

(1996) 02 PAT CK 0047
In the Patna High Court
Case No : C.W.J.C. No. 9880 of 1994

S.K. Nasiruddin Beedi Merchant Ltd.

APPELLANT

Vs

Central Provident Fund Commissioner and Others

RESPONDENT

Date of Decision : 20-02-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 304

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 7A

Citation : (1996) 2 BLJR 1550 : (1997) 2 PLJR 506

Hon'ble Judges : S.K. Homchaudhuri, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.K. Homchaudhuri, J.—The question involved in this petition is as to whether the petitioner is entitled to waiver in respect deposit of the employees' contribution for the period from October, 1985 to 3.5.1983, during which period the petitioner could not and did not make deduction from the wage, of the home-workers employed through contractors for manufacture of beedi because of pendency of litigation on the question of applicability of the provision of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter mentioned as "the Act") in respect of the home workers employed by the contractors.

2. The petitioner is a limited company having its headquarters at Calcutta, which carries on business of manufacture and trade of Beedi. After receipt of the notice under the provision of the Act from the respondent No. 2, the Regional Provident Fund Commissioner, the petitioner challenged the notice in this Court in C.W.J.C. No. 4089 of 1988, contending, inter alia, that the provision of the Act has no application in respect of the home workers, who were engaged for rolling Beedi by the independent contractors. Interim stay was granted by this Court pending disposal of the writ petition. This court, however, by judgment and order passed on 27.7.1989 dismissed the said writ petition, holding that the provision of the

Act was applicable in respect of the home workers engaged in for rolling the Beedi of the petitioner through the contractors. The petitioner challenged the aforesaid judgment of this Court in the Hon''ble Supreme Court in SLP No. 10538 of 1989. After dismissal of the writ petition, the Regional Provident Fund Commissioner calculated and determined the petitioner's liability on account of employees provident fund and by memo dated 15.1.1990 asked the petitioner to deposit a sum of Rs. 66,84,930.50 being the employer's and employees' contribution to the Employees. Provident fund for the period from July 1977 to August, 1986. By another order dated 18.12.1989, respondent No. 2 directed the petitioner to pay a sum of Rs. 28,72,383.85 within fifteen days on account of employee's and employees' contribution to the provident fund for the period from September, 1986 to February, 1988.

3. The petitioner challenged the aforesaid demands in this Court in C.W.J.C.J. No. 114 of 1990 and C.W.J.C. No. 1115 of 1990, respectively, contending that the home workers rolling the Beedi out or raw material supplied by the petitioner were employed by the independent contractor's and the petitioner-company was not the employer of those home workers within the meaning of Section 2(e) of the Act. In the meantime, the Supreme Court by order dated 22.8.1989 disposed of SLP No. 10538 of 1989, preferred against the judgment of this Court dated 27.7.1989 passed in C.W.J.C. No. 4089 of 1988, with the observation that the question involved therein could be heard and decided in the pending C.W.J.C No. 1114 of 1990 and C.W.J.C. No. 1115 of 1990. A division Bench of this Court by judgment dated 19.8.1992 dismissed C.W.J.C. No. 1114 of 1990 and C.W.J.C. No. 1115 of 1990. Thereafter, a sum of Rs. 46,90,051/- out of the total demand of Rs. 95,57,314.35, was realised by the respondent No. 2, the Provident Fund Commissioner by coercive process. The petitioner filed SLP No. 15312-13/92 in the Hon''ble Supreme Court challenging the judgment of this Court dated 19.8.1992 passed in C.W.J.C. No. 1114 of 1990 and C.W.J.C No. 1115 of 1990. Some other establishment/company also moved the Supreme Court on identical questions. The Supreme Court dismissed the SLP by the order dated 3.5.1993 on the following terms:

The S.L.P's are dismissed. It is open for the petitioner to collect the names of the Bidi workers for them through their contractors and furnish the name of all the workers to the P.F. Commissioner. The P.F. Commissioner thereafter will verify those names and calculate the liability excess amounts is found due from the .petitioner, the P.F. Commissioner, will recover such amount from the petitioner on the other hand if any amount is found due to the petitioner, the P.F. Commissioner will refund the same. The petitioner to furnish the names of the workers as above within six months, from today.

