

(1997) 12 PAT CK 0050
In the Patna High Court
Case No : L.P.A. No. 403 of 1996

Central Provident Fund Commissioner and Another	APPELLANT
Vs	
S.K. Nasiruddin Beedi Merchant Ltd.	RESPONDENT

Date of Decision : 12-12-1997

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A

Citation : (1998) 79 FLR 666 : (1999) 1 LLJ 360 : (1998) 1 PLJR 687

Hon'ble Judges : Dharmpal Singh, J; Bisheshwar Prasad Singh, J

Bench : Division Bench

Advocate : Y.V. Giri and Ram Shankar Pradhan, for the Appellant; Basudeo Prasad, Anil Kumar and Sunil Kumar, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal has been preferred by the Central Provident Fund Commissioner and the Regional Provident Fund Commissioner impugning the judgment and order of a learned single Judge in C.W.J. C. No. 9880 of 1994, dated February 29, 19%, allowing the writ petition preferred by the respondent-S.K.Nasiruddin Beedi Merchant Limited-and quashing the order dated June 2, 1994, determining the liability of the respondent, and the certificate dated September 27, 1994, issued to the recovery officer for recovery of a sum of Rs. 46,17,538.20, which was determined to be the provident fund and allied dues payable by the respondent u/s 7A of the Employees" Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act").

2. The main question involved in the writ petition was as to whether the respondent was entitled to waiver in respect of deposit of the employees" contribution for the period from October, 1985, to May 3, 1993, during which period the respondent claimed not to have made deduction from the wages of the home workers employed through contractors for manufacture of beedi because of the pendency of litigation on the question of applicability of the provisions of the Act in respect of the home workers employed by the

contractors. The learned Judge took the view that despite the decision of the Supreme Court in P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others, , the respondent had yet a case to agitate in this Court as well as in the Supreme Court since his case was that the home workers employed for rolling beedis were appointed by the independent contractors. Even though the respondent failed in its attempt to get relief from the Courts of law, in view of the observations contained in Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others, , it had a case to argue, and it approached this Court bona fide by filing writ petitions in the years 1988 and 1990, and, thereafter, took up the matter in appeal before the Supreme Court. Since the home workers were engaged by contractors and their particulars could not be known to the respondent, no deduction could be made from their wages nor could the amount be deposited in their account. Relying upon the Division Bench of the Calcutta High Court in Mantu Biri Factory (P) Ltd. v. Regional Provident Fund Commissioner 1994 2 CHN 75 , the learned Judge held that the respondent did not deduct the contribution from their wages for the period in question, as it bona fide took the view that the employers of these home workers were the contractors and not the respondent. As such, it could not be said that the respondent deliberately or negligently did not make deduction of the employees' contribution from the wages of the home workers. Under paragraph 30 of the Employees' Provident Funds Scheme, 1952 (hereinafter referred to as "the Scheme"), the employer was required to pay both contributions payable by the employer as well as the employees, and the employer's contribution was equal to the contribution of the employees, but such contribution was to be deducted from their current wages only. In case the respondent was required to pay the employees' contribution for the period from October, 1985, to May 3, 1993, in view of the provisions of paragraphs 31 and 32 of the Scheme, the respondent could not make deduction of the employees' contribution from the wages of the home workers for the said period. He, therefore, concluded that it will be inequitable and unfair to saddle the respondent with the liability to pay the employees' contribution for the period from October, 1985, to May 3, 1993, which the respondent could not and did not deduct through its contractors on bona fide grounds. Therefore, the respondent deserved waiver from payment of employees' contribution for the period October, 1985, to May 3, 1993. The writ petition was, accordingly, allowed.

3. Aggrieved by the judgment and order of the learned Judge allowing the writ petition, the appellants have preferred this appeal. It has been submitted on their behalf that having regard to the law laid down by the Supreme Court in P.M. Patel's case (supra), there was no scope for anyone to entertain a doubt about the liability of the employer in a beedi industry to deposit the employees' as well as the employer's contribution under the Act and the Scheme after making necessary deduction from the wages of home workers employed by the establishment regardless of the fact whether they were directly employed, or employed through contractors or whether they worked within or outside the

premises of the establishment. So far as the respondent is concerned, there were several earlier rounds of litigation, and at no stage could the respondent succeed. Yet it persisted in contending that it was not liable to deposit the employees' contribution. The plea was not even bona fide. It was also submitted that if a liability is created by law, the mere fact that one raised a dispute about one's liability and persisted in litigation at all levels, did not justify the extinguishment or waiver of that liability. If, ultimately, it failed in litigation, and it was held that it was liable, it could not be heard to say that since it was litigating the liability should be waived. There was also no legal basis for claiming a waiver as a matter of right. The learned Judge was, therefore, in error in directing that the liability determined for the period in question ought to be waived. The waiver of a liability implies the existence of such liability in the first instance, and a claim for waiver, therefore, implied acceptance of the liability.

