

(1971) 08 PAT CK 0006
In the Patna High Court
Case No : C.W.J.C. No. 1049 of 1969

Shri D.K. Barua

APPELLANT

Vs

The Regional Provident Fund Commissioner and Others

RESPONDENT

Date of Decision : 06-08-1971

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3)(b), 1(5), 14, 2A, 7A

Citation : (1971) PLJR 524

Hon'ble Judges : S.N.P. Singh, J;Kanhaiyaji, J

Bench : Division Bench

Advocate : B.C. Ghose and Deba Prasad Mukherjee, for the Appellant; K.P. Verma, for the Respondent

Judgement

S.N.P. Singh, J.—In this writ application under Articles 226 and 227 of the Constitution, the petitioner, D.K. Barua, has made a prayer for quashing the order dated the 6th of March, 1968 (Annexure 5) passed by the Regional Provident Fund Commissioner, Bihar, Patna, u/s 7A of the Employees Provident Funds Act, 1952 (hereinafter called the Act). The petitioner has further made a prayer for quashing the criminal proceeding, which has been instituted against the petitioner, and for a direction to the respondents to forbear from using coercive machinery against him for the realisation of any amount under the Act and the Scheme made thereunder. The petitioner is the proprietor of Messrs Barua's Restaurant. It is situated at P. Road, police station Bistupur, in the town of Jamshedpur. There is another restaurant called "Telco Restaurant" located in the Telco Colony. According to the petitioner, that restaurant, though owned by him, is being run by his son. It is alleged that Barua's Restaurant is separately registered under the Shops and Establishments Act and the number of employees is shown as 7. It is also alleged that it was separately registered under the Sales Tax Act and the sales tax was separately assessed. The establishment is also registered with the Jamshedpur Notified Area Committee as

a licensee under the Prevention of Food Adulteration Act for dealing in foodstuff. It is further alleged by the petitioner as follows:--

(i) That an Inspector working under the Regional Provident Fund Commissioner, Patna, visited Telco Restaurant on the 13th of May, 1964 and due to threat and intimidation of the said Inspector, the petitioner's son deposited a sum of Rs. 50.00 as contribution under the Act for Barua's Restaurant.

(ii) That neither the Barua's Restaurant was ever visited by the Inspector nor its books of account were examined by him.

(iii) That during the absence of the petitioner, the petitioner's son received two communications (Annexures 3 and 3/a) from the Regional Provident Fund Commissioner, Bihar, Patna (respondent no. 1) to remit the Provident Fund contribution in full together with administrative charge and to produce books of account, ledgers, etc., in his office at Patna.

(iv) That the petitioner subsequently protested and stated by a letter that the establishment was not covered by the Act as the number of employees employed in the establishment is less than 20.

(v) That without disposing of the petitioner's objection respondent no. 1 insisted on production of books of account at Patna Office.

(vi) That by a letter (Annexure 4/a) the petitioner made a prayer that the books of account, etc. should be inspected by the Local Inspector appointed under the Act at Jamshedpur.

(vii) That the prayer made by the petitioner was not accepted and the petitioner was directed to produce the books of account at Patna.

(viii) That the petitioner insisted on determination of the liability under the Act before showing the books of account, etc.

(ix) That the petitioner on the insistence of respondent no. 1 came to the respondent's office sometime in January, 1968 and tried to meet respondent no. 1 but the latter refused to meet him.

(x) That the petitioner again came to Patna sometime in the month of February, 1969 at the respondent's office and tried personally to explain his case before respondent no. 1 who again refused to see him.

(xi) That the petitioner somehow managed to see an Assistant Officer under respondent no. 1 and placed before him the relevant evidence in support of his case that the provisions of the Act were not applicable to the establishment.

(xii) That the Assistant Officer threatened and intimidated him with civil case and criminal prosecution in view of his inspection of the attendance registers of the petitioner's establishment without any reasonable cause although the petitioner lawfully insisted that the establishment did not come under the Act.

(xiii) That without deciding the issue regarding the liability of the petitioner's establishment under the Act, the notice (Annexure 5) u/s 7A of the Act making the petitioner liable to pay the amount of Rs. 1,574.00 as total employees' and employer's share of contribution apart from the administrative charges amounting to Rs. 46.55 was issued.

(xiv) That respondent no. 1 instituted not less than 38 criminal cases under the Act, which are pending in the Court of Mr. B. Prasad, Munsif-Magistrate, 1st Class, Jamshedpur.

