(2019) 08 CAL CK 0212

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 29341 (W) Of 2014

M/S. Sheong Shi Tannery & Anr APPELLANT

Vs

Regional Provident Fund Commissioner & Ors RESPONDENT

Date of Decision : 20-08-2019

Acts Referred:

Employees' Provident Fund And Miscellaneous Provisions Act, 1952 — Section 7(1), 7A, 8F, 8F(3)
Indian Penal Code, 1860 — Section 193, 196, 228

Citation : (2019) 08 CAL CK 0212

Hon'ble Judges : Shampa Sarkar, J

Bench : Single Bench

Advocate : Partha Bhanja Chowdhury, Anant Kumar Shaw, Ravi Kumar Dubey, Shiv Chandra Prosad

Final Decision : Allowed

Judgement

Shampa Sarkar, J

In this writ petition, the petitioner No.1 being a partnership firm engaged in the manufacturing of finished leather, and the petitioner No.2 being one of the partners, have challenged an order under Section 7A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (in short the said Act) issued by the Assistant Provident Fund Commissioner(C.C.I.), Regional Office, Kolkata, as also the order of attachment for an of amount Rs.5,59,968/- which was lying in the petitioners' account maintained with the Federal Bank Limited, Tangra Branch.

The challenge of petitioners are on the following grounds as stated hereunder:-

a) That the proceeding which was initiated by a notice dated July 15, 2004 by the Provident Fund authorities and the hearing of which had been adjourned to September 20, 2005, could not be reopened for a de-novo proceeding under Section 7A of the said Act after 6 years.

a) That there was nothing on record to show that the proceeding relating to the coverage of the same period could be reopened after several years, that too subsequent to the application of the petitioners for a provident fund code made in 2009, upon accepting their liability to be covered by the said Act on and from 2009 onwards.

a) That the law did not permit the respondents to recover the amount by attachment of their Bank Account without issuing any notice under Section 8F(3) of the said Act.

a) That the amount recovered ought to have been deposited by the authorities against identified persons who were contractor's labourers. That the authorities could not attach the amount and hold on to the same, as if, the amount was their own.

Mr. Bhanja Chowdhury, learned Advocate appearing on behalf of the petitioners has relied on the following decisions :-

Food Corporation of India Vs. Provident Fund Commissioner & Ors. reported in (1990)SCC 68.

M/s. Mantu Biri Factory (P) Ltd. Vs. The Regional Provident Fund Commissioner & Anr. reported in (1994)2 CHN 75, and

Raj Kumar Gupta vs. The Assistant Provident Commissioner & Anr. reported in 2013(139)FLR 2017 in support of his contentions.

Mr. Prasad, learned Advocate appearing on behalf of the respondents submitted that paragraphs 30 and 36 of the Employees Provident Fund Scheme, 1992 provided that even if the petitioner had out- sourced the job to a contractor it was their duty to collect the provident fund contribution from the contractor and deposit the same with the authorities as the principal employer.

Mr. Prasad further submitted that the petitioners were liable to pay the amount recovered under the 7A proceeding to the authorities and the authorities would hold the same as a custodian or in trust on behalf of those labourers appointed by the contractor, to whom the petitioners had outsourced the job, and as and when such labourers would approach the provident fund authorities, the amount would be disbursed to them accordingly.

On the question as to why the authorities did not take any steps after September, 2005 in the proceeding which was initiated to recover the self same amount for the self-same period, Mr. Prasad submitted that the matter escaped the notice of the authorities. Mr. Prasad further submitted that the order under Section 7A was appealable under Section 7(1) before the appellate tribunal. Mr. Prasad relied on the decision of the Hon'ble Apex Court in the matter of Employees' State Insurance Corporation Vs. Harrison Malayalam Pvt.Ltd. reported in (1993) 4 SCC 361.

Heard the parties.

Admittedly, a proceeding was initiated by the authorities against the petitioners in 2004 under Section 7A of the Act for non-deposit of provident fund dues for the period from May 2001 to March 2005. The petitioners were issued summons and they participated in the proceeding. Considerable progress was made in the proceeding. The hearing was adjourned to September 20, 2005. Thereafter, no further action was taken by the authorities to continue with the hearing. In connection with the above proceedings, the petitioners on or about December 6, 2005 filed an application before the Assistant Provident Fund Commissioner, West Bengal, Sikkim and Andaman & Nicobar Island for consideration of certain points raised therein. However, no steps were taken by the authorities concerned. The proceeding thus died a natural death. By an application dated December 4, 2009, the petitioners applied for a code number under the provisions of the said Act, as by then, the petitioners had appointed 20 persons as their employees. A Code was also assigned to the petitioners bearing P.F.No.WB/54563.