4. The case has a long history, and it would be necessary to briefly recapitulate the facts of the case, and the events that preceded the filing of the writ petition by the respondent, which was allowed by the learned judge giving rise to this appeal. From the material placed before us, it is evident that by issuance of a notification on June 1, 1976, a summons had been issued to the respondent in January, 1977, in terms of Section 7(1) of the Act. The summons showed that the notification intended to apply the provisions of the Act with effect from July, 1966, to December, 1976. Code No. DR/1365 was allotted to the respondent's establishment. The respondent replied that the beedi industry was not covered by the Act and, therefore, no action could be taken against it.

5. In the meantime, the beedi industry was brought within the purview of the Act on May 17, 1977, when such notification was issued by the Central Government, followed by a notification dated May 23, 1977, making the scheme applicable to the beedi industry. The said notification dated May 23, 1977, was challenged in the Supreme Court in P.M.Patel's case (supra). The Supreme Court has also granted a general stay in the matter pending disposal of the writ petitions. Ultimately, by judgment and order dated September 25, 1985, the Supreme Court dismissed the writ petitions and consequently the general stay granted by it stood vacated. Their Lordships held:

"There is no dispute that pursuant to the impugned notification dated May 17, 1977, the beedi industry has been brought within the scope of the Employees' Provident Funds Act and the impugned notification dated May 23, 1977, has made the scheme applicable to the beedi industry. Clause (a) of Sub-section (3) of Section 1 of the Employees' Provident Funds Act applies the Act to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed. Admittedly, the factory belonging to the manufacturer is, therefore, drawn within the compass of the Employees' Provident Funds Act and the Scheme. It is also admitted by the petitioners that the workers employed within the factory premises would be covered by the Act and the Scheme. The real question is whether the home

workers are entitled to that benefit. Clause (f) of Section 2 of that Act defines an "employee" to mean "any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets his wages directly or indirectly from the employer, and includes any persons employed by or through a contractor in or in connection with the work of the establishment" . It will be noticed that the terms of the definition are wide. They include not only persons employed directly by the employer but also persons employed through a contractor. Moreover, they include not only persons employed in the factory but also persons employed in connection with the work of the factory. It seems to us that a home worker, by virtue of the fact that he rolls beedis, is involved in an activity connected with the work of the factory. We are unable to accept the narrow construction sought by the petitioners that the words "in connection with" in the definition of "employee" must be confined to work performed in the factory itself as a part of the total process of the manufacture."

6. After considering its earlier judgment in *Mangalore Ganesh Beedi Works v. Union of India*(supra), the Court concluded at p.93:

"In our opinion, the home workers are "employees" within the definition contained in Clause (f) of Section 2 of the Employees' Provident Funds Act."

So far as the respondent is concerned, a proceeding was initiated u/s 7A of the Act, and the respondent was called upon to comply with the requirement mentioned in the letter of Regional Provident Fund Commissioner dated October 4, 1986. It appears that, thereafter, the Regional Provident Fund Commissioner fixed a date for determining the dues payable by the respondent and threatened to take ex parte proceeding if the respondent failed to appear. Under these circumstances, the respondent filed a writ petition before this Court, being C.W.J.C.No. 4089 of 1988. The question urged before this Court by the respondent was whether the provisions of the Act applied to beedi merchants who get their beedi rolled through independent contractors. After considering all aspects of the matter including the judgment of the Supreme Court in *P.M.Patel's* case (supra), a Division Bench of this Court unequivocally held that the respondent was liable to contribute to the provident fund account of home workers of the so-called independent contractors as well. The Court, however, granted some relief to the respondent inasmuch as the Court held that the respondent could not be held liable for any period prior to June, 1977, when the Act was made applicable to the beedi industry. Notice to the respondent had been issued for the period from July 1966 to December, 1976. The Court held that the respondent may be liable only since the time the Act was extended to include beedi workers, i.e., in June, 1977. and not prior to it. The writ petition was, accordingly, dismissed.

