
(2016) 05 OHC CK 0009
In the Orissa High Court
Case No : W.P.(C) No. 2582 of 2011

M/s. Ram Chandra Omkar Lal	Vs	APPELLANT
Assistant Provident Fund Commissioner		RESPONDENT

Date of Decision : 12-05-2016

Acts Referred:

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

Citation : (2016) 3 CLR 419 : (2016) 150 FLR 325 : (2016) 2 ILRCuttack 429 :
(2016) LabLR 767 : (2016) 3 LLJ 483

Hon'ble Judges : S.N. Prasad, J.

Bench : Single Bench

Advocate : M/s. J. N. Rath, S.K. Jethy, S.K. Mishra and B. Barik, Advocate, for the Appellant; M/s. Gitimoy Mishra, B. N. Mohapatra, S. K. Gupta, S.K. Nanda and P. Panda, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Prasad, J.—This writ petition is against the order as contained in Annexure-5 which is an order passed by the authority U/s.7A of the Employees Provident Fund & Miscellaneous Provision Act, 1952 dated 11.12.2003 and the order as contained in Annexure-7 which is an order passed by the Appellate Authority in A.T.A. No.28(10) of 2004 dated 12.10.2010.

2. The brief fact of the case of the petitioner is that the petitioner being an establishment was registered for the purpose of manufacturer of excisable goods particularly for sale of Tamakhu, purchase of raw bidi and sale of finished bidi. After purchase of bidis, same are levelled and branded in the petitioner's establishment. The petitioner unit from the very beginning was continuing with two to three employees which was subsequently enhanced to four employees maximum. In the year 1998 the enforcement officer of the Provident Fund Department made a survey under section 13(2) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act") in respect of the petitioner's establishment. After verification of the records of the

establishment from 7/95 to 9/98 an inspection report was submitted clearly indicating that the strength of the establishment as on 10.10.1998 comes to two permanent employees and some ad hoc employees utilised on some occasions and the activities of the establishment was purely purchase of un-branded bidi and sale of Tamakhu and branded bidi only. The Provident Fund authorities have accepted the report but remained silent for long one year and after one year, one another enforcement officer was deputed who visited the establishment officer for the purpose of inspection of the records and in course of inspection of records the enforcement officer had prepared one another investigation proforma indicating therein that three persons with their pay particulars and asked the proprietor of the establishment to put his signature down below on the investigation proforma.

The enforcement officer gave the petitioner impression that the proceeding would be dropped as he was not having 20 or more than 20 employees, however, no copy of the said report was supplied to the petitioner. When a proceeding U/s.7-A was initiated the second report of enforcement officer was placed showing therein that the petitioner ? establishment has 37 part time employees and accordingly the assessment has been made U/s.7A of the Act, 1952 quantifying the amount to be paid by the petitioner ? establishment. The petitioner being aggrieved with the order passed U/s.7A has filed an appeal before the Appellate Tribunal and the Appellate Tribunal in a very mechanical manner has dismissed the appeal and affirmed the order passed U/s.7A of the Act, 1952.

The order passed U/s.7A and 7I of the Act, 1952 has been challenged by the petitioner on the grounds that the authority while deciding the proceeding U/s 7A has not provided an opportunity of being heard, the establishment is not having more than two or three employees and the enforcement officer has misled the authority by submitting report to the extent that the petitioner ? establishment is having 37 employees working. Likewise the order of the Appellate Authority is also been challenged stating therein that the Appellate Authority has not applied its mind as an Appellate Forum and passed the order in mechanical manner.

3. Counter affidavit has been filed by the opposite party, inter alia therein it has been stated that there is no infirmity in the order passed U/s.7A since the authority who has decided the proceeding U/s.7A of the Act, 1952 has provided ample opportunity to the petitioner but it never turned up and as such the final order was passed on 11.12.2003. The petitioner has failed to produce relevant reply. It has been stated that the petitioner has not disclosed the details of the workers to whom the wages was determined as per RG-12A register during the 7A proceeding.

It has been contended that the petitioner ? establishment deals with manufacturing of the bidi or even its brand, then also the workers are being engaged and as per definition of the employees given under section 2(f) of the Act, 1952 the work of any person who is engaged for any kind of work, manual or otherwise or in connection with the work of an establishment who gets wages

directly or indirectly from the employer will be said to be an employee of the establishment and as such after taking into consideration all these aspects of the matter order has been passed U/s.7A of the Act, 1952.

