

(2004) 05 JH CK 0052

In the Jharkhand High Court

Case No : CWJC No's. 2356 of 1997 (R) and 3275 of 1999 (R)

Tata Engineering and Locomotive Co. Ltd.

APPELLANT

Vs

The Regional Provident Fund Commissioner and Others

RESPONDENT

Date of Decision : 20-05-2004

Acts Referred:

Constitution of India, 1950 — Article 226

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

Industrial Disputes Act, 1947 — Section 2(5)

Citation : (2004) 4 JCR 285

Hon'ble Judges : P.K. Balasubramanayan, C.J.;Visnudeo Narayan, J

Bench : Division Bench

Advocate : M.N. Rao, V.P. Singh and Arun Kumar Singh, for the Appellant; P.P.N. Roy, Kalyan Roy, A.K. Sahni, S.N. Jha, Ashok Kumar Sinha, C.S. Singh and Yasraj Bardhan, for the Respondent

Final Decision : Allowed

Judgement

P.K. Balasubramanayan, C.J.—CWJC No. 2356 of 1997R was initially filed challenging the order dated 23.6.1997 passed by the Regional Provident Fund Commissioner, Jamshedpur holding that the writ petitioner. M/s Tata Engineering and Locomotive Company Limited (TELCO) was liable to make contributions under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 in respect of convoy drivers who drive the vehicles manufactured by the petitioner company to different destinations for supply to the distributors. Though, this Court while admitting the writ petition stayed all further proceedings pursuant to that order, this Court subsequently modified that order and permitted the Provident Fund Commissioner to make a final order, but directed him not to enforce that order until further orders from this Court. Thereupon, the Provident Fund Commissioner passed another order dated 24.6.1999 quantifying the amount to be contributed by the petitioner company. Thereupon, the petitioner company amended CWJC No. 2356 of 1997 to include a challenge to the consequential order as well. The company also filed CWJC No. 3275 of 1999

challenging the final order dated 24.6.1999 and also challenging the constitutional validity of the definition of "employee" contained in Section 2(f) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act). Since the two writ petitions were intrinsically connected, they v/ere heard together. Ultimately, the main arguments were addressed in CWJC No. 2356 of 1997 which included a challenge to both the orders and nothing much was argued on the question of the constitutional validity of Section 2(f) of the Act which defines as "employee" in respect of whom the contribution has to be made.

2. Sometime in the year 1981, the Provident; Fund Commissioner issued a notice to the petitioner company (hereinafter referred to as TELCO) u/s 7A of the Act calling upon TELCO to make contributions under the Act in respect of the convoy drivers. TELCO challenged that notice in the High Court of Patna in CWJC No. 1571 of 1981. By judgment dated 25.9.1987, a single Judge of the Patna High Court allowed the writ petition and quashed the notice issued by the Provident Fund Commissioner. The learned Judge held that there was no relationship of employer and employee between TELCO and the convoy drivers. The Provident Fund Commissioner filed an appeal under clause 10 of the Letters Patent, as LPA No. 53 of 1988, challenging that decision.

3. Meanwhile, the TELCO Convoy Drivers Mazdoor Sangh, sought to raise an industrial dispute claiming that they are workmen employed by TELCO and are entitled to all the benefits as such. The appropriate Government, the Government of Bihar, refused to make a reference of the dispute raised by the Sangh to the Industrial Tribunal u/s 10 of the Industrial Disputes" Act, The Mazdoor Sangh filed a writ petition, CWJC No. 1852 of 1987 in the Patna High Court. That writ petition was dismissed by the Patna High Court by judgment dated 15.1.1988. The Mazdoor Sangh challenged the decision of the Patna High Court before the Supreme Court, The Supreme Court, by the decision reported as the Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others, , allowed the appeal and directed the State of Bihar to make a reference to the appropriate Industrial Tribunal u/s 10(1) of the Industrial Disputes Act, of the dispute raised by the Mazdoor Sangh. The Supreme Court noticed the argument of TELCO that unless there was the relationship of employer and employees between the parties, or, in other words, unless those who are raising the dispute are workmen under the other party, there could not exist or arise any industrial dispute within the meaning of that term as defined in Section 2(k) of the Industrial Disputes Act and that the Government had to consider that question before making the reference. The Supreme Court observed that though the argument was attractive, the same could not be accepted in view of the settled position that while exercising power u/s 10(1) of the Act, the function of the appropriate Government was only an administrative function and not a judicial, or quasi-judicial function and in performing its administrative function, the Government could not delve into the merits of the dispute and take upon itself the determination of the ifs. It was thus that the dispute was directed to be

referred to the Industrial Tribunal. Pursuant to this direction, the Government of Bihar made a reference of the following question to the Industrial Tribunal, Ranchi :-

"Whether relationship of employer and employee exists between M/s. TELCO Limited, Jamshedpur, and the Convoy Drivers? if so, whether they are entitled to be made permanent employees of TELCO?"