By a notice dated January 7, 2011, the authorities once again in exercise of power under Section 7A of the said Act, summoned the petitioners to appear before the Assistant Commissioner of Provident Fund, West Bengal, Sikkim and Andaman & Nicobar Island for determination of the provident fund dues from May 2001 to March 2005. The petitioners objected to the said notice and put forward their written reply.

Upon conclusion of the hearing, the order impugned to this writ petition dated June 20, 2012 was passed. On the basis of the documents produced before the authorities, it was assessed that the petitioners were liable to pay a sum of Rs.5,59,968/- as provident fund dues in respect of persons deployed by the contractor of the petitioners. Although, the name of one Birendra whom the authorities assumed to be the contractor was available on record, the authorities did not summon him in order to ascertain whether the contractor had deducted the provident fund dues of his labourers. The authorities also did not take any evidence with regard to the identity of the persons who were deployed by the contractor, so that the money recovered from the petitioners as provident fund dues could be deposited against those persons as members under the scheme.

On the basis of the order dated June 20, 2012, the authorities attached the amount from the Bank of the petitioners. There is nothing on record to show that a notice was given to the petitioners prior to such attachment under Section 8F(3) of the said Act. According to Mr. Prasad, the order under Section 7A of the proceeding, called upon the petitioners to pay up the amount within 15 days from the date of the order which was sufficient notice under Section 8F(3). In my opinion, the same cannot be accepted, as the law required the authorities to give a notice under Section 8F as well.

The order impugned was passed on the basis of inability of the petitioners to produce records with regard to salary register and vouchers etc of the contractor's labourers. The only voucher available was payment of charges to one Birendra, from which the authorities concluded that the petitioners were liable to deposit the provident fund amount in respect of employees deployed, by Birendra. In my opinion, the same was not a proper procedure followed by the authorities.

Reliance is placed on the decision of Food Corporation of India (supra) wherein the Hon'ble Apex Court had clarified that as the Commissioner was vested with the power of the Civil Court, it would be the duty of the Commissioner in a proceeding under Section 7A of the said Act, to exercise his power in order to collect all evidence and collate all material before coming to a proper conclusion. The relevant portion is quoted below:-

"6. We have carefully perused the Commissioner's order and also the order of the High Court. The total amount ordered to be payable comes to about Rs 22,48,000 in respect of the employees of depots namely: Udaipur, Jaipur, Ajmer, Badmer and Sawai Madhopur. The Commissioner has also directed the Divisional Officer, Jaipur to deposit the provident fund contribution i.e. Rs 18,72,194 to the Fund being maintained by the trustees of the establishment. It is indeed a large amount for the determination of which the Commissioner has only depended upon the lists furnished by the Workers' Union. It is no doubt true that the employer and contractors are both liable to maintain registers in respect of the workers employed. But the Corporation seems to have some problems in collating the lists of all workers engaged in depots scattered at different places. It has requested the Commissioner to summon the contractors to produce the respective lists of workers engaged by them. The Commissioner did not summon the contractors nor the lists maintained by them. He has stated that the Corporation has failed to produce the evidence.

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 to 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 under Section 7-A has the same powers as are vested in a court under the Code of Civil Procedure for trying a suit. The section reads as follows:

"7-A 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 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, 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."

The question here is not whether the petitioners failed to adduce evidence in support of their contention to the effect that they had not employed 20 persons but had outsourced the entire work to a contractor and paid a lumpsum amount to the contractor after the job was done. The question is whether the authority, who is a statutory authority, had exercised his power vested in him to collect relevant evidence before determining the amount payable by the petitioners, if at all. In this case, the contention of the petitioners should have been tested upon summoning the alleged contractor and recording his evidence. Also, the persons employed should have been called or in the least the register of the contractor and other records should have been asked to be produced in order to ascertain whether such amount was deducted from the wages of the labourers by the contractor. Moreover where the contractor, was the employer providing services of manpower, was having control over the personnel being supplied by him to the establishments by way of issuance of appointment letters, payment of wages and other allowances, taking disciplinary actions affecting their placement, transfer, and termination of services, the relationship between such a contractor and the establishment where the manpower was supplied by him would be of principal to principal and not that of employer-contractor. Such a situation should have also been assessed by the authority in the 7A proceeding by taking evidence. The contractor should have been summoned. It is also pertinent to mention that with respect to the contractors, who were registered with the Provident Fund Department, having the independent code number, they were to be treated as independent employers. The establishments engaging such contractors could not be treated to be the principal employer. This aspect should have been gone into by the authorities. In the instant case, it appears that the liability was fixed under Section 7A of the said Act on the assumption that some persons (unknown and unidentified) had been deployed by the contractor for doing the work of the petitioners and as such the petitioners were liable to deposit the amount as stated above.