In terms of the order dated 3.5.1993, the petitioner intimated the Regional Provident Fund Commissioner about the particulars of the home workers engaged by the contractors to the best of information, as they were not directly employed by the petitioner, for final determination of the petitioner's liability u/s

7A of the Act as observed by the Supreme Court in the aforesaid order dated 3.5.1993. The petitioner also filed two petitions dated 19.8.1983 and 30.5.1994, along with a copy of the judgment of the Calcutta High Court dated. 8.3.1994 passed in a similar matter and demanded waiver of the employees' contribution for the prediscovery period from October, 1985 3rd May, 1993. The Assistant Provident Fund Commissioner, however, by the impugned order dated 2.6.1994, disallowed the claim of waiver from payment of employees' contribution for the period from October, 1985 to 3.5.1993 on the ground that there was no instruction for allowing waiver from any competent authority and determined the outstanding liability including the employees' contribution for the period from October 1985 to 3.5.1993. The petitioner, after receipt of the impugned order dated 2.6.1993. The petitioner, after receipt of the impugned order dated 2.6.1994, made a representation on 20.6.1994 demanding exemption from payment of employees' share of the provident fund by them to the extent the contributions were not deducted from the wages of the concerned employees during the said period in the light of the judgment of the Calcutta High Court. The Regional Provident Fund Commissioner did not allow waiver for the said period and by the impugned order dated 27.9.1994 issued certificate for recovery of the outstanding liability Rs. 46,17,538.20 Ps. to the Recovery Officer, Bihar, Patna. Feeling aggrieved, the petitioner has approached this Court in this writ-petition.

4. The petitioner has assailed the impugned orders and the recovery proceeding on the following grounds:

A. Although the Hon'ble Supreme Court had settled the law that the employees of the petitioner Company were entitled to provident fund and that the Company was liable to pay employees contribution in addition to the employer's contribution, the company could not be validity asked to pay retrospectively the employees contribution to their provident fund without deducting that from their salary is violation of para 32 of the statutory scheme and during the period of uncertainty of their liability due to litigations in which stay orders were passed from time to time and before the final demand was made on assessment u/s 7A of the Employees Provident Funds Act which was made by the decision dated 2.6.1994 by the authority concerned, the Regional Provident Fund Commissioner, Bihar (please refer to 1991 LIC 1332 SC).

B. There was bona fide dispute regarding applicability of the Act, and, under the proviso to paragraph 32 of the Provident Fund Scheme the employees' contribution was to be paid only after making deductions from the wages of the employees and that the employer could not be made liable to pay the employees' contribution from any date prior to the final determination of his liability u/s 7A of the Act. In the instant case the final demand was made on 2.6.1994 in respect of the period when the employer was not even finally aware of their liability and, therefore, could not make the required deduction from the wages of the employees, and in the absence of a provision requiring the

employer to pay the employees" share not deducted from their salary in such circumstances, is illegal. Moreover there was a statutory directions of the Government of India in circular letter O & H/4(5)/76/8.1, dated 20.3.1976 mentioned in Annexure 6 and 7 herein which directed the Regional Provident Fund Commissioner to waive the recovery of employees" share contribution not deducted from the wages of the employees for pre-discovery period which vitiated the impugned demand as illegal, because it related to a period before the final formal notices of demand u/s 7A of the Act was served on the establishment by the orders dated 2.6.1994 and the certificate was issued on 27.9.1994.

C. The mentioned demand amounts to arbitrary and unreasonable restrictions on the fundamental right of the petitioner under Articles 14 19(1)(g) and 304(B) of the Constitution of India in view of the admitted position that the petitioner had bonafide not deducted the employees, contribution from the salary of the employees who were legally liable to pay their share, due to continued protection of interim stay of the impugned liability by the High Court and the Supreme Court.