4. The Industrial Tribunal, Ranchi, took that reference on its file as Reference Case No. 123 of 1989. By an award dated 31.7.1991, the Tribunal answered the question referred to it in favour of TELCO and against the Sangh. The Tribunal recorded its conclusion that the convoy drivers were not employees of TELCO and no relationship of employer and employee existed between TELCO and the convey drives and as such the convoy drivers were not entitled to be made permanent employees of TELCO. This award was challenged by the Mazdoor Sangh in CWJC No. 3392 of 1997. By judgment dated 11.5.2001. reported as TELCO Convoy Drivers Mazdoor Sangh v. Presiding Officer, Industrial Tribunal, Ranchi 2001 (2) JCR 211 the writ petition was dismissed upholding the finding of the Tribunal that there existed no relationship of employer and employee between TELCO and convoy drivers. The Mazdoor Sangh challenged the said decision in LPA No. 373 of 2001. By judgment dated 6.7.2001, a Division Bench of this Court, dismissed the appeal. The said dismissal was sought to be challenged before the Supreme Court by the Sangh, by filing Petition for Special Leave to Appeal (C) No. 19936 of 2001. By order dated 10.12.2001. the Supreme Court dismissed the Petition for Special Leave to Appeal by stating that their Lordships were not inclined to interfere with the impugned order. Thus, the award of the Tribunal holding that there existed no relationship of employer and employees between TELCO and the convoy divers and that the convoy drives were not entitled to be treated as permanent employees of TELCO, became final.

5. After the Industrial Tribunal had rendered its award on 31.7,1991, LPA No. 53 of 1988 filed by the Provident Fund Commissioner against the decision in CWJC No. 1571 of 1981 quashing the notice issued by the Provident Fund Commissioner u/s 7A of the Act, came up for hearing.

6. It may be noted that neither the Convoy Drivers Union, nor the TELCO Transport Contractors Association who were parties to the writ petition, challenged the decision of the learned Single Judge holding that there was no relationship of employer and employee between TELCO and the convoy drivers. But the Division Bench in the appeal filed by the Provident Fund Commissioner, on 23.1.1992 set aside the decision of the learned Single Judge and remanded the proceedings to the Provident Fund Commissioner to independently apply his mind and consider the evidence produced before him as to whether there existed the relationship of employer and employee between TELCO and the convoy drivers, after independently considering the effect, if any, of the award of the Tribunal in the dispute referred to it u/s 10(1) of the Industrial Disputes Act. The Provident Fund Commissioner was directed to give due opportunities to the

parties concerned to lead evidence. On 23.6.1997, the Provident Fund Commissioner passed an order to the effect that the convey drivers are employees of TELCO within the meaning of Section 2[f] of the Act. The Commissioner proceeded to observe that the existence of the relationship of master and servant was not required to attract the liability under the Act to bring a person within the definition of an employee in Section 2(f) of the Act. It is this decision and the subsequent decision quantifying the liability that are in challenge before us.

7. Learned senior counsel appearing for TELCO, the writ petitioner, submitted that the order dated 26.3.1997 passed by the Provident Fund Commissioner was erroneous in that before coming to the conclusion that TELCO was liable to make contributions in respect of the convey drivers, the evidence on record was not considered. Specific direction given in the judgment in LPA No. 53 of 1988 in that regard was ignored by the Commissioner. The finding recorded was without reference to any documentary or oral evidence. What the Commissioner alleged were admitted facts were some of them really disputed at facts. No evidence was recorded by the Provident Fund Commissioner and some of the facts taken as admitted, were really contradictory to the findings rendered by the Industrial Tribunal in its award. The finding that there need not exist the relationship of master and servant to cast liability under the Act on an employer was unsustainable and it went against the clear observations of the Supreme Court in that regard. There was no proper consideration of the legal effect of the finding of that Industrial Tribunal. The Commissioner had also acted illegally in not giving an opportunity of hearing to TELCO Transport Contractors Association (T.T.C.A.) and in rejecting the application made by the Association for getting itself impleaded and even though, that Association was a party to the writ petition and the Letters Patent Appeal in which the direction was made to the Commissioner to consider the question properly. Thus, the first order was clearly vitiated by errors of law apparent on the face of the record justifying interference by this Court. The second order was also unsustainable and was also passed without hearing all the parties concerned and even without summoning the relevant records from the Contractors' Association. It was also erroneous for the totally unsustainable assumption that at TELCO could have produced the documents in the custody of the Contractors' Association. The Commissioner has totally misunderstood the concept of employer and employee relationship on which the liability, if any, under the Act could not be fastened on TELCO.

8. Before proceeding to deal with these submissions, we may observe that the Convey Drivers Union and certain drivers seeking to intervene in the writ petition as well as counsel for the Provident Fund Commissioner raised an objection that TELCO has an efficacious alternative remedy by way of an appeal u/s 7(1) of the Act. Senior Counsel for TELCO pointed out that an Appellate Tribunal itself was constituted only with effect from 1.7.1997 and the order of the Provident Fund Commissioner was made on 23.6.1997 even prior to the constitution of the Tribunal and in such a situation, the objection that an appeal ought to have been

filed, cannot be sustained. On our part, we find one other aspect arising in this case. This writ petition was filed on 8.8.1997 about five weeks after the Provident Fund Appellate Tribunal was constituted. This Court entertained the writ petition and posted it for final hearing and it has been pending in this Court for more than six years. Thus this Court having entertained the writ petition, passed interim orders therein after hearing both sides and having directed it to be posted for final hearing, we feel that it will be totally inappropriate to uphold at this stage the objection that TELCO has an efficacious alternative remedy by way of appeal and leave it to file an appeal before the Tribunal. After all, the existence of an alternative remedy is not an absolute bar. In the circumstances of the case and considering the nature of the proceeding, we think that it will be appropriate for this Court to decide the question posed for decision. We therefore, overrule the objection to the maintainability of the writ petition raised by counsel for the respondents.

