the liability should be extinguished. If such were the law, any liability imposed by law would be defeated by challenging any order passed for the enforcement of that liability. Moreover, it cannot be disputed now that the respondent was obliged to make deductions from the wages of the employees, and to deposit their contribution in accordance with the scheme. If in law the respondent was obliged to do so, and failed to do so, it certainly cannot be permitted to argue that its liability is

extinguished, or must be waived, because of its own failure to act in accordance with law. We have also no doubt held that the waiver of liability under the Act and the scheme is within the discretion of the Central Government. The respondent cannot as a matter of right claim waiver. In any event merely because the respondent was litigating before this Court and the Supreme Court, that would not furnish a sufficient ground justifying interference by this Court by directing waiver of the liability. We, therefore, entertain no doubt that the view taken by the learned judge is not sustainable in law."

8. On the strength of above-said observations of Division Bench of this court, learned counsel for the applicant submits that since the plea of so-called bona fide litigation had already been rejected by Division Bench of this court, the Tribunal had got no jurisdiction to give relief to the respondent on the above-said ground. He further submits that admittedly, the above-said observation of Division Bench of this court was upheld up to the Hon'ble Supreme Court. He further submits that the Hon'ble Supreme Court in its judgment reported in S.K. Nasiruddin Beedi Merchant Ltd. Vs. Central Provident Fund Commissioner, held in following manner:

"For the period up to September 1985 and for subsequent period, there is no manner of doubt and the dispute raised by the applicant cannot be said to be bona fide at all. In the circumstances, we fail to understand as to how the applicant can rely upon his own laches in not deducting the wages from 1985 onwards to enable him to make employees' contribution to the fund."

9. On the other hand, learned counsel for respondents, at the very outset, raised the question of maintainability of CWJC No. 11001 of 2010, submitting that the above-said writ petition has been filed by Assistant Provident Fund Commissioner in its individual capacity and admittedly, the concerned organization has not filed any writ petition, challenging the orders impugned in the above-said writ petition. He further submits that the order dated 12-10-2004, by which, the Regional Provident Fund Commissioner imposed damages under Section- 14B of the Act, was quashed by learned Tribunal passing impugned order dated 08-08-2008. He, further, submits that no authority is supposed to defend its own order. He further submits that the applicant is not an aggrieved person as he is a stranger to the proceeding, initiated under Section- 14B of the Act. In support of his contention, he referred a decision of Andhra Pradesh High Court passed in Assistant Provident Fund Commissioner, Visakhapatnam Vs. Employees Provident Fund Appellate Tribunal and Another, wherein the Hon'ble Andhra Pradesh High Court held that the Assistant Provident Fund Officer, who exercises quasi-judicial function, is not supposed to defend his own order before the EPF Appellate Tribunal. He also relied upon a decision of Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Another, wherein it has been held that the adjudicating authority, in absence of any power, conferred upon it, in this behalf by the Central Government, cannot prefer any appeal against the order passed by the appellate board. The aforesaid case was of Foreign Exchange Regulation

Act, 1973 and in the aforesaid case, the Apex Court held that merely because an officer is appointed to act in terms of provisions "FERA", the same would not be itself entitled him to discharge all or any of the functions of the Central Government unless he is authorized by the Central Government. Learned counsel also relied upon the decision of The District Collector, Srikakulam and Others Vs. Bagathi Krishna Rao and Another, . In the aforesaid case, Civil Suit was filed for seeking declaration of title and possession of the disputed lands and in the aforesaid suit, a stand was taken on behalf of the defendant that the suit land had already been vested in the State of Andhra Pradesh. The dispute came before the Hon''ble Apex Court and when the District Collector, Srikakulam & other officials filed Civil Appeal before the Hon''ble Court, without impleading the State of Andhra Pradesh as party, the Hon''ble Apex Court remanded the matter to the High Court for impleading the State of Andhra Pradesh as party and to decide the matter afresh.

10. Learned counsel for respondent further submits that admittedly, the litigation between the respondent and concerned organization continued for several years and as soon as the litigation was over, the respondent deposited the dues amount of provident fund and, as a matter of fact, there was a bona fide litigation between the parties as the respondent was under impression that the Act was not applicable to his establishment and as soon as the litigation came to an end, the respondent deposited the amount. He further submits that the aforesaid facts clearly go to show that there was no wilful default on the part of the respondent in making contribution of provident fund in time. He further submits that Section- 14B is only applicable when there is a willful default in making the payment of contribution but in the instant case, there was no willful default in making payment of contribution in time and, therefore, the learned Tribunal rightly quashed the amount of damage imposed upon the respondent.