5. Respondent No. 2, on the other hand, contended that the question as to whether the home workers engaged through contractors for rolling the Beedis are covered under the provisions of the Act was considered and finally set at rest by the decision of the Supreme Court in the case of P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others, , wherein the Supreme Court held that such home workers were employees of the establishment within the meaning of Section 2(f) the Act. After the judgment in the case of P.M. Patel (supra), the Central Provident Fund Commissioner, by directed all the Regional Provident Fund Commissioners that the period covered by general stay order passed by the Supreme Court on the application challenging the notification extending the provisions of the Act to an industry/class of establishment, the employees, share should be payable from the first of the month following the judgment, and pursuant to the said instruction, respondent No. 2, by order dated 12.11.1993 waived payment of employees" share of provident fund for pre-discovery period, i.e. June, 1977 to September, 1985.

After the question was settled by the judgment of the Supreme Court in the case of P.M. Patel (supra), there was hardly any scope for litigation regarding applicability of the Act in respect of all home workers employed by the petitioner through contractors. However, the petitioner continued to agitate the settled matter in this Court in C.W.J.C. No. 4089 of 1988 and, therefore, in C.W.J.C No. 1114 of 1990 and C.W.J.C. No 1115 of 1990, but did not succeed and the petitioner"s SLP filed against the judgment of this Court was also dismissed by the Supreme Court.

As such, there is no question of granting further waiver as regards the payment of employees" contribution for the period from October, 1985 3rd March, 1993.

6. I have learned Counsel for the petitioner and learned Counsel for the

respondents.

7. Learned Counsel for the petitioner submitted that the decision of the Supreme Court in the case of P.M. Patel (supra) did not cover the point raised I by the petitioner in the writ petitions in this Court, inasmuch as the j petitioner's case was that the home workers rolling Beedis were engaged by I the independent contractors and as per the decision of the Constitution Bench of the Supreme Court in the case of Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others, , the home-workers engaged by the s independent contractors and not of the manufacture. The petitioner agitated this points both in this Court as well as in the Hon"ble Supreme Court bona fide although ultimately the petitioner did not succeed.

8. Learned Counsel for the petitioner further submitted that after dismissed of the SLP by the Supreme Court by order passed on 3.5.1993, the petitioner collected the names of the home-workers engaged by the contractors and , supplied thereof with particulars to respondent No. 2 and respondent No. 2 and respondent No. 2, thereafter, made the assessment. As such, the predicsovery period in the case of the petitioner's establishment should be up to 3.5.1993 and that pursuant to the general instruction of the Central Provident Fund Commissioner, New Delhi (Annexure-9), respondent No. 2 ought to have waived the employees" contributions, which were not deducted from the wages of the employees during the period from October, 1985 to 3.5.1993. In support of the contention, learned Counsel for the petitioner placed reliance on a decision of the Calcutta High Court in the case of Mantu Biri Factory (P) Ltd. v. Regional Provident Fund Commissioner and Ors. reported in 1994 2 Cal 75p> 9. Mr. Giri, learned Counsel for the respondents, on the other hand, submitted that after the Hon"ble Supreme Court in the case of P.M. Patel (supra) had settled that the home-workers engaged through contractor for rolling Beedis of its establishment or firm are employees within the meaning of Section 2(f) of the Act and are covered under the provisions of the Scheme, the petitioner unnecessarily and without any basis continued frivolous litigation"s in this Court as well as in the Hon"ble Supreme Court and ultimately did not succeed. Filing of the petitions in this Court as well as in the Hon"ble Supreme Court was superfluous and was not bona fide. The petitioner had filed such petitions just to delay the implementation of the scheme under the provisions of the Act in respect of the home-workers employed by the petitioner through the contractors. Drawing my attention to paragraphs, 30, 31 and 32 of the Employees" Provident Fund Scheme, learned Counsel for the respondents submitted that the petitioner was liable to deposit the employees" share on account of provident fund/Learned Counsel for the respondents further submitted that prediscovery period was up to the decision of the Hon"ble Supreme Court in the case of PM. Patel (supra)and thereafter, the petitioner was bound to deposit the employer"s and employees" shares of the contribution to the employees provident fund. The decision of the Calcutta High Court in the case of Mantu Biri Factory (supra) has no application to the facts of the present case.