The Government of India issued a direction on October 10, 1989, to the following effect:

"In exercise of the powers conferred by paragraph 78 of the Employees' Provident Funds Scheme, 1952, the Central Government hereby directs the waiver of the recovery of the employees' share of provident fund contribution which have not been deducted from the wages of the employees during the period mentioned below:

Pre-discovery period. - This will include the period commencing on the date from which the Act is legally applicable to factory or establishment and the date on which a formal notice for coverage under the Act is served on the employer by the Provident Fund Authorities. In all such cases, the employees' share of contribution shall be payable from the first of the month following the issue of the notice for coverage under the Act".

7. This is contained in Annexure "9" to the writ petition. From Annexure "10" to the writ petition it appears that instructions were also given in letter dated November 8, 1989, regarding waiver of employees' share of contribution in respect of beedi establishment. The Government of India had issued direction that the employees' share of contribution for pre-discovery period which had not been deducted from the wages of employees, shall not be recovered. Further, as regards the period covered by general stay order given by the Supreme Court on the application challenging the notification extending the provisions of the Act to an industry/class of establishment, the employees' share shall be payable from 1st of the month following the judgment. It would thus appear that the Government of India granted some relief to the beedi industry and it was decided that their liability to deposit the employees' contribution, which may not have been collected from the wages of the workers, be waived, since there was a stay order given by the Supreme Court. However, it was made clear that the employees' share shall be payable from the 1st of the month following the judgment. In terms of the said decision the liability to deposit the employees' contribution arose from October 1, 1985.

8. After dismissal of the respondent's writ petition by the High Court a date was fixed for determination of the dues under the Act. The respondent took time to produce the records but failed to do so. In these circumstances, the dues under the Act were determined. Two orders were passed on December 18, 1989, and it was found that for the period from July, 1977, to August, 1986, the respondent was liable to pay a sum of Rs. 66,84,930.50 being the employees contribution. For the period September, 1986, to February, 1989, a sum of Rs. 28,72,383.85 was found due on account of the employer's and employees' contributions. Accordingly, a demand notice was issued on February 16, 1990.

9. The respondent preferred S.L.P.No. 10538 of 1989 before the Supreme Court impugning the judgment of this Court dated July 27, 1989. It also filed two writ petitions before this Court against the two orders of assessment, which were registered as C.W.J.C.Nos. 1114 and 1115 of 1999. The respondent had also filed two other writ petitions being C.W.J.C.Nos. 8101 and 8102 of 1990 against the orders issuing warrant of arrest.

The Supreme Court, by its order dated August 22, 1991, disposed of the SLP noticing that the final awards made by the Provident Fund Commissioner had been challenged by the respondent before this Court in two writ petitions, being C. W.J.C.Nos. 1114 of 1990 and 1115 of 1990, which were pending before the High Court. The Supreme Court was, therefore, not inclined to consider this question in the special leave petition. It, therefore, directed the High Court, Patna, to consider and decide those questions raised in the said two writ petitions in accordance with law after hearing the parties including the question as to who are the employees within the meaning of Section 2(f) of the Provident Funds Act. It was also clarified that in deciding the aforesaid two writ petitions the impugned judgment shall not in any way stand as a bar.

10. Thereafter, both the writ petitions filed by the respondent were heard and dismissed by judgment and order dated August 19, 1992. The judgment of this Court is reported in *Sk. Nasiruddin Bidi Merchant (P) Ltd. Vs. Regional Provident Fund Commissioner and Others*, but a copy of the said judgment was also annexed to the writ petition as Annexure "1". After the dismissal of both the writ petitions a sum of Rs. 46,90,051 only was recovered from the respondent.

11. The respondent preferred two special leave petitions before the Supreme Court, being SLP Nos.15312 and 15313 of 1992, against the judgment and order of this Court dated August 19, 1992, dismissing both the writ petitions. The Supreme Court, by its order dated May 3, 1993, dismissed both the special leave petitions. It, however, observed that it was open to the respondent to collect the names of beedi workers who worked for them through their contractors and furnish the names of all the workers to the Provident Fund Commissioner. The Provident Fund Commissioner was thereafter to verify these names and calculate the liability of the respondent on the basis of such verification. If any excess amount was found due from the respondent, the Provident Fund Commissioner would recover such amount from the respondent. On the other hand, if any amount was found due to the respondent, the Provident Fund Commissioner would refund the same. The respondent was directed to furnish the names of the workers within six months from the date of the order.