(xv) That when the petitioner went to the office of the Local Inspector at Jamshedpur under the Act, he came to know that several other criminal cases and certificate proceedings would be instituted against the petitioner.

2. On the aforesaid allegations, the petitioner has filed this application praying for quashing the order (Annexure 5) and for other reliefs.

3. In the counter-affidavit filed on behalf of the respondents it is stated that the establishment was brought under the purview of the Act and the Scheme framed thereunder on the basis of a report dated the 17th of April, 1965 (Annexure A) submitted by the establishment itself, under the signature of its Manager, Shri A.K. Dutta. That report was received in the office of the Regional Provident Fund Commissioner, Bihar, along with a forwarding letter bearing no. 154 dated the 22nd of April, 1965 from the then Area Provident Fund Inspector, Shri H.C. Mahapatra. Thereupon a letter (Annexure C) dated the 11th of May, 1965 was issued to the management to comply with the provisions of the Scheme from the 10th of April, 1965. As stated in the counter-affidavit, the report submitted by the management reveals that on the 10th of April, 1965 there were 7 employees in the main establishment, i.e., Barua's Restaurant and 13 employees in its Telco Branch known as Telco Restaurant, and the total number of employees reached 20 to attract the provisions of the Act and the Scheme framed thereunder. As stated in the counter-affidavit records were ultimately produced for the enquiry fixed on the 2nd of March, 1968 and thereafter the impugned order u/s 7A of the Act was passed. It is said that in course of the enquiry it was found that the establishment had employed 20 employees in the month of August, 1965 and not in the month of March, 1965 and, therefore, it was liable to comply with the provisions of the Act with effect from the month of August, 1965. In Paragraph 15 of the counter-affidavit, it is stated that the question of applicability of the Act to the establishment was, among other things, examined in greater details on the basis of the books of account, etc., produced before the Regional Provident Fund Commissioner, respondent no. 1, on the 2nd of March, 1968 and it was found that the establishment employed 20 employees in August, 1965 and, therefore, the provisions of the Act, and the Scheme framed thereunder were made applicable from August, 1965, instead of May, 1965 as notified earlier in the coverage letter. It has been further stated that the criminal proceedings started against the petitioner are legal and valid; that the petitioner's establishment is an establishment within the meaning of Section (3)(b) of the

Act; that the applicability of the Act to the petitioner's establishment was examined before determining the liability u/s 7A of the Act; and that the subsequent legal action was taken under the provisions of Section 14 of the Act read with Paragraph 76 of the Scheme.

4. Mr. B.C. Ghose, learned counsel appearing for the petitioner, raised the following contentions:--

(i) That there is nothing to show that the two restaurants are one establishment except that there is one proprietor.

(ii) That even if at any point of time the number of employees was 20, the Act was not applicable unless it was found 20 employees were in continuous employment.

(iii) That the liability u/s 7A of the Act could not be imposed unless the question whether the provisions of the Act were applicable to the establishment was decided.

5. As laid down by Section 2A of the Act, where an establishment has branches, whether situate in the same place or in different places, all branches are to be treated as part of the same establishment. According to the petitioner, the Telco Restaurant is not a branch of Barua's restaurant and there was no material before the Regional Provident Fund Commissioner, Bihar (respondent no. 1) for treating the two restaurants as one establishment. In the counter-affidavit filed on behalf of the respondents it has been stated that both the units are owned by the petitioner, and, therefore, the Telco Restaurant is a part of Barua's Restaurant though having separate sales tax and income tax assessments. Mr. K.P. Verma, learned counsel appearing for the respondents, relied on Annexure "A" to the counter-affidavit, which is said to be a report submitted by the establishment itself under the signature of its Manager Shri A.K. Dutta. In column 17 of the report it is stated as follows:

Branch Telco Restaurant, New Colony, Telco, Jamshedpur-4, Employees 13(9-4).

