

(2009) 10 MAD CK 0046
In the Madras High Court
Case No : Writ Petition No. 19026 of 1998

India Cements Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 22-10-2009

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 19A, 2A, 2F, 6
Penal Code, 1860 (IPC) — Section 193, 196, 228

Citation : (2009) 10 MAD CK 0046

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Advocate : Rahul Balaji, for Satish Parasaram, for the Appellant; V. Vibhishanan, R2 and R3, for the Respondent

Final Decision : Allowed

Judgement

T.S. Sivagnanam, J.—The petitioner has filed the above Writ Petition challenging the order passed by the first respondent dated 13.7.1998.

The matter arises under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, (hereinafter referred as "the Act").

2. The facts leading to the filing of the Writ Petition is as follows:

(a) The petitioner is a Company which is registered under the Indian Companies Act and engaged in the manufacture of cement. The cement

manufactured by the petitioner is packed in gunny bags and such gunny bags were either new gunny bags or re-conditioned gunny bags. According

to the petitioner there are various suppliers of re-conditioned gunny bags who supplied to various Cement Companies like the petitioner.

(b) According to the petitioner one of the suppliers of such re-conditioned gunny bags established, a factory near the petitioner's factory

compound in Sakaridurg and one K.C. Rangaswamy was the occupier of the factory and the factory licence was also obtained by him during

1968 under the provisions of the Factories Act, 1948.

(c) In order to ensure regular and steady the supply of re-condition gunny bags without fluctuation of price, the petitioner accepted the willingness

of one K.C. Rangasamy during 1972 to enter into an agreement to supply re-conditioning gunny bags. Accordingly, an agreement was drawn on

9.8.1972 between the petitioner and the said K.C. Rangasamy. Under the terms of the agreement, the petitioner agreed to provide old gunny

bags, re-conditioning factory space, electricity and water without claiming any charges for the said old gunny bags. According to the petitioner, the

old gunny bags re-conditioning factory shall employ its own workmen and they were supervising them and paying the wages. On 29.4.1974, the

occupier of the said re-conditioning factory applied to the Regional Provident Funds Commissioner for coverage of his employees. Majority of the

employees of the said Unit were also willing to get the coverage and also willing to make their contributions. At that stage of the matter, the third

respondent herein by letter dated 24.8.1974, addressed the petitioner stating that the old gunny bags Factory should be treated as a Branch or

Department of the petitioner and therefore its employees would also be the employees of the petitioner for the purposes of the Act. The said

communication directed that coverage under the Act would be from 1.12.1969 and arrears of Provident Fund Contributions together with

administration charges should be remitted by the petitioner.

(d) The petitioner by reply dated 26.9.1974 objected to the said demand on various grounds. Thereafter no action was taken by the third

respondent till 1978 and in the meantime, the old gunny bags re-conditioning factory shifted its location about five miles away from the petitioner

Factory during the year 1977. It is further submitted that a dispute was raised by the workmen of the said old gunny bags Factory regarding their

non-employment and the dispute was referred for adjudication by the Government and taken on file by the Labour Court, Coimbatore, as I.D.

No. 172 of 1978. The Labour Court by an award dated 28.9.1989, held that there

is no employer-employee relationship between the petitioner and that of the employees in the old gunny bags factory. The petitioner received a notice dated 4.4.1978, issued u/s 7A of the Act calling upon the petitioner to appear for an enquiry. A reply dated 17.7.1978 along with affidavit sworn to by the Secretary of the petitioner Company was sent.

Thereafter, by a communication dated 7.9.1981, the third respondent stated that the issues have been considered and it was decided that the re-conditioning factory is a branch of the petitioner within the meaning of Section 2A of the act. This order came to be challenged by the petitioner by filing W.P. No. 10485 of 1981 before this Court. The Hon'ble Division Bench of this Court disposed of the said Writ Petition by an order dated 22.8.1989. The Hon'ble Division Bench has taken into consideration the insertion of Section 19A of the Act, which provided for power to remove difficulties in giving effect to the provisions of the Act, the Central Government may by an order make such provisions or give such direction not inconsistent with the provisions of the Act, for the removal of the doubt or difficulty. Thus liberty was granted to the petitioner and the following directions were issued:

1. The petitioner shall prefer the requisite application u/s 19A of the Act within a period of three months from today;
2. If so done, the Union Government shall dispose of the applicant with expedition;
3. Until the application is disposed of by the Union Government as per clause(2) supra, the provisions of the act need not be enforced as against the petitioner.
4. The petitioner shall forward a copy of the petition to be preferred u/s 19-A of the act to the respondent, so that the respondent may keep track of the position with regard to the disposal of the said application by the Union Government.
5. If there is a failure on the part of the petitioner to resort to the process u/s 19A of the Act as directed above, the respondent is at liberty to take appropriate process under the provisions of the Act, if there is a warrant for it, under law and on facts.