10. I have considered the submissions made by learned appearing on behalf of the petitioner and learned Counsel appearing on behalf of the respondents and persuade the materials placed before me.

11. In the case of P.M. Patel (supra) at paragraph 9, the Hon''ble Supreme Court also took note of the observation of the Constitution Bench of the Supreme Court in the case of Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others, .

as follows:

...the manufactures or trade mark Holders have liability in respect of workers who are directly employed by them or who are employed by them or who are employed by them through contractors. Workers at the industrial premises do not present any problem. The manufacturer or trade mark holder will observe all the provisions of the Act by reason of employing such labour in the industrial premises. When the manufacturer engages labour through the contract or the labour is engaged on behalf of the manufacturer, and the latter has therefore liability to such contract labour. It is only when the contractor engages labour for or on his own behalf and supplies the finished product to the manufacturer that he will be the principal employer in relation to such labour and the manufacturer will not be responsible for implementing the provisions of the Act with regard to such labour employed by the contract or. If the right of rejection rests with the manufacturer or trade mark holder, in such a case the contract or who will prepare beedi is through the contract labour will find it difficult to establish that he is the independent contractor.

When the petitioner''s case was that the home-workers employed for

rolling Beedis were appointed by the independent contractors, it cannot be said that after the decision of the Hon''ble Supreme Court in the case of P.M. Patel (supra), the petitioner has no case to agitate in this Court as well ass in the Hon''ble Supreme Court, the petitioner might not have been successful, but in view of the decision of Constitution Bench of Hon''ble Supreme Court in the case of Managlore Ganesh Beedi Works (supra), the petitioner had a point to agitate in this Court as well as in the Hon''ble Supreme Court. As such, I find force in the submission of the petitioner that after decision of the Hon''ble Supreme Court in the case of P.M. Patel (supra), the petitioner approached this Court bona fide in the writ petitions in the years 1988 and 1990 and thereafter, before the Hon''ble Supreme Court against the decisions of this Court, urging that the home-workers employed by the contractors for rolling beedis for the petitioner''s establishment were not employees under the petitioner.

12. Admittedly, the home-workers engaged by the contractors had no direct relationship with the petitioner and the petition was not in a position to know particulars of home-workers, who had been engaged through by the contractors. Unless the particulars of the home-workers could be known, the provident fund money could not be deposited in the account of employees. The provident fund

contribution is neither tax nor fee payable by the employer to -the Provident Fund Commissioner under the Act. The amount of contribution of the employer"s as well as employees" share are meant for the benefit of employees. It is apparent from the dated 18.12.1989 passed by respondents No. 2 that respondent No. 2 made the assessment on estimate basis taking "80% of the rolling charges for calculation of dues leaving out the remaining 20% thereof for possible contingencies. A correct assessment can be made after getting particulars of the employees, i.e. home-workers engaged in rolling beedis by the contractors for the petitioner, which was supplied by the petitioner in compliance with the direction of the Hon"ble Supreme Court dated 3.5.1993. On more or less similar facts in paragraph 7 of the decision in the case of Mantu Biri Factory (supra), a Division Bench of the Calcutta High Court held amongst others as follows:

