

(1980) 07 PAT CK 0002

In the Patna High Court

Case No : Civil Writ Jurisdiction case No. 4089 of 1988

M/s Sk. Nasiruddin Bidi Merchant Pvt. Ltd.

APPELLANT

Vs

The Regional Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 27-07-1980

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 2, 2(f), 7(a)

Citation : (1980) 2 PLJR 135

Hon'ble Judges : Uday Sinha, J;B.K. Roy, J

Bench : Division Bench

Advocate : Ashok Sen, Dr. Shankar Ghosh, Birendra Kumar Sinha, B. Parkar Sen and Ratan Pd. Sinha, for the Appellant; Y.V. Giri and Ajoy Kumar Tripathy, for the Respondent

Final Decision : Dismissed

Judgement

Uday Sinha, J.—The crucial question falling for consideration in this application under Articles 226 and 227 of the Constitution of India is whether the provisions of the Employees Provident Fund and Miscellaneous Provisions Act (hereinafter called the Provident Fund Act) apply to beedi merchants who get their beedi rolled through independent contactors. In this, behalf, the petitioner has prayed for quashing annexures 14, 16 and 27 to this application as well as the proceeding u/s 7 (a) of the Employees Provident Fund Act.

2. The petitioner is a private limited company with its head office at Calcutta. It has branches at several places. Three of them are in this State. It is registered with Bengal Regional Provident Fund Commissioner at Calcutta, bearing code No. W. B/6892. In regard to its business in Bihar, it is registered with Regional Provident Fund Commissioner, Patna, and bears code No. BR/1365. The assertion of the petitioner is that it is purchaser of beedi from the market. The process of purchase is that it negotiates with independent contractors who are known as

commission agents or suppliers. The independent contractors/commission agents themselves hold licence under the Central Excise and Salt Act, 1940, and under the Beedi Workers (Conditions of Employment) Act. The commission agents procure raw materials namely tobacco and leaves and distribute it to workers to roll it in their own homes. The workers are, therefore, known as "Home workers". The independent contractors collect the rolled beedi from the home workers and supply it to the petitioner. Neither the beedi merchant (the petitioner) given any premises to workers for rolling beedi nor does the independent contractor call the beedi makers at its own premises but the workers roll it in their own homes, that is why the job is considered sheltered job and workers as home workers. This is so, for the simple reason that the entire family of a worker is employed in beedi rolling which may include his son, his mother, his sister etc.

3. The petitioner's case is that it has its branches at several places in the country. It accepts that it has four hundred persons in its own employment who work in the company premises where leaves, tobacco, thread, etc. are supplied by the company for rolling the beedis. On their behalf, the petitioner concedes that it has liability to contribute to their Provident Fund in terms of the Provident Fund Act and in fact it does so. The payment is made at the head office level which is in Bengal although the workers working in the premises of the petitioner are spread over various places in the country. Apart from the beedis manufactured by these workers in the premises of the petitioner, who must be held to be employees of the company, the petitioner obtained beedis from other independent sources as well. It purchases rolled beedis from them on principal to principal basis. The number of such persons or sources is five hundred and twenty seven. The petitioner calls them "Independent contractors". The petitioner's assertion is that it has no knowledge about the workers with whom the independent contractors maintained liason. The independent contractors supply tobacco and other raw materials to the home workers. After the beedis have been rolled, the home workers deliver them to the contractors. The contractors in turn supply/sell the rolled beedis to the petitioner. The so-called independent contractors have their own godown, office and premises where either the workers roll beedis or after rolling them in their homes deliver them to the contractors. The petitioner, therefore, contends that the petitioner only purchases beedis from the independent contractors. Since the purchase is on principal to principal basis, the home workers may be employees of the independent contractors but they are certainly not employees of the petitioner which is engaged in the sale and purchase of the beedis. The home workers being workers of the independent contractors they are not employees of the petitioner. As they are not employees of the petitioner, there is no liability upon it to comply with the terms of the Employees Provident Fund Act and section 7 (a) of the said Act, which does not come into play so far as home workers is concerned. Let me once again reiterate that the petitioner concedes its liability in regard to workers manufacturing beedis in the premises of the petitioner. The number of persons working in the premises of the petitioner is about four

hundred inclusive of establishment at all places, but refutes its liability for the "Home workers of Independent contractors."