Under the law, the provident fund authorities were required to keep an account of the individual workmen. Their names, addresses and identities etc. should be available with the authorities and the amount attached could not be kept by the authorities with reference to an alleged contractor for an unlimited period. Provident fund dues are not taxes payable by the petitioners to the authorities. It is an amount to be paid to the employees as a welfare measure. It was the duty of the authority to summon the said Birendra alleged to be the contractor by the authorities, in order to assess the correct situation and also to identify the workers before assessing the final liability of the petitioners. Reliance is placed to the decision of M/s. Mantu Biri Factory(P) Ltd. (supra).

Reliance is also placed on the decision of Raj Kumar Gupta(supra), wherein it had been held that the provident fund authorities could not collect or compel contribution to be made by the employers with regard to faceless, nameless or non-identifiable workmen on mere head-count or herd count. In the said case, the Court granted liberty to the employer to claim refund inter alia holding that recovery of the amount against faceless, nameless or non-identifiable workmen on mere head-count or herd count was not permissible in law.

The decision of the Hon'ble Apex Court in Harrison Malayalam Pvt. Ltd (supra) is distinguishable on facts. There is no quarrel with the proposition laid down in the said judgement, that the Principal Commissioner was bound to get the necessary details of the employee of the contractor. In the case before the Hon'ble Apex Court, the question was whether the contribution in respect of the employees of the contractor was payable although the contract was completed much prior to the demand for such contribution made by the Corporation. Thus the facts are distinguishable.

Reverting to the facts at this case, it appears from the records that the 7A proceeding was initially initiated with regard to non-payment of provident fund dues by the petitioners between May 2001 and March 2005. After six years, the matter was reopened and decided on the basis of evidence which was insufficient for the authorities to have come to the conclusion. Moreover, the amount deposited was kept by the authorities against non-identifiable labourers which is not permitted under the law, as per the decisions referred to hereinabove.

The petitioners in this case need not be relegated to the appellate authority, in view of the fact that the decision making process was contrary to the settled principles of law and was vitiated by the failure on the part of the statutory authority to act in terms of the statute. Moreover, the authority under 7A was required to collect more evidence for proper adjudication of the dispute, which would not be possible before the appellate tribunal.

The order dated June 20, 2012 and the order of attachment of the bank account of the petitioner is hereby quashed and set aside.

The matter is remanded back to the concerned Assistant Provident Fund Commissioner(C.C.I) Regional Office at Kolkata to rehear the matter in accordance with law and as per the discussions made hereinabove. He shall summon the petitioners as also the contractor and other parties in order to adjudicate the matter in its correct perspective. For the reasons supplied herein-above, the amount attached by the authorities from the Bank of the petitioners which has been kept in a short term fixed deposit as directed by another learned judge of this Court, should be refunded to the petitioners along with the interest accumulated therein, within six weeks from the date of communication of this order, upon the petitioners' furnishing a Bank Guarantee of equivalent amount.

The respondent authorities will intimate the petitioners within two weeks from the date of communication of this order the exact figure which is lying in the said account in order to enable the petitioners to furnish the bank guarantee of an equivalent The proceedings under Section 7A will be concluded within 3 months. The authorities will be at liberty to invoke the bank guarantee, if upon conclusion of the proceedings the petitioners are found liable to make the payment. If there is any short fall, then the additional amount will be payable by the petitioners. If the petitioners do not co-operate during the proceedings and seek necessary adjournments, the authorities will also be at liberty to invoke the bank guarantee.

This writ petition is allowed.

There will be, however, no order as to costs.

Urgent photostat certified copy of this order be given to the parties on priority basis, if the same is applied for.