Accordingly a petition was presented before the first respondent u/s 19A of the Act.

3. The first respondent by an order dated 26.6.1997 dismissed the said Application and the said order was communicated through the second respondent, since by then Section 19A was substituted by introduction of Section 7(I) and u/s 7P all Applications which were pending before the Central Government u/s 19A before its repeal stood transferred to the Tribunal. This order passed by the first respondent is impugned in the present Writ Petition.

4. Heard Mr. Rahul Balaji, learned Counsel for the petitioner and Mr. V. Vebhishanan, learned Counsel appearing for the respondents.

5. Mr. Rahul Balaji, learned Counsel appearing for the petitioner would assailed the correctness of the impugned order by contending that u/s 7A

of the Act, the third respondent may by order, decide a dispute as to whether the provisions of the Act are applicable to an Establishment,

determine the amount due from any Employer under the provisions of the Act.

6. By relying upon Sub-section (2) of Section 7A of the Act, the learned Counsel would contend that for the purpose of enquiry under Sub-section

(2) of Section 7A of the Act, such an Officer shall have the same powers which are vested in a Court under the CPC for trying a Suit. By that, the

third respondent is entitled to summon any person or examine him on oath, call upon the parties to produce the documents, receive evidence on

affidavit and issue commission for the examination of witnesses and such proceedings shall be deemed to be a judicial proceedings within the

meaning of Sections 193 and 228 and for the purpose of Section 196 of IPC. Further, in terms of Sub-section (3), no order under Sub-section 1

of Section 7A shall be passed unless the employer concerned is given reasonable opportunity of representing his case.

7. The learned Counsel would submit that the first communication which was received after a lull from 1978 was the proceedings of the third

respondent dated 7.9.1981. The learned Counsel would submit that the third respondent without conducting any enquiry held that it has been

conclusively decided that the old gunny bags re-conditioning factory is a branch of the petitioner company within the meaning of Section 2A of the

Act.

8. The learned Counsel by laying emphasis on the word "conclusive", used in the order dated 7.9.1981 passed by the third respondent, contended

that in the absence of procedure being followed as contemplated under Sub-section (2) of 7A, there cannot be such a "conclusive" finding. The

learned Counsel would also contend that the findings rendered in the order dated 7.9.1981 has been made without considering any of the

submissions made by the petitioner through his counsel on 26.9.1974 and further reply dated 20.2.1978 and the letter given by K.C. Rangaswamy

on 29.4.1974, requesting that their Unit may be covered under the provisions of the Act. Therefore the learned Counsel would submit that no

enquiry as required to be done u/s 7A was conducted before such a finding was rendered.

9. These issues were pointed out by filing a representation u/s 19-A of the Act, in terms of the liberty granted by the Hon"ble Division Bench of

this Court in the earlier W.P. No. 10485 of 1981. However, the first respondent by merely perusing the Agreement dated 9.8.1972, came to a

conclusion that since space have been provided within the Factory premises, it should be taken that there is functional integrality and therefore the

Unit has to be treated as part of the petitioner u/s 2A of the Act. The learned Counsel would further contend that the award of the Labour Court

was rejected by stating that it has no relevance. Therefore, the learned Counsel would contend that there has been absolutely no application of

mind to the facts and circumstances of the petitioner's case and curiously no notice has been issued to the said Rangasamy who has independently

approached the authorities requesting for extending the provisions of the Act to the said Unit. Hence, on these grounds, the learned Counsel would

submit that the impugned order is not sustainable in the eye of law.

10. Mr. Vibhishanan, learned Counsel appearing on behalf of the respondents would contend that the petitioner Company had provided space for

receiving, storing and stocking gunny bags, and also electricity and water was provided without claiming any charges. Further, the petitioner also

maintained the machines of the said undertaking and the re-conditioning factory is exclusively for the purpose of supplying the re-conditioning

gunnybags to the petitioner. Hence, the learned Counsel contended that the business carried on by the Contractor is incidental to the main business

of the principal employer, the petitioner herein.

11. It is further contended that the petitioner Company has power and control

over the work of the old gunny bags factory and therefore, they were treated to be a branch of the petitioner Company. The learned Counsel would contend that the first respondent had entertained the Application u/s 19-A, considered the facts and circumstance of the case and came to a correct conclusion that the claim made by the petitioner is not sustainable. It is further submitted that while giving effect to the provisions of the Act, the meaning of the words "Employee" in the Act has been liberally construed so as to render maximum welfare to the working class.