In the instant case there was a bona fide dispute regarding applicability of the Act to such an establishment and that it appears that not only the petitioner-company but others in the trade were also under confusion and doubts about their liability under the Act and that in the absence of any provisions in the Act that the employer would be liable for the employees" share of contribution when no such education was made from the salaries and wages of the employees by the employer and that if the proceeding was started earlier and that the dispute was resolved fixing the liability to pay provident fund dues in that event the employer could have released dues by deducting from the wages from such employees. Furthermore, the proviso to paragraph 32 of the Employees" Provident Fund Scheme provides that the amount of members contribution paid by the employer shall notwithstanding the provisions in the scheme or the liability for the time being in force or any contract to the contrary be recoverable by means by deduction from the wages of the employees or the members and not otherwise. It was further provided that no such deduction can be made from any wages other than what was paid in respect of the period or part of the period in respect which the contribution is payable. Only in case where no deduction has been made on account of an accidental mistake or clerical error, such deduction could be made with the consent in writing of the Inspector from the subsequent wages. This provision make it clear that the employees" contribution should be paid only after making deductions from the wages paid to the employees by the employer and not otherwise. This is also made clear that in case of employer failed to make deduction and/or in case where the liability was fixed subsequently the employer could not recover it from the wages for whose behalf was required to be made. Accordingly, we are of the view that the employer cannot be made liable to pay the employees" contribution from the date prior to the date of determination of the liability u/s 7A of the said Act and in respect of the period when the employer was not aware of the liability and could not make deduction from the wages paid to such an employee. Accordingly, in the absence of any provision requiring the employer to pay the employees" share in such circumstances we are unable to hold that the employer is liable even for the

employees" share when deduction could not be made as the liability of the employer was not known and/or determination and the employer could not make any deduction. Consequently, the Regional Provident Fund Commissioner is directed to exclude the determination of the liability of the employees" share imposed with retrospective effect in respect of the period when the employer could not deduct employees" share of the contribution of the wages paid to the employees.

13. In the instant case, I have found that the petitioner raised dispute as regards the applicability of the Act bona fide and that until collection of particulars of the home-workers engaged by the contractors and furnishing thereof in compliance with the order dated 3.5.1993, passed by the Hon"ble Supreme Court, the petitioner did not have the particulars the home-workers engaged by the contractors. The petitioners also did not get deduction of those employees" contributions from their wages by the contractors for the period from October, 1985 to 3.5.1993, as the petitioner bona fide took the view that the employers of these home-workers were the contractors and not the petitioner. As such, cannot be said that the petitioner deliberately or negligence did not make deduction of the employees contribution from the wages of the home-workers for the period from October 1985 to 3.5,1993. No doubt, as per the provision of paragraph 30 of the Employees" Provident Funds Scheme, 1952 (hereinafter mentioned as "the Scheme"), the employer is required to pay both contributions payable by the employer as well as the employees and that the employees" contributions, equal to the contribution of the employer, are to be deducted from their wages. Now, in case the petitioner is required for the period from October, 1985 to 3.5.1993, in view of the provisions of paragraph 31 and 32 of the Scheme, the petitioner will not be able to make deduction of the employees" contribution from the wages of the homeworkers for the said period.

14. From the reasons stated above, I am of the opinion that it will be inequitable and unfair to saddle the petitioner with the liability to pay the employees" contribution for the period from October, 1985 to 3.5.1993, which the petitioner could not and did not deduct through its contractors on bona fide ground. In respectful agreement with the decision of the Calcutta High Court in the case of Mantu Biri Factory (supra), I hold that under facts and circumstances of the case, the petitioner deserves waiver from payment of employees" contribution for the period from October, 1985 to 3.5.1993, which the petitioner could not and did no deduct from the wages of the employees employed through the contractors.

15. The petition is, therefore, allowed. The impugned order dated 2.6.1994 (Annexure 3) and the certificate dated 27.9.1994 (Annexure 7) issued to the Recovery Officer for recovery of Rs. 46,17,538.20 are set aside and quashed, Respondent No. 2 is directed to pass appropriate order u/s 7A of the Act in accordance with law by exempting the petitioner from payment of employees" contribution of the home-workers to the employees" provident fund for the period from October, 1985 to 3.5.1993.

On the fact and circumstances of the case, I make no order as to cost.