

(2007) 02 PAT CK 0130

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 4411 of 2006

Kit Kat Restaurant and Bar and Others

APPELLANT

Vs

Assistant Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 27-02-2007

Acts Referred:

Citation : (2007) 02 PAT CK 0130

Final Decision : Allowed

Judgement

Navin Sinha, J.—Heard learned Counsel for the petitioners and learned Counsel for the Employees" Provident Fund Department.

2. The petitioners are aggrieved by the order dated 8.6.2004 at Annexure-10 by which the Respondent-authorities have arrived at a determination u/s 7A of The Employees" Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act") that the establishment of the petitioners styled as M/s Kit Kat Restaurant & Bar was a continuing establishment in terms of Section 17B to which the provisions of the Act were applicable. In consequence, a recovery certificate has been issued by order dated 12.1.2006 at Annexure-12.

3. Learned Counsel for the petitioners submitted that the determination u/s 7A of the Act made by the Respondents was erroneous and raises a question of jurisdiction. If the provisions of the Act were not applicable to the establishment, the Respondent-authority would have no jurisdiction in the matter. The Respondent-authority has erred in arrogating the question of jurisdiction to itself without proper consideration of the matter, taking evidence behind the back of the petitioners and arriving at a cryptic conclusion by a non-speaking order of their liability under the Act.

4. Learned Counsel for the Respondent-authority submitted that the petitioners had the alternative statutory remedy of an appeal available u/s 71 of the Act and, therefore, the writ petition was not maintainable.

5. This Court has heard the counsels for the parties.

6. The rule with regard to the reluctance of the writ Court to interfere in matters where an alternative statutory remedy is available, is a matter of discretion and there can be no hard and fast rule with regard to the same. The availability of an alternative remedy is certainly a strong circumstance to inhibit the exercise of powers by the writ Court. This is a self imposed restriction. Nonetheless, if the Court is satisfied on the face of the order that it suffers from inherent flaws of such nature that goes to the root of the matter raising questions of jurisdiction or violation of natural justice, the self imposed restriction by the writ Court shall not operate.

7. In the present case, the authorities were required to determine the factual question of applicability of the Act to the petitioners. A determination made in accordance with law would leave the petitioners with the only remedy of a statutory appeal. But, when the determination itself is wrong leading to the question of assumption of jurisdiction, which is not supported by the records, the situation would be fundamentally different.

8. In the present case, the proceedings u/s 7A of the Act have the trappings of the Civil Court under the Code of Civil Procedure. The procedure in the inquiry is akin to a suit. The authority inquiring has the power to enforce the attendance of a person or to examine him on oath, requiring production of documents, receiving evidence on affidavit and issue commissions for the examination of witnesses. Under Sub-clause (3A) of Section 7A of the Act if the person noticed fails to attend the inquiry without assigning any valid reason or fails to produce any document or to file any report or return, called upon to do so, the authority conducting the inquiry, may determine the amount on the basis of the evidence adduced during such inquiry that may be available on record. There is also a power to pass an ex parte award.

9. The present proceedings were initiated on the basis of two notices dated 1.7.2000 and 19.2.2001, which are presently appended as Annexures-7 & 7/a. The notices do not say what was the material on basis of which the inquiry was proposed to be held and what documents the petitioners were required to produce. The impugned order dated 8.6.2004 refers to two complaints as the basis for the inquiry. It is not in controversy that these complaints were never made available to the petitioners and they had an opportunity to meet the same. The complainant's were not summoned to lead evidence on oath or to give evidence on affidavit nor there was commission issued for their examination. But, based on the aforesaid complaints relied upon behind the back of the petitioners a presumption has been arrived at against the petitioners. The authorities in this manner have assumed jurisdiction in the matter by arriving at a determination of the applicability of the Act to the petitioners.

10. This Court also finds substance in the submission of the petitioners that the order is non-speaking in nature. There is no discussion in the order as to what transpired in the mind of the authority and the materials on the basis of which it has arrived at a factual determination. It is settled law that where an order is

appealable, it is necessary that the order must be reasoned. It must disclose what was passing in the mind of the authorities to enable the appellate authority to consider the matter in its proper perspective. An order, which is non-speaking in nature clearly hinders judicial review.

11. This Court is satisfied that no useful purpose shall be served by relegating the petitioners to the alternative statutory remedy. The petitioners were not called upon to produce special documents. The authority accepted evidence behind their back and relied upon the same to hold the petitioners liable. The order is cryptic and non-speaking. Jurisdiction has been arrogated on a self determination arbitrarily.

12. The Apex Court in the case of State of Uttar Pradesh v. Mohammad Nooh reported in 1958 Supreme Court Reports 595 held that "this rule requiring the exhaustion of statutory remedies before the writ is granted is a rule of policy, convenience and discretion rather than a rule of law". Their Lordships then proceeded to hold at page 609:

If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned.

13. Again in the case of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, delivering the majority judgment, Justice K.C. Das Gupta at paragraph 27 hold, as follows:

It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.

14. The writ application is, therefore, allowed. The impugned order dated 8.6.2004 at Annexure-10 and the consequential demand certificate dated 12.1.2006 at Annexure-12 is hereby quashed.

15. The Respondents shall not be precluded, if they so desire, to proceed afresh against the petitioners in accordance with law.