(2009) 10 CAL CK 0006

In the Calcutta High Court

Case No : Writ Petition No. 1318 (W) of 2008

Paramount Leathers	APPELLANT
Vs	
Regional Provident Fund Commissioner and Another	RESPONDENT

Date of Decision : 26-10-2009

Acts Referred:

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

Citation : (2010) 124 FLR 84

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Mrinal Kanti Das and Subrata Das, for the Appellant;Mihir Kundu, for the Respondent

Judgement

Jayanta Kumar Biswas, J.—The petitioner in this writ petition dated January 18, 2008 is questioning the order pf the Assistant Provident Fund Commissioner, Regional Office, Kolkata dated December 14, 2007, Annexure 12 at p.61. The order was made in the proceedings initiated u/s 7-A the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952.

2. The authority under the Act called upon the petitioner to comply with the provisions of the Act and the Schemes framed thereunder with effect from April, 1999. The direction was given after a team of enforcement officers visited the establishment, made necessary investigation and submitted report with all supporting documents. The petitioner disputed the question of applicability of the Act to its establishment Accordingly the authority initiated the proceedings, gave the petitioner opportunity of presenting its case and also of hearing, and then came to the conclusion that the Act would be applicable to the establishment.

3. In the impugned order the authority has recorded as follows:

"AND WHEREAS, on 10.12.2007 Sri Sandipan Mitra, Advocate appeared on behalf of the establishment with Vokalatnama. He filed a letter dated 10.12.2007 by Sri Subrata Das, Advocate enclosing the copy of order passed by Hon''ble Justice

Soumitra Paul wherein it was directed to respondent to pass order within a period of 4 (four) weeks on the date of communication of the order. However, in the instant matter, Sri Sandipan Mitra, Advocate submitted that he had nothing to comment on the ongoing 7-A enquiry regarding applicability dispute. His attention was drawn towards the fact that the report of squad of officers was handed over to establishment''s representative to put forth their counter arguments, if any but Mr. Mitra again submitted that he had nothing to say about the applicability dispute u/s 7A of the Act However, vide above letter dated 10.12.2007, Sri Subrata Das, Advocate drawn the attention of the authority on the following--

(1) That it is stated that the establishment is recognized and assessed by the Government Departments and/or Statutory Authorities viz., by the Directorate of Commercial Taxes, Ministry of Commerce (I.E.) and also for Income Tax etc. Furthermore, the establishment has also complete, separate sets of employees, different and separate machineries as well as separate supply of electricity with separate consumer and meter number and in all other respect those establishments were complete and separate in themselves for all material purposes.

(2) That it was again stated that the establishment was visited by the department/authorities and numerous documents and registers were seized wherefrom it is evident that those documents were of two different establishments and none of the above establishments could be said to employ the requisite numbers of employees to come under the purview of Employees'' Provident Funds and Miscellaneous Provisions Act, 1952.

Sri D. Sen, Assistant Accounts Officer and Departmental Representative stated that the squad in its report dated 27.3.2007 observed the following commonness with regard to its functioning, control, personnel and management with that or another establishment under the name and style of M/s. Wu. Leathers as functioning at its officially projected address of 113-D, Matheswartala Road, Kolkata-700 046 and as such, the squad recommended that both the establishments can be clubbed together and brought under the fold of Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 w.e.f. 4/99-

(1) THAT as regards Unity of Management between the two establishments, the squad has observed that both the establishments are partnership concerns and such partners belong to the same family viz. the partnership amongst the husband, his wife and their son.

(2) THAT as regards Geographical Proximity between the two establishments the squad observed that the respective office and works of both of the establishments are actually housed at the same premises at 113-D, Matheswartala Road, Kolkata-46 where the relevant documents of both of the establishments were found physically available and therefore seized. Both the establishments were using the identical telephone number, i.e., 247-5901 (as

recorded during that period). The squad has also noted that as per the Partnership Deed, Cash Book, Balance Sheet Ledgers, Salary Register etc. although the address of M/s. Wu Leathers it was 113-D, Matheswartala Road, Kolkata-46, but as per the seized vouchers of both of the establishments it was noted that the addresses of those establishments were just the reverse.

(3) THAT the aspect of common employees of the two establishments has been clarified by the squad by citing the example of Sri Swapan Kr. Khamaru, who was working as an Accountant for both the establishments and was drawing salary from both the establishments.

(4) THAT besides the above, the products and line of business are common between the two establishments."