It has been contended that the petitioner has filed an appeal before the Appellate Tribunal and the Appellate Tribunal after taking into consideration the reasoning given by the authority U/s.7A of the Act, 1952 and placing reliance upon the judgment rendered by Hon"ble Apex Court has affirmed the order passed U/s.7A, hence there is no infirmity in the same.

4. Heard the learned counsels for the parties and perused the documents available on record.

The sole dispute raised by the petitioner is that the petitioner ? establishment is not an establishment to be taken under the purview of the Act, 1952.

In order to appreciate this argument it would be relevant to quote the relevant provisions of law and the relevant provisions for consideration are Section 1, Section 2(f) and Section 7A of the Act, 1952 which are being reproduced herein below:-

"1. Short title, extent and application.- (1) This Act may be called the Employees? Provident Funds and Miscellaneous Provisions Act, 1952.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) Subject to the provisions contained in section 16, it applies ?

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify, in this behalf:

xxxxxxxxxxxxxxxxxxxxx"

Employee? has been defined U/s.2(f) of the Act, 1952 which speaks as follows:

"2.(f) "employee" means 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 person,-

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment;]"

Section 7A speaks regarding determination of money dues from the employees

which is being reproduced herein below:-

"[7A. Determination of moneys due from employers. ?(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,-

(a) In a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) Determine the amount due from any employer under any provision of this Act, the Scheme or the [Pension] Scheme or the Insurance Scheme, as the case may be,

And for any of the aforesaid purposes may conduct such inquiry as he may deem 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 (5 of 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 witnesses, 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 (45 of 1860).

(3) No order shall be made under sub-section (1), unless [the employer concerned] is given a reasonable opportunity of representing his case.

[(3A) Where the employer, employee or any other person required to attend the inquiry under sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.]

[(4) Where an order under sub-section (1) is passed against an employer ex-parte, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show-cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date of proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show-cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation.- Where an appeal has been preferred under this Act against an order passed ex parte and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this subsection for setting aside the ex parte order.

(5) No order passed under this section shall be set aside on any application under sub-section (4) unless notice thereof has been served on the opposite party.]]"

Thus it is evident that any establishment whose strength of workmen is more than 20 will come under the purview of the Act, 1952.

It is further evident that any person who is involved in the work of the establishment directly or indirectly and getting wages will be termed as an employee.

Apart from the statutory provision, it is relevant to refer the judgments which are necessary for adjudication of the issue involved in this case. These are the judgments of Hon"ble Apex Court in the case of M. G. Beedi Workers v. Union of India, AIR 1974 Supreme Court 1832, M/s. P.M. Patel & Sons v. Union of India, AIR 1987 Supreme Court 447 and M/s. S. K. Nasiruddin Beedi Merchant Ltd. v. Central P.F. Commissioner, AIR 2001 Supreme Court 850.

In the case of M.G. Beedi Workers v. Union of India their Lordships have been pleased to hold that the Act would be applicable even in respect of home workers engaged through contractors.

In the case of M/s. P. M. Patel & Sons v. Union of India their lordships have been pleased to hold that the home bidi workers would come within the purview of the definition of employee.

In the case of M/s. S. K. Nasiruddin Beedi Merchant Ltd. v. Central P.F. Commissioner their lordships have been pleased to hold that "It is open for the petitioner to call up the names of the bidi workers who worked for them or the contractors and furnish names of all the workers to the Provident Fund Commissioner."

Now there is no dispute about the proposition of law that home bidi workers are within the meaning of employees for the purpose of Section 2(f) of the Act, 1952.

The petitioner's main dispute is that the establishment is having less than four employees and as the establishment is not involved in the manufacturing process, as such the Act is not amenable to the petitioner ? establishment, but on critical analysis of the order passed U/s.7A it is evident that the authority while deciding the application under section 7A had conducted detail enquiry and

a squad of two enforcement officers, i.e. Sri T.K. Panda and S.K. Rath were formed, the squad had submitted its report on 25.4.2001 in which it was ascertained from the workers Sri Dhirajlal Biswal and Hem Prasad Deep that the four aforesaid suppliers are manufacturers of bidis and sell branded bidis to M/s.Ram Chandra Omkarlal and after processing unbranded bidis the owner of M/s.Ram Chandra Omkarlal used to sell branded bidis with brand name "Fatphati Chhap". The squad further reported on verification of the stock book that 907.4 kg of tobacco was available as on 11.2.2001.