11. In reply to the above-said contention, learned counsel appearing for applicant submits that vide resolution dated 5-05-1989 of Board of Trustee, Additional Provident Fund Commissioner as well as some other officials were authorized by the Board of Trustee to institute, file, conduct, prosecute and defend all civil and criminal proceedings, managed by or against the Central Board of Trustees, Employees Provident Fund and to act and appear in all the aforesaid proceedings for and on behalf of the Central Board of Trustee, Central Provident Fund Commissioner. Therefore, after the above-said authorization, the petitioner was fully competent to file CWJC No. 11001 of 2010. Learned counsel for applicant referred a unreported decision of Hon''ble Madras High Court dated 11-01-2012 passed in the Assistant Provident Fund Commissioner Employees Provident Fund Organization v. M/s. Tulya Alloy Castings Ltd. wherein at paragraph-8 of the aforesaid judgment, the Hon''ble Madras High Court has observed as follows:

"Paragraph-8 In an earlier batch of writ petitions filed by the petitioner Assistant Provident Fund Commissioner, an objection was raised by the contesting

respondents about maintainability of the writ petition at the instance of the organization against the order of the Tribunal. However, this court in W.P. Nos. 17518 to 17521 of 2010 etc batch cases, dated 21-06-2010 in Assistant Provident Fund Commissioner v. Employees Provident Fund Appellate Tribunal and others had upheld the right of the EPF Organization to challenge the award in the following lines: "16. Taking note of the first objection by the employer regarding the maintainability of the writ petitions, this Court is of the view that the writ petitions cannot be rejected on the ground of locus standi of the APFC. Taking note of the peculiar position that the PF authorities are to play under the PF Act, the challenge by the authorities of the order of the Tribunal cannot be rejected on the ground of want of jurisdiction. It must be noted that the authorities are playing multifarious role under the provisions of the PF Act including investigation, enforcement, quashi judicial determination of the rights of the parties, prosecution of the erring employers as well as securing the rights of workmen, who also contribute PF subscriptions."

12. Having heard the above-said contentions of the parties and having perused the materials, available on the record, I find that two important points are involved in these writ petitions: Firstly, whether the applicant has any locus standi to file CWJC No. 11001 of 2010 or not and, secondly; whether the grounds, given by the Tribunal in the impugned order dated 08-08-2008 for quashing the amount of damage, imposed upon the respondent under Section-14B of the Act are in accordance with law or not?

13. First of all, I think it proper to refer Section- 5-E of the Act which says that The Central Board may delegate to the Executive Committee or to the Chairman of the Board or to any of its officers and a State Board may delegate to its Chairman or to any of its officers, subject to such conditions and limitations, if any, as it may specify, such of its powers and functions under this Act as it may deem necessary for the efficient administration of the scheme [The [Pension] Scheme and the Insurance Scheme].

14. From bare perusal of the aforesaid provision, it is apparent that the Central Board or the State Board, as the case may be, may delegate its powers and functions under the Act to its officers and others and admittedly, the Board, exercising the aforesaid power of Section 5-E of the Act, vested its power to institute or to defend any civil and criminal proceeding to its several officers including Assistant Provident Fund Commissioner vide its resolution dated 25-05-1989. Therefore, it is apparent that the Assistant Provident Fund Commissioner, Patna was authorized to institute or defend any proceeding of civil or criminal nature. Therefore, in my view, the decisions, cited on behalf of the respondents are not applicable in this case. However, the decision of Mohtesham Md. Ismail (supra) clearly says that if, a person is authorized by the board to pursue litigation, the said person can pursue the litigation on behalf of the Board. Therefore, it is obvious that the aforesaid decision also supports the case of the petitioner in respect of maintainability of this writ petition and the authorization

of the Assistant Provident Fund Commissioner by the Board to pursue any litigation on behalf of the Board does not raise any finger against the competence of the applicant to file CWJC No. 11001 of 2010. Therefore, the objection raised on behalf of the respondent in respect of maintainability of CWJC No. 11001 of 2010 does not have any leg and liable to be flat on the ground. Accordingly, above-said contention of the respondent is, hereby, rejected.