After hearing the advocate for the petitioner and the departmental representative the authority held as follows:

"I have gone through the case file, documents filed and arguments advanced by the parties to the dispute and I am of the opinion that--

(1) Two units even if have different addresses whether located at one place or other, are a single establishment if there is financial, managerial and functional integrity between them and as such different registrations under Directorate of Commercial Taxes becomes irrelevant. Further, it is noticed vide Enforcement Officer''s report though two different addresses have been projected but on vouchers exactly reverse addresses have been mentioned.

(2) Real management and control in this case belongs to same owners and as such due to common supervision and control over the units, clubbing is right approach to extend the benefits of Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 and Schemes framed thereunder.

(3) When same infrastructure is being used, the integrality is further approved, and as such unity of ownership, management, supervisory control, infrastructure, employability and same nature of production in the both units is proved conclusively and hence the two establishments are rightly covered by the department by clubbing their entity on the above reasons as detected by the squad of officers in their reports dated 26.9.2001, 28.9.2001 and 27.3.2007."

4. Mr. Das, Counsel for the petitioner, has argued that the authority, not deciding the question concerning number of employees and the functional integrality between the two firms mentioned in the order, has acted without jurisdiction; that the reports of the enforcement officers were never disclosed to the petitioner, and hence the principles of natural justice were violated. According to him, since the order was made without jurisdiction, the petitioner was not required to approach the Tribunal by filing an appeal, and in support of this contention he has relied on Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another, , Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , Harbanslal Sahnia and Another Vs. Indian Oil

Corpn. Ltd. and Others, and Central Provident Fund Commissioner and another v. M/s. Modern Transportation Consultancy Service Pvt. Ltd. and others 2008 (2) CLJ (Cal) 696 : 2008 (4) LLN 806.

5. The writ petition was admitted by an order dated January 28, 2008 when the question of its maintainability was kept open. At the time of admission hearing Counsel for the respondents raised the preliminary objection as to maintainability of the writ petition. Since it was submitted that the case involved an important question of law, the writ petition was admitted keeping the question of maintainability open. Under the circumstances, I wanted to know from Mr. Das what is the important question of law involved in the case.

6. As noted hereinbefore, Mr. Das has submitted that the authority holding that the Act is applicable to the establishment has not decided the questions concerning number of employees engaged by the two firms and the functional integrality between them. According to him, since the order is without jurisdiction, in view of the decisions relied on by him, even in the face of the provisions of section 71, providing for an appeal from the order to the Tribunal, the petitioner was entitled to approach the writ Court.

7. There is no dispute about the proposition that if the order is without jurisdiction or has been made in violation of the principles of natural justice, then, even in the face of the provisions of section 71 providing for an appeal from it to the Tribunal, challenging it the petitioner can approach the writ Court. The question is whether there is any merit in the argument that the order is without jurisdiction and has been made in violation of the principles of natural justice.

8. The authority making the impugned order was empowered by the provisions of section 7-A to give it. It is not correct to say that he has not decided the number of employees engaged by the two firms and the question of functional integrality between the two firms. He has relied on the reports of the enforcement officers who inspected all the relevant records of the two firms over the course of investigation; and it is not the case of the petitioner that the reports r do not disclose all necessary particulars concerning number of employees engaged by the two firms and the facts showing how both are connected with each other.

9. I am unable to accept the argument that the authority has simply quoted certain observations of the Supreme Court made in certain judgments. The relevant portions of the order have been quoted hereinbefore. It is absolutely wrong to say that the reports of the enforcement officer were not disclosed to the petitioner. The authority specifically recorded that attention of the petitioner''s advocate was drawn to the fact that the reports had been handed over to the establishment''s representatives.

10. I am, therefore, unable to hold that the impugned order is without jurisdiction or has been made in violation of the principles of natural justice,

there is no reason to permit the petitioner to avoid the statutory appellate forum. The order has been made under a special statute that has provided for an appellate forum and it is only in an exceptional case that one should be permitted to avoid the appellate forum and approach the writ Court.

11. I find no merit in the argument that for appealing from the order the petitioner would be required to deposit a substantial part of the determined amount that is the requirement of the relevant provisions of the law, and hence the petitioner is bound to comply with it. The requirement cannot be a warrant for permitting it to avoid the appellate forum and approach the writ Court.

12. For these reasons, I dismiss the writ petition making it clear that nothing herein shall prevent the petitioner from appealing, in accordance with law, from the impugned order to the Tribunal u/s 71. There shall be no order for costs.

Urgent certified xerox of this order, if applied for, shall be supplied to the parties within three days from the date of receipt of the file by the section concerned.