Mr. Verma submitted that in view of the report the Regional Provident Fund Commissioner was fully justified in treating both the units as one establishment. In the supplementary affidavit filed on behalf of the petitioner in reply to the counter-affidavit it has been alleged that Shri A.K. Dutta was never the Manager of the petitioner's establishment but was a mere service boy of the Telco establishment and he had no authority to submit any report to the respondents on behalf of the petitioner. In column 16 of the report the name of the Manager and his postal address had to be filled in. Mr. Ghose pointed out that against that column there is the entry "Nil", and, submitted that if there was no Manager, as shown in column 16, Shri A.K. Dutta could not be the Manager of the establishment. There is force in the contention raised by Mr. Ghose. The Regional Provident Fund Commissioner should have made further enquiries in the matter as to whether the two units are part of the same establishment when the

petitioner from the very beginning, as it appears from Annexure 4, was asserting that he had no Manager and he himself looked into the affairs of the establishment. It appears from the impugned order (Annexure 5) that the petitioner was required to deposit Provident Fund contributions from the month of May, 1965 to the month of January, 1968, on the basis that 20 or more persons were employed in the establishment in May 1965. Mr. Ghose contended that in the absence of a finding that 20 employees were in continuous employment of the establishment, the Regional Provident Fund Commissioner was not justified in applying the provisions of the Act. There is substance in the contention raised. In the case of (1) the Regional Provident Fund V. Sri T.S. Harisharan (Civil Appeal No. 1128 of 1967 recently decided by the Supreme Court) it was held by their Lordships of the Supreme Court that the number of persons to be considered to have been employed by an employment for the purpose of the Act has to be determined by taking into account the general requirements of the establishment for its regular work which should also have a commercial nexus with its general financial capacity and stability. It was further observed in that case as follows:

.....this Act is intended to apply only where an establishment has attained sufficient financial stability and is prosperous enough to be able to afford regular contribution provided by the Act. Contribution by the employer is an essential part of the statutory scheme for effectuating the object of inducing the workmen to have something regularly. The establishment, therefore, must possess stable financial capacity to bear the burden of regular contribution to the Fund under the Act. In this connection it may be recalled that by virtue of Section 1(5) an establishment to which the Act is applied continues to be governed by the Act notwithstanding that the number of persons employed by it at any time falls below the required number. This liability to be governed by the Act ceases only if the terms of the proviso to Section 1(5) are complied with. The financial capacity of the establishment to bear the burden must, therefore, have some semblance of a reasonably long term stability. In other words, the employment of requisite number of the persons must be dictated by the normal regular requirement of the establishment reflecting its financial capacity and stability.

In the case the Andhra Pradesh High Court had taken the view that the required number of persons must continuously work in the establishment for one year. Their Lordships of the Supreme Court did not accept this extreme view but accepted the principle that the employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business prosperity or its financial capacity and stability could not be covered by the definition of the word "employment" in Section 1(3)(b) of the Act. It was held that the word "employment" must be construed as employment in the regular course of business of the establishment and such employment would not include employment of a few persons for a short period on account of some pressing necessity or some emergency beyond the

control of the establishment. It is manifest from the impugned order that the Regional Provident Fund Commissioner took the view that the provisions of the Act and the Scheme framed thereunder were applicable from May, 1965 as there were 20 persons employed in the establishment in May, 1965. The Regional Provident Fund Commissioner did not go into the question whether 20 persons were employed in the establishment in the regular course of business or some of them were temporarily employed for a short period, though the petitioner, as it appears from Annexure 4/A, had been asserting that the total number of employees of the restaurant was far below the number required under the Act. He assumed that the provisions of the Act applied to the establishment as the number of employees in the month of May, 1965 reached 20. It is manifest that the Regional Provident Fund Commissioner passed the impugned order u/s 7A of the Act without determining the question whether the provisions of the Act were applicable to the establishment or not.

6. For the foregoing reasons, I am of the view that there is substance in all the three contentions which have been raised by Mr. Ghose.

7. Very wide power has been conferred u/s 7A of the Act on the Regional Provident Fund Commissioner and that power should be exercised in a careful manner so as not to cause any undue hardship to an establishment which has not got sufficient financial stability. In the instant case, for the reasons which I have already stated, I am constrained to hold that the impugned order (Annexure 5) has been passed by the Regional Provident Fund Commissioner without proper consideration of the main questions whether the two units are the same establishment and whether the provisions of the Act are applicable to the establishment. I, therefore, allow this application, quash the order dated the 6th of March, 1968 (Annexure 5) passed by the Regional Provident Fund Commissioner, Bihar, and also quash the criminal proceedings which have been instituted against the petitioner. I further direct that the respondents should forbear from using coercive machinery against the petitioner for the realisation of any amount in pursuance of the order (Annexure 5). The petitioner will be entitled to cost. Hearing fee Rs. 150/-. I may observe that it will be open to respondent no. 1 to consider afresh the question of liability of the petitioner's establishment under the Act and to proceed in accordance with law.

Kanhaiyaji, J.

I agree.