4. Beedi industry came within the purview of the Act in June 1977, when a notification was issued by the Central Government bringing beedi industry within the purview of the Act. Even before the issuance of the notification on 1.6.1977, a summons had been issued to the firm in January, 1977, in terms of Section 7 (a) of the Act. The summons shows that the notification intended to apply the provisions of the Act with effect from July, 1966, to December, 1976. Code no. BR 1365 was accordingly allotted. The petitioner replied that the beedi industry not being covered by the Act, no action could be taken against it. The company, however, informed the Provident Fund Commissioner, hereinafter called the PF. Commissioner that it was paying its contribution in terms of the provisions of the Act in West Bengal. The petitioner was, however, informed that it had been allotted code number in case no. 31 of 1977. No action was taken by the Provident Fund Commissioner thereafter. In reply to the notice, annexure 3, dated 18.2.1977, the petitioner replied by letter dated 4.4.1977, giving out the names of the workers working in Bihar but covered by the Calcutta office. Thereafter, matters remained stagnating. Either the authorities were satisfied about the assertion of the petitioner or the authorities forgot about the matter. In 1987, by annexure 8 dated 20.2.1987, the petitioner received a letter from the Regional Commissioner, Provident Fund, hereinafter called the Regional Commissioner, to comply with the requirements mentioned in letter dated 4.10.198(sic). It appears that the Enforcement Officer Dinesh Singh had visited the premises of the petitioner company at Bihar Sharif on 24.9.1986. He tried to ascertain the details of dues from 1.10.1985 to 31.8.1986, in regard to home workers but it could not be ascertained as no record was produced before him by the officers of the company. The Enforcement Officer was told that there being no home workers in the employment of the company no such record was being maintained by the management. The Enforcement Officer, directed the company to supply the materials in regard to home workers. Suffice it to say that the company did not supply the names of home workers said to be working for the petitioner. By letter dated 24.11.1987, annexure 14, a show cause notice was issued to the petitioner u/s 14 of the Provident Fund Act calling upon the company to supply the names of all those employees who were engaged directly or through commission agents in rolling beedi for the establishment of the petitioner. The petitioner was also called upon to show cause why legal action in terms of the Act and the scheme framed thereunder be not taken against it. The petitioner filed a long show cause explaining its position.

5. The Regional Provident Fund Commissioner heard Mr. T.K. Jagdish, learned counsel for the petitioner. The Regional Provident Fund Commissioner after hearing counsel for the petitioner rejected the contention of the petitioner by order dated 23.2.1988, annexure 16. The petitioner was directed to report compliance of the earlier direction issued by him within fifteen days. Annexure 16 shows that the representative of the company was directed once again to comply

with the requirements as directed in the earlier communication, annexure. 5 Thereafter the company once again reiterated its position by a long letter dated 11.3.1988. By letter dated 12.4.1988, annexure 27 the Assistant Regional Provident Fund Commissioner once again called upon the petitioner to produce all relevant documents and records pertaining to notice period before the Regional Provident Fund Commissioner, Patna, on 27.4.1988, at 10.30 A.M. for determining dues payable by the petitioner failing which ex parte proceeding would be taken on the basis of materials in possession of the department. Hence this application for quashing annexures 14, 16 and 27.

6. The first stand of the petitioner is that the petitioner has no employees and has no contact with any of the "home beedi workers." It claims to purchase rolled beedi from independent contractors who maintain contact with the beedi workers. The purchase according to the petitioner, was on principal to principal basis. The parties from whom it purchases beedis are independent contractors/ commission agents/ sellers. According to the petitioner, although the persons rolling beedis are home workers But they are workers of independent contractors/ commission agents/ sellers. That being so, the petitioner cannot be held to be employer of the workmen and is not answerable for complying with the provisions of the Act in regard to those home workers. Strong reliance has been placed by Mr. A.K. Sen, learned counsel for the petitioner upon P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others, .

7. The second stand of the petitioner is that the Act having been extended to beedi workers in 1977, the petitioner cannot be made liable to account for provident fund deduction and payment for a period prior to the date the Act was made applicable to beedi workers. This submission was based on a footing that the petitioner had been called upon to submit return for the period 1966-77.

8. The third stand of the petitioner is that the order of the Regional Provident Fund Commissioner was vitiated as it had been made in contravention of rules of natural justice as annexure 16 had been passed on the basis of inspection effected behind the back of the petitioner.