12. It is not in dispute that pursuant to the direction of the Central Provident Fund Commissioner waiver was allowed for the period June, 1977, to September, 1985, in so far as it related the liability to deposit the employees' contribution, but for the subsequent period, the Regional Provident Fund Commissioner redetermined the liability by his order dated June 2, 1994, which was followed by demand notices issued on June 3, 1994. Since the amount demanded was not paid, a certificate for recovery of the dues was issued on September 27, 1994. The demand and issuance of certificate for recovery were challenged before this Court in the writ petition giving rise to this appeal.

13. Counsel for the appellants submitted that the learned Judge has erred in law in holding that since the respondent was bona fide pursuing litigation before this Court, and the Supreme Court, and had not made deductions from the wages of

the employees, it could not be compelled to deposit the employees' contribution. It was argued that the Act and the Scheme create a right in favour of an employer coupled with an obligation. The employer is authorised to make deduction from the wages of its employees, but at the same time he is obliged to deposit the same in the appropriate account. If an employer fails to perform its duty by exercising his right under the Act, he cannot avoid the obligation/liability by pleading failure on his part to deduct the contribution from the wages. On the other hand, Counsel for the respondent submitted that the respondent was bona fide pursuing its legal remedies before this Court and before the Supreme Court. Under the Scheme the deduction has to be made from the current wages of the employees concerned and not against future wages. If, therefore, the respondent had not deducted from the wages of the employees in the past, it could not be compelled to make deduction from their wages in nature, as that was prohibited under the scheme.

14. In our considered opinion, the submission urged on behalf of the respondent cannot be accepted. We fail to understand how despite all the proceedings that proceeded, including several rounds of litigation before this Court and the Supreme Court, the respondent still entertained a bona fide impression that it was not liable to deposit the employees' contribution under the Scheme. After the judgment of the Supreme Court in P.M.Patel's case (supra), no such doubt could be entertained by anyone. Even thereafter, when notice u/s 7A was issued for determination of the dues for the period July, 1977, to August, 1985, the respondent objected to the demands and contended that it was not liable to deposit the employees' contribution in so far as they related to home workers. When its objection was overruled by order dated February 23, 1988, it filed a writ petition before this Court being C.W.J.C. No. 4089 of 1988. That writ petition was dismissed and the demand in so far as it related to a period subsequent to the notification of the Central Government dated May 31, 1977, bringing the beedi industry within the scope of the Act was upheld. Thereafter, the liability of the respondent was again determined on December 18, 1989. and demand notices issued on February 16, 1990. The respondent challenged those orders also in C.W.J.C.Nos. 1114 and 1115 of 1990. It also preferred an appeal against the High Court's judgment dated July 27, 1989. The Supreme Court disposed of the SLP directing the High Court to decide the issues involved in the pending writ petitions before the High Court with a clear observation that the judgment dated July 27, 1989, shall not be a bar to the hearing of the two pending writ petitions. Both the writ petitions were dismissed on August 19, 1992, and all the submissions urged on behalf of the respondent were rejected. The demands were found justified and in accordance with law. The respondent was not satisfied and it again filed two special leave petitions before the Supreme Court being SLP Nos.15312 and 15313 of 1992. Both the special leave petitions were dismissed on May 3, 1993, with certain observations to which reference has been made earlier in this judgment. The observations of the Supreme Court were not intended to start a fresh round of litigation. The Supreme Court only gave an

opportunity to the respondent to collect particulars and to furnish details of employees with a view to modification of the orders determining the liability. That the respondent was liable could not be challenged. All that the respondent could do was to satisfy the Regional Provident Fund Commissioner, by producing relevant material, that the number of workers was less and, therefore, the liability should be reduced. This was because in the absence of relevant material the liability had been determined on an average basis by applying the best judgment rule. The Supreme Court only gave an opportunity to the respondent to get the liability redetermined, if it could satisfy the authorities that the number of employees employed as home workers was less than what was taken to be the figure in the orders determining the liability. Similarly, it was open to the authority to enhance the liability, if it was found on the basis of material produced that the number of employees employed by the respondent was more.

15. All these leads 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.

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.