15. So far as the grounds, mentioned by the learned Tribunal in the impugned order dated 08-08-2008 are concerned; admittedly, learned Tribunal took two grounds for quashing the damage, imposed upon the respondent under Section-14B of the Act. Firstly, the respondent could not deposit the amount due to bona fide litigation and secondly; there was no wilful default on the part of the respondent in depositing the provident fund dues due to stay orders passed by the different courts. It is an admitted position that vide Notification No. GSR-660 dated 17-05-1977, the Bidi industry was brought under the purview of the Act w.e.f. 31-05-1977 and it was included in Schedule-I of the Act. It is also an admitted position that the validity of the aforesaid notification was challenged but upheld by the Hon''ble Supreme Court in P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others, holding the validity of the aforesaid notification. The Hon''ble Supreme Court also held in the above-said decision as well as decision of Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others, that the Act would be applicable even in respect of home workers, engaged through the contractors. Therefore, the contention of respondent that he was fighting bona fide litigation appears to be doubtful because after decision of the aforesaid cases, the respondent cannot say that he was in doubt about the application of Act in respect of his establishment. However, Division Bench of this court in case of the petitioner itself reported in Central Provident Fund Commissioner and Another Vs. S.K. Nasiruddin Beedi Merchant Ltd., of the aforesaid judgment clearly observed that the respondent, in order to avoid the liability, went on litigation before this court as well as before the Hon''ble Apex Court and furthermore, the Division Bench also observed in the said judgment at the same paragraph that it was very difficult to appreciate the plea of the respondent that he was bona fide seeking relief before the court of law. Therefore, when the Division Bench of this court has already observed that the litigation, dragged by the respondent was not bona fide, the learned Tribunal had no jurisdiction to observe that due to bona fide litigation, the respondent could not remit the dues of the provident fund and, therefore, I am of the opinion that in view of the aforesaid observations of Hon''ble Division Bench of this court, there is no scope for this court also to hold that the litigation, initiated by the respondent, was bonafide in nature and due to above-said litigation, he could not deposit the dues of provident fund in time. Furthermore, I am of the opinion that if, it is found that the litigations, dragged by the respondent, were not bona fide, there is no hurdle to come to the conclusion that the default of the respondent was wilful and intentional.

16. As I have already observed that the respondent wilfully and intentionally

failed to deposit the dues amount of provident fund in time, I am of the opinion that the learned Regional Provident Fund Commissioner (C & R) Bihar, Patna rightly initiated a proceeding under Section- 14B of the Act and issued notice for realization of damage imposed upon the respondent under the above-said Section of the Act.

17. Admittedly, vide order dated 12-10-2004 passed by the Regional Provident Fund Commissioner (C & R) Bihar, Patna under Section- 14B of the Act, the damage and interest have been calculated on the delayed payments for the period from the month of June, 1977 to March, 1993 but at paragraphs-6 & 7 of the judgment reported in S.K. Nasiruddin Beedi Merchant Ltd. Vs. Central Provident Fund Commissioner, it was held by the Apex Court of this country that the liability upon the respondent to deduct the amount from the wages arose in the year, 1985 in the light of clarification, issued by the Central Government. Annexure-A to the CWJC No. 11001 of 2010 goes to show that the Regional Provident Fund Commissioner, Bihar Patna levied damages and its interest upon the respondent under Section- 14B of the Act taking into consideration the period for the month of June, 1977 to March, 1993. In my view, when there was no responsibility of the respondent to deduct the amount from the wages of the employees till 1985, the damage and interest from June, 1977 to September 1985 could not have been taken into consideration for counting damages and interest thereon under Section- 14B of the Act.

18. On the basis of above-said discussions, CWJC No. 11001 of 2010 is allowed and accordingly orders dated 08-08-2008 and 20-11-2008 passed by the Tribunal in A.T.A. No. 906(3) of 2004 are hereby quashed and the matter is remitted back to Regional Provident Fund Commissioner (C & R) Bihar, Patna to recalculate the damages and interest on the delayed payments for the appropriate period, as discussed in this order and take necessary steps in accordance with law. Similarly, CWJC No. 20394 of 2010 stands disposed off with direction to the Regional Provident Fund Commissioner (C & R) Bihar, Patna (respondent No. 1) in CWJC No. 20394 of 2010 to pass appropriate orders on the prayer of refund of the realized amount, after fixing damage and interest thereon upon the respondent afresh in accordance with the direction, given by this court in this order.