12. In view of the factual situation, it may be easily said that there is functional integrality between the petitioner and the said Unit and since the officials of the petitioner company have got supervisory control over the workmen of the said Unit, it has to be held that they are the branch of the petitioner Unit. Therefore, the learned Counsel would contend that the impugned order does not call for any interference.

13. I have carefully considered the submissions made by the learned Counsel appearing on either side and perused the materials available on record.

14. The Act came to be enacted for making some provisions for future of the Industrial Worker after he retires or for his dependents in the case of his early death, therefore, the Act is essentially a labour welfare legislation.

15. As rightly contended by the learned Counsel for the respondents that while interpreting the provisions of the act, the word "employee" in the Act has to be liberally construed so as to render maximum welfare to the working class. Bearing the object of the enactment in mind, if the facts of the present case are perused, the following emerges:

i) that there were two agreements between K.C. Rangaswamy and the petitioner dated 9.8.1972 and 10.10.1974, under the said agreement, the said Mr. K.C. Rangaswamy has been termed as Contractor who has offered to stitch and re-condition the secondhand gunny bags and deliver the same to the petitioner company;

ii) that the rate per unit has also been stipulated and under the agreement, the contractor has to secure a licence under the Factories Act as Manager or occupier ;

iii) that there are several other conditions including the condition to give a

security deposit in favour of the petitioner.

16. According to the petitioner, for the purpose of uninterrupted supply of gunny bags, agreement was entered into and space was provided within

the factory premises of the petitioner Unit. It is to be seen that the said Mr. K.C. Rangaswamy on 29.4.1974 has addressed the third respondent

requesting that the provisions of the Act may be extended to its employees and he is willing to pay the employer's share as provided u/s 6 of the

Act and majority of employees have also agreed for such coverage. Further, 57 workers of the said Factory have also given such a similar

representation dated 29.4.1974, agreeing to the extension of the provisions of the Act. However, no record has been placed before this Court by

the respondents Department as regards the action taken on such representations made by K.C. Rangaswamy and the workers.

17. Next communication which has been received by the petitioner is dated 24.8.1974, wherein the re-conditioning factory was treated as a Unit

of the petitioner. On receipt of the said communication, the petitioner has sent a reply through their counsel on 26.9.1974. In the said reply, it has

been contended that the employees employed by the occupier can by no stretch of imagination be brought within the fold of the definition of the

terms "employee" as defined u/s 2F of the act in so far as the petitioner is concerned. Further, since there is a subsisting agreement between the

petitioner and the occupier and he is the person who has employed such workmen, there is no employer - employee relationship.

18. Further, it has been contended that Section 2A of the Act has no application and a reference has also been made about the voluntary

application made by K.C. Rangaswamy on 29.4.1974. It is to be noted that a reply was sent through the counsel for the petitioner on 26.9.1974

and thereafter no action seems to have been taken for over four years and on 2.2.1978, the third respondent has threatened to take action against

the petitioner u/s 14 and Section 8 of the Act to realise the dues. Thereafter, the petitioner has submitted that an application would be presented

u/s 19-A of the Act. On 4.4.1978 a summon was issued to the petitioner to their registered office at Chennai u/s 7A of the Act, calling upon them

to produce the records relating to the said re-conditioning Unit such as Attendance Register, Membership Register, Cash Book and Vouchers,

Payment Registers and other documents necessary. In response to the said notice of enquiry, the petitioner submitted a reply on 17.7.1978,

reiterating the earlier stand taken and as to how such records cannot be produced by them since they were not the occupier of the said Unit. An

affidavit sworn to by the Secretary of the Company was also enclosed for the reference of the third respondent. Thereafter, the third respondent

by an order dated 7.9.1981, determined that the re-conditioning Unit is the branch of the petitioner within the meaning of Section 2A of the Act.

19. As rightly contended by the learned Counsel for the petitioner, the scope of enquiry u/s 7A of the Act is not a summary procedure, but, is in

the nature of a quasi judicial enquiry, since the authority has been given the same powers as vested in the Court under the provisions of the Code

of Civil Procedure.

20. The Hon"ble Supreme Court in Food Corporation of India Vs. Provident Fund Commissioner and Others, while considering the scope of

enquiry u/s 7A of the Act, has held as follows:

7.The question, in our opinion, is not whether one has failed to produce evidence. The question is whether the Commissioner who is the statutory

authority has exercised powers vested in him o collect the relevant evidence before determining the amount payable under the said Act.

8.It is of importance to remember that the Commissioner while conducting an inquiry u/s 7A has the same powers as are vested in a Court under

the CPC for trying a suit. The section reads as follows:

7A Determination of moneys due from employer-- (1) The Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner or

any Regional Provident Fund Commissioner may, by order determine the amount due from any employer under any provision of this Act (the

scheme or the Family Pension Scheme or the Insurance Scheme as the case may be) and for this purpose may conduct such inquiry as he may

deed necessary.