9. The stand of the Regional Provident Fund Commissioner is that there is no distinction between home workers maintained by the contractors and home workers maintained by independent contractors. According to Mr. Giri, learned counsel for Union of India, the expression "Independent Contractor" was only a subterfuge to defeat the provisions of the Provident Fund Act. The second submission urged by Mr. Giri, was that no action has been taken against the petitioner up till now and therefore the present writ application is premature. He submitted that the petitioner had only been called upon to furnish the relevant information. The stage of enquiry in regard to the liability of the petitioner is yet to arrive. He has, therefore, submitted that the application is fit to be rejected.

10. Mr. A.K. Sen, learned counsel for the petitioner, did not dispute that the workers employed by contractors of beedi manufacturers were covered by the

provisions of the Act and the scheme His only point was that since the petitioner was dealing with independent contractors they were not their employer. That being so. it would not be liable to account for the provident fund deduction and payment to the home workers. At this stage I would only like to point out that in paragraph 8 of the petition it has been conceded on behalf of the petitioner that the small offices of the petitioner company located in different towns and suburb are supplying raw materials on sale note to the independent contractors/ commission agents/suppliers.

11. The stand of the Regional Provident Fund Commissioner is that the story of the claim of independent contractors is not tenable and in terms of law thousands of persons engaged in beedi manufacturing coming to the stock of the petitioner are employees of the petitioner. According to the department, the law is a welfare measure and it cannot be defeated by subterfuges. The facade cannot conceal the real state of affairs and deprive numerous employees of the benefits of the Employees Provident Fund Act.

12. Section 2 (f) defines employee as follows:--

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 employed by or through a contractor in or in connection with the work of the establishment.

From the above it should be obvious that in order to attract the liability under the Provident Fund Act, there must be an employer and an employee. Relationship for employer and employee is a sine qua non for application of the Act. A producer or a manufacturer cannot be made liable to contribute towards the provident fund of a workman who is not employed by the producer. The content of the word "employee" has, however, undergone radical change. In terms of the definition quoted above, it is obvious that if wages are paid to a person for production in connection with the industry, the worker would become employee of the manufacturer. The words "in or in connection with the work of an establishment" have widened the ambit of the employer-employee relationship. In *Hussainbhai v. The Alath Factory Tezhilali Union and others*: 1978 S.C. 1410, V.R. Krishna Iyer J. posed the question who is an employee. His lordship answered the question in the following words-

Who is an employee, in labour law ? That is the short, die-hard question raised here but covered by this court's earlier decisions. Like the High Court, we give short shrift to the contention that the petitioner has entered into agreements with intermediate contractors who had hired the respondent Union's work-men and so no direct employer-employee *vinclulum juris* existed between the petitioner and the workman.

This argument is impeccable in *laissez faire* economics "red in tooth and claw" and under the Contract Act rooted in English Common Law. But the human gap

of a century yawns between this strict doctrine and industrial jurisprudence. The source and strength of the industrial branch of Third World Jurisprudence is social justice proclaimed in the preamble to the Constitution. This court in Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others, has raised on British and American rulings to hold that mere contracts are not decisive and the complex of considerations relevant to the relationship is different. Indian Justice, beyond Atlantic liberalism, has a rule of law which runs to the aid of the rule of life. And life, in conditions of poverty aplenty, is livelihood, and livelihood is work-with wages. Raw societal realities, not finespun legal niceties, not competitive market economics but complex protective principles, shape the law when the weaker working class sector needs succour for livelihood through labour. The conceptual confusion between the classical of contracts and the special branch of law sensitive to exploitative situations accounts for the submission that the High Court is in error in the holding against the petitioner.

Judged by above standard, persons manufacturing beedi and supplying to manufacturer must be held to be persons engaged in or in connection with the work of an establishment. The wages may be paid to him directly by the employer or indirectly from the employer through a contractor. The definition takes in its sweep not only persons engaged in the premises of the employer but also who work at their own homes but work in connection with the business of the employer Beedi Industry is one such where the workman produces beedi at his own home. Naturally therefore, they are spread out at different places and do not work in the establishment of the employer yet they are in the category of workers who get their wages from the employer. That payment may be direct or may be indirect. Where the beedi worker gets his wages directly from the employer there is no difficulty in appreciating that he is an employee of the manufacturer. Even if he does not receive wages directly from the employer but he receives it through a contractor retained by or in contact with the employer. Home worker therefore, employed either by an employer or by a contractor must be held to be employee of the employer.