It has further been reported by the squad that from the stock of the Tamaku in the premises of the establishment that the employer have supplied the raw materials to the manufacturers / contractors and also to the home bidi rollers as advance and getting the unbranded bidis in return through purchases adjusting the advances cost towards supply of raw materials.

The second squad has reported after visiting the office of the petitioner ? establishment that on verification of the stock book it was found that 26 Nos. of bags containing 6,24,000 labelled bidis were there and all those bidis were Asli bidi of Omkar brand. It has also found one stock of unbranded bidis, Asli bidis and Chhat bidis. Accordingly report was submitted that the principal employer M/s.Ram Chandra Omkarlal have more than 40 employment strength and therefore, Act is applicable to the establishment.

After holding the Act applicable, summons were issued to the suppliers of bidi as also to the witnesses but seeing the contradictions in the statement of the witnesses the relevant record of the excise duty has been directed to be produced but the records have not been produced. The employer has filed written document and on perusal of the written document the report of the enforcement officer and the rolled bidis the authority has come to a finding that M/s.Ram Chandra Omkarlal is the principal employer and the four so called suppliers are the contractors. Home bidi rollers were engaged by those contractors as contract employees of the principal employer and on the basis of this factual aspect and taking into consideration the rule laid down by the Hon'ble Apex Court in the case of M/s. P. M. Patel & Sons v. Union of India (supra) the authorities have come to a definite finding that the Act is applicable on the strength of the number of employees and accordingly the amount has been assessed U/s.7A and 7Q.

5. From perusal of the order passed U/s.7A it is further evident that in spite of several opportunities having been given to the petitioner ? establishment not turned up, but the authorities on perusal of the inspection report and on conducting an enquiry and also taking into consideration the other documents like RG-12 register has passed the order U/s.7A. The petitioner has filed an appeal before the Tribunal in exercise of power U/s.7I of the Act, 1952. The learned Tribunal after appreciating the order passed U/s.7A, has declined to interfere with the finding.

6. Learned Tribunal has also relied upon the other aspects of the matter like the worker strength of the establishment, the scope of the statute, the definition of employee and its applicability on the basis of the judgment rendered by the Hon"ble Apex Court in the case of M/s. P. M. Patel & Sons v. Union of India (supra), M.G. Beedi Workers v. Union of India (supra) and M/s. S. K. Nasiruddin Beedi Merchant Ltd. v. Central P.F. Commissioner (supra) has rejected the appeal.

After taking into consideration the order passed U/s.7A and 7I, in my considered view there is no infirmity in the orders for the following reasons:-

(i) The power under section 7A has been vested with the authority to conduct enquiry regarding the liability.

(ii) The authorities have initiated the proceeding, issued notice to the petitioner on several occasions, but the petitioner did not turn up, accordingly, the authorities have constituted the inspecting team to inspect the office premises to get the records verified and on the basis of that direction two squad were constituted both of them have given reports, on the basis of the strength of the said report, the authorities have come to a conscious finding that the worker strength of the petitioner ? establishment was more than 40, hence the very Act is applicable.

7. Thus the petitioner has been given all opportunity of being heard but he has not availed that opportunity and now he is assailing the order by saying that the very Act is not applicable. But from perusal of the document which has been annexed by him and submitted before the authority which is at annexure-2, i.e. the investigation proforma where the disclosure has been given with respect to the detail particulars of employees which is more than 40, likewise the other documents has been annexed which were also been produced before the authorities which is at page 20 of the writ petition in which also the reference of 40 nos. of employees have been given.

8. Thus it is own document of the petitioner ? establishment it is evident that the contention raised by the petitioner that the number of employees are less than 4 is contrary and hence the same is rejected and taking into consideration the order passed U/s.7A based upon the relevant documents it is held that the Act is applicable.

9. The authorities after appreciating all these aspects of the matter and going through the relevant records of the RD-12 register has assessed the amount under section 7A and 7Q and this has been tested even by the Appellate Authority who has declined to interfere with the same.

10. It is settled that High Court sitting under Article 226 of the Constitution of India cannot assume the power of 2nd Appeal in order to disturb the fact finding by re-appreciating the finding based upon various facts.

11. This court in exercise of power of judicial review is only required to see whether the decision making process is proper or not and not to decide

correctness of demand in the nature of appeal.

12. In view of this settled proposition, no interference can be shown by this court.

13. Accordingly, the case is dismissed.