(2)The Officer conducting the inquiry under Sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court

under the Code of Civil Procedure, 1908 for trying a suit in respect of the following matters, namely:

(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 witness and any such inquiry shall be deemed to be a judicial proceeding within the meaning of

Sections 193 and 228, and for the purpose of Section 196 of the Indian Penal Code.

21. Thus before rendering a finding as to whether an Establishment would fall within the scope of the Act, in my view, an enquiry has to be

conducted, especially a full-fledged enquiry where the attendance of witnesses are enforced, documents are summoned, evidence on affidavit is

received and evidence could also be collected by issue of Commission. However, without following such procedure, the third respondent decided

that it has been ""conclusively"" proved that the said re-conditioning Unit is a branch of the petitioner, within the meaning of Section 2A of the Act.

The order passed u/s 7A of the Act has to be a speaking order and it should reflect as to the basis on which the authority comes to a conclusion

that the provisions of the Act are applicable. There is no record to show as to whether any summons were issued to the said re-conditioning Unit

or any records were summoned from the said Unit especially after the petitioner has taken a stand that they are not the employer, the occupier of

the said Unit is a different person and the said Unit hold a valid licence under the provisions of the Factories Act. Thus, the authority summarily

came to a conclusion that the said Unit is a Branch of the petitioner u/s 2A.

22. It is to be noted that the petitioner was directed to approach the first respondent by way of a petition u/s 19-A of the Act. Section 19-A of the

Act envisages that a direction could be issued by the Central Government when any difficulty arises in giving effect to the provisions of the Act and

if any doubt arises as to matters referred to under Clauses (i) to(v) of Section 19A. Further, it is to be noted that Section 19-A of the Act does not

indicate the procedure that should be adopted before a conclusion is reached. However, such a conclusion cannot be reached without an enquiry

or an investigation, especially when the decision has to be rendered on a question of fact. Therefore, the enquiry ought to be in the nature of a quasi

judicial enquiry, since it affects the rights of the parties to the proceedings.

23. A perusal of the impugned order would show that the first respondent came

to a conclusion that the said re-conditioning Unit has functional integrity with the petitioner factory based on the agreement dated 9.8.1972. It is to be noted at this juncture that the said re-conditioning Unit was not a party to the proceedings before the first respondent and no records were also placed before the authority, except the agreement between the petitioner and the said occupier of the re-conditioning Unit. Therefore, I am of the view that the findings of fact rendered by the first respondent is without conducting any investigation or enquiry and without taking into consideration the facts and circumstances. Equally the findings as regards the applicability of the award passed by the Labour Court in I.D. No. 172 of 1978 dated 28.09.1989, is also erroneous. according to the learned

Counsel for the petitioner, the said award had become final, therefore the applicability of the said Award ought to have been considered on merits.

24. Though the subject matter in I.D. No. 172 of 1978 relates to non-employment of the workmen in the old gunny re-conditioning Unit, the

Labour Court had rendered a finding that the said Unit, which was the second respondent in I.D. No. 172 of 1978, cannot be said to be

maintained by the petitioner because of the reason for providing space, water supply, electricity etc. Further, a finding has also been rendered that

the workmen had worked only under the Contractor. Thus, the findings of the Labour Court had not been taken note of by the first respondent,

but has been rejected on the ground that they have no relevance so far as the provisions of the present Act. Such a finding would be incorrect in

law especially when the subject matter in issue is between the same parties. Therefore, the first respondent ought to have endeavored to go into the

said findings and decide on its applicability, which unfortunately has not been done in the present case.

25. Further, it is brought to the notice of this Court by the learned Counsel on either side that during 1977, the said Unit had shifted its place of

activity about five miles away from the petitioner Factory. The summons issued u/s 7A of the Act was issued on 4.4.1978, after the unit had

shifted. This factor also ought to have been taken note of while deciding the issue, since the earlier finding was rendered primarily on the ground

that the re-conditioning Unit was situated in the premises of the petitioner Factory, enjoying free supply of water, electricity and other facilities.

26. For all the above reasons, I find that the order passed by the first respondent is not sustainable and requires interference. Accordingly, the impugned order is set aside and the matter is remanded back to the third respondent to conduct a detailed enquiry u/s 7A of the act, afford an opportunity to the petitioner to produce all oral and documentary evidence, issue notice to the re-conditioning Factory and call for records and documents lying in the case of the said Unit and after affording an opportunity to the parties, shall pass an order on merits and in accordance with law, within a period of four months from the date of receipt of a copy of this order.

The Writ Petition is allowed with the above direction. No costs.