13. Section 7 (a) of the Act lays down the mode of determination of money due from the employer. It provides that the Provident Fund authorities may, by order, determine the amount due from the employer and for this may conduct such inquiry as he may deem necessary. In the case of P.M. Patel (supra) the manufacturer of beedi claimed that he was not liable to pay the provident fund in terms of the Act to the home workers, as they are called. At paragraph 3 of the judgment, the Supreme Court identified the various categories of workers. The first category was of those who roll beedi in the premises of the manufacturer, the raw materials being supplied by the manufacturer. That situation Creates no difficulty and the petitioner candidly concedes that they are liable to contribute to the provident fund of the workers engaged in the premises of the petitioner. They have given names of such persons and it is claimed that they have been regularly contributing to their provident fund through the Bengal Section.

14. The Supreme Court then proceeded to identify other categories of workman in the industry of beedi rolling. They were, firstly, workman entrusted by the manufacturers directly to workers who prepare beedi at their homes after obtaining supply of raw materials. The second category consisted of workers employed by the manufacturer through contractors, the manufacturer's passing of the raw materials to such workers for rolling beedi in their dwelling houses. The third category of the workers was of those to whom the work is entrusted by independent contractors who treated the workers as their employees and get the work done by them either at their own premises or in the dwelling houses of the workers in order to fulfil and to complete contract entered between the manufacturer for the supply of finished products from the raw materials supplied by the manufacturer to the contractors. In each of these categories the workman are considered to be home workers as they roll beedi in their own homes. The Supreme Court thereafter noted the contentions urged on behalf of the petitioners at paragraph 5. The first contention was that the provisions of the Provident Fund Act and scheme cannot be extended to home workers because there is no relationship of employer and employee between the manufacturers and the home workers. At paragraph 6 of the judgment the Supreme Court noted that some of the home workers had been working regularly for several years exclusively with a single manufacturer. The findings recorded in paragraph 6 by the Supreme Court are not available in the present case as the necessary exercise by the Commissioner has not been gone through. The workers have yet to be identified. Up till now the Regional Provident Fund Commissioner has only come by five hundred and twenty seven names of contractors, described as independent contractors by the petitioner. The authorities have called upon the petitioner to furnish the names but have not succeeded in spotting them. After noting several earlier decisions of the Supreme Court, the conclusion was recorded at paragraph 11 in the following terms:--

In our opinion, the home workers are employees within the definition contained in clause (f) of section 2 of the Employees Provident Fund Act.

It should be appreciated that the Supreme Court identified three categories of home workers. They could be workers directly employed by the manufacturer. They could be workers employed by the contractors for manufacturer. They could be workers supplying the finished products to persons known as independent contractors. In all of these three categories the workmen were home workers. The conclusion of Chief Justice Pathak at paragraph 11 in the case of *M/s P.M. Patel and others vs. Union of India* (supra) must mean that all the three categories of home workers were employees within the definition contained in clause 2 (f) of the Act.

The Supreme Court did not lay down that employers/manufacturers functioning through independent contractors were not liable for the provident fund dues of the home workers of independent contractors. It is true that in paragraph 9 the Supreme Court laid down certain tests for determining whether the relationship

of employer and employee existed between the manufacturer and the home workers or not but the Supreme Court did not lay down at any point of time whether workers employed by independent contractors were workers of the principal employer or not or that the principal employer was not liable under scheme in respect of home workers employed by the independent contractors. Chief justice Pathak noted in the case of P.M. Patel (supra) that the conventional notions of employer-employee relationship took a major shift in Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another, as to the criteria which determined the relationship of Master and Servant. His lordship Mathew J. pointed out that test of control as traditionally formulated was no longer treated as exclusive test. Pathak C.J. then observed that there are various aspects to be taken into account in considering the question of control, one of them though not the only one, is the right of rejection of the finished goods by the beedi merchant. The very fact that the case of P.M. Patel (supra) refers to power of rejection as a factor pointing in the direction of existence of an independent contractor shows that the concept of independent contractor in the beedi industry has not been thrown to the winds. The decision in that case therefore, cannot be said to be an authority to resolve the question whether home workers of an independent contractor would be employees of the beedi merchant or not. That decision cannot be held to be a settler on that point.