17. Mr. Basudeo Prasad, learned senior counsel appearing on behalf of the respondent advanced a new argument before us that the formal notice of coverage u/s 7A of the Act was for the first time issued on June 3, 1994. At best

the formal notice of coverage can be deemed to have been issued on May 3, 1993, when the Supreme Court dismissed both the special leave petitions preferred by the respondent. Thus, the Act became legally applicable in the case of the respondent from June 3, 1994, or at best from May 3, 1993. Counsel submitted that the order of the Supreme Court dated May 3, 1993, amounted to an order-for fresh assessment of liability on the exercise of option by the respondent in pursuance of the said order. We have already considered the effect of the order of the Supreme Court dated May 3, 1993, and for the reasons already mentioned the plea that the order of the Supreme Court was an order for fresh assessment of the liability must be rejected.

18. We may notice that the plea that the final notice of coverage u/s 7A of the Act was issued on June 3, 1994, and that in the absence of notice of coverage u/s 7A, the respondent cannot be held liable, is a plea raised for the first time before us in appeal. Relying upon the decision of the Supreme Court in *The District Exhibitors Association, Muzaffarnagar and others Vs. Union of India and others*, it was urged that a scheme under the Act could not be applied retrospectively and, therefore, the starting point of the liability is the issuance of notice of coverage which in the case of the respondent was issued on June 3, 1994.

19. The plea is untenable. No such plea was raised in the writ petition filed by the respondent. Moreover, if the plea of the respondent was that no notice of coverage was ever issued earlier, and, therefore, it had no liability as the scheme was not applicable to it, such a plea should have been raised before the authorities under the Act. In any event it should have been raised in any of the earlier writ petitions before this Court. In all those writ petitions the respondent had disputed its liability to make the contribution as assessed by the authorities under the Act, but it never challenged the applicability of the Act or the scheme to its establishment on the ground of non- issuance of formal notice of coverage. If it was its case that notice of coverage had never been issued, that would have been a complete answer to the demands raised by the authorities under the Act. No such plea was ever raised, either in the earlier writ petitions or even the special leave petitions preferred before the Supreme Court. The principle of constructive *res judicata* is, therefore, attracted and the respondent cannot be permitted to raise such a contention for the first time in this Letters Patent Appeal.

20. There is yet another reason why such a plea cannot be entertained in the absence of any factual foundation in the writ petition. The question as to whether notice u/s 7A was issued, which is commonly described as notice of coverage, is a question of fact and, therefore, if the respondent disputed this fact or disputed its liability on the ground that no notice of coverage was given to it, such a plea ought to have been raised in the writ petition itself, so that the appellants could produce before this Court necessary material to satisfy the Court that notice of coverage was issued. Such a plea cannot be permitted to be urged for the first

time in appeal when there is no factual foundation for the same in the writ petition.

21. Even if we ignore the technical impediments in the way of the respondent, the material on record is abundant to satisfy us that the notice of coverage was issued to the respondent much earlier. We have noticed that as early as on January 22, 1977, a notice u/s 7A was issued to the respondent for the period July, 1966, to December, 1976, and a code number was also allotted to the establishment of the respondent. Again, notice u/s 7A was issued on September 25, 1986, for the period July, 1977, to August, 1985, after the decision in P.M.Panel's case (supra). Thereafter, the liability of the respondent was determined, which was challenged before the High Court by filing a writ petition, which was ultimately dismissed. Thereafter, again the liability of the respondent was determined by issuance of two orders on December 18, 1989, u/s 7A of the Act. The two writ petitions challenging these orders were also dismissed on August 19, 1992. In these circumstances, it is obvious to us that several proceedings were taken u/s 7A of the Act, and it is too late in the day for the respondent to contend that no notice of coverage was issued before June 3, 1994. In fact the liability of the respondent was redetermined on June 2, 1994, after allowing waiver of liability for the period June, 1977, to September, 1985. Pursuant to such determination a demand notice was issued on June 3, 1994. This cannot be said to be first notice of demand. Even earlier such determination had been made by the authorities under the Act in proceedings u/s 7A of the Act, and at no time was plea raised that a notice of coverage had not been issued.

For the aforesaid reasons, we are of the view that this appeal should be allowed and is, accordingly, allowed. The impugned judgment and order of the learned judge is set aside and the writ petition filed by the respondent is dismissed. The respondent shall pay to the appellants' costs of this appeal which is quantified at Rs. 5,000 (five thousand only).