15. The decision of the Supreme Court in the case of P.M. Patel (supra) shows that the employer is liable, to contribute to the provident fund for home workers. That decision, therefore, not having held that where there are independent contractors, the beedi merchant is not liable, the decision cannot be of any help to the petitioner. Question, however, is, can a manufacturer of beedi circumvent or set at naught a welfare legislation by setting up a particular pattern for his trade. The preamble to Employees Provident Fund and Miscellaneous Provisions Act, 1952, shows that it is an Act to provide for the institution of Provident Fund, family pension fund and deposit linked insurance fund for employees in factories and other establishments. The object thus is welfare of employees. This objective should not be allowed to be scuttled by mere devices. The beedi workers, be they home workers or be they workers in the premises of the factory have to receive provident fund. There are such a lot that they cannot combine and wrest in favour or fulfilment of their right from the employer. The State has, therefore, stepped in and extended the benefit of the Act to home workers. On the other hand, we find that the management is all set to escape liability under the Act, come what may, to the workmen. In that situation which interpretation of law should be accepted, the law which saves the employer from liability or the law which fulfils the objective for the betterment of workmen. It is an established principle of interpretation of statute that where two views of a law are possible, the one which sustains or advances the objectives should be preferred than the one which stultifies it. "Office of all the judges, is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and

pro privato commodo, and to add force and life to the cure and remedy according to the true intent of the makers of the Act pro bono publico." (See Craies on statute law 5th edition page 91). By that rule propounded in Heydons cast, the word "employees" must be understood in a manner as to include home workers as employees of beedi merchants. In my view, therefore, beedi workers employed by so called independent contractors also come within the ambit of the Employees Provident Fund Act,

16. Learned counsel for the petitioner relied upon the decision of the Supreme Court in Silver Jubilee Tailoring House v. Chief. Inspector of Shops and Establishment, (supra) to establish that workers of independent contractors would not be the responsibility of the beedi merchant in the matter of contribution to provident fund. That case must be distinguished on the basis of the thesis propounded by V.R. Krishna Iyer. in the case of Hussainbhai v. The Alath factory Tezhilali Union and others (supra). The decision of the Supreme Court in D.C. Dewan Mohideen Sahib & sons v. The Secretary, United Beedi Workers' Union Salem & others: 1966 S.C. 370, is distinguishable on the same basis. Notice, however, must be taken of the observation of the Supreme Court that the nature of control required to make a person a servant (employee) and the Master (employer) would be, dependent on the facts of each case. That case, was decided in favour of the workmen and not the management.

17. Learned counsel for the petitioner contended that the method of working of the petitioner was not a subterfuge and that the pattern of obtaining beedi from persons described as independent contractors was in existence since much before the Act had been applied to beedi merchants. In my view that is no answer. The device or the pattern adopted by beedi merchant like the petitioner may have been the cause for extending the Act to cover beedi workers. The Provident Fund Commissioner has found as a fact that home workers were really employees of the petitioner. That is a question of fact. The task of identifying each home worker will still have to be gone through. That will not be an easy task for the commissioner but that exercise will have to be gone through.

18. Mr. Y.V. Giri, learned counsel for the respondents was justified on relying upon a decision of a Division Bench of this Court presided over by S.B. Sanyal and R.N. Lal, JJ. in C.W.J.C. No. 3700 of 1988 dated 18.8.1988. The decision of another Division "Bench of this Court presided over by S.K. Jha and L.P. N. Shahdeo, JJ. in C.W.J.C. No. 5791 of 1988 (R) is to the same effect

19. There is, however, yet another aspect of the matter. The Provident Fund Act was made applicable in June, 1977. I have failed to appreciate and Mr. Giri learned counsel for the respondents could not persuade us to appreciate how the petitioner could be asked to give accounts for the provident fund contribution between the years 1966-77.

20. For all the reasons stated above, I am of the view that the petitioner cannot escape the rigor of the law by describing some of its links as independent

contractors. The petitioner is liable to contribute to the provident fund on account of home workers of so-called independent contractors as well. I am conscious of the fact that the provident fund Commissioner may not receive co-operation from the petitioner and may have to look for the home workers himself. That exercise will have to be taken up in all seriousness. The application must, therefore, fail to the extent indicated above. The petitioner 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 application is dismissed accordingly with costs. Hearing fee Rs. 250/-.