9. The finding rendered by the Industrial Tribunal in the reference made to it that the convoy drivers are not employees of TELCO has become final. The said finding was rendered by a tribunal, which had (lie exclusive jurisdiction to render that finding. The finding having attained finality by not being interfered with by the High Court or the Supreme Court, the said finding is binding on TELCO and on the convoy drivers. The Provident Fund Commissioner is also not entitled to go behind that finding, since clearly, the principle of *res judicata* would bar him from going into that question. The question whether the relationship of employer and employees existed between the parties, was heard and finally decided in the presence of the parties by the Tribunal competent to do so. In the order of the remand in LPA 53 of 1988, based on which the Provident Fund Commissioner was directed to reconsider the question, it was specifically stated that it was for the Commissioner to consider the effect of the finding of the Tribunal. What the Provident Fund Commissioner has now done is to say that the existence of the relationship of master and servant is not necessary for attracting the liability under the Act. Learned counsel for TELCO brought to our notice the observation of the Supreme Court in *P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others*, . The Supreme Court was considering the provisions of the Act, including the definition of "employee" contained in Section 2(f) of the Act. The Supreme Court observed (at page 38), "now to be an employee, it is necessary that the relationship of master and servant should exist with the employer." The Supreme Court then proceeded to deal with the facts obtaining in that case in the light of the other decisions relevant on the aspect and ultimately concluded that the workers involved therein were not employees within the meaning of Section 2(f) of the Act. The Provident Fund Commissioner in his order dated 24.6.1999, after referring to the definition of "employee" contained in Section 2(f) of the Act. has simply asserted. "Accordingly, the relationship of master and servant is not required for the purpose of extension of provident fund benefit to an employee u/s 2(1) of the Act. So I do not find any merit in the contention raised by M/s. TELCO Ltd. and TTCA that there is no relationship of master and

servant between the above and TELCO Ltd. and convey drivers and TTCA. The definition u/s 2(f) under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 is much wider than the definition of "workman" contained in Section 2(s) of the Industrial Disputes Act and also includes every employee who works in or in connection with the work of the establishment. Thus, the defence made u/s 10 of the Industrial Disputes Act and the Tribunal's finding has no bearing on the definition of employee given u/s 2(f) of the Employees Provident Fund and Miscellaneous Provisions Act."

10. Learned senior counsel seriously attacked this approach and the finding of the Commissioner. It may be seen that the definition, of "workman" contained in Section 2(s) of the Industrial Disputes Act also contemplates a person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward....." In other words, the definition of a workman in Section 2(s) of the Industrial Disputes Act also contemplates the employment of a person in an industry. Therefore, when the Industrial Tribunal finds that there exists no relationship of employer and employee between TELCO and the Convey drivers, it is an essential finding for answering the reference that is made to the Tribunal u/s 10(1) of the Industrial Disputes Act. In our view, the Provident Fund Commissioner was in error in brushing aside the effect of that finding. He is bound by the finding that there existed no relationship of employer and employee between TELCO and the Convey drivers.

11. Then the question is whether TELCO can be made liable on the ground that the convey drivers are employed by TELCO, by or through a contractor in or in connection with the work of the establishment? According to the Provident Fund Commissioner, the work done by the convey drivers is an essential item of work in respect of the business carried on by TELCO. TELCO is engaged in the manufacture of motor vehicles (chassis). According to the Commissioner, chassis has not only to be made but has also to be delivered to various outlets in different parts of the country and the drivers are employed for taking the vehicles to various destinations and since this must be taken to be included in the business of TELCO. TELCO must be held to be liable as an employer in respect of convey drivers. Obviously, the question whether the inclusive part of the definition of an "employee" as one employed by or through a contractor or in connection with the work of the establishment, is satisfied or not, has to be considered on examining the nature of the relationship between TELCO and the TTCA, the contractors' firm and their relationship with the convey drivers. It may be noted that the Industrial Tribunal while rendering its finding, had found that ultimately the control in the selection of convey drivers is with the TTCA and the convey drivers Union are not with the TELCO; that the convey drivers engaged by the transport contractors are also engaged by other establishments; that the disciplinary control over the drivers vested in the drivers' Union and payments were made to the convey drivers by the contractors and not by TELCO; that there was not contract of service between TELCO and convey drivers and that convey drivers are not employee of TELCO and there is no relationship of

employer and employee between them. The Tribunal also took note of the fact that there was a settlement between the convoy drivers' Union and the TTCA under which the convoy drivers' Union undertook to ensure that employees of TELCO are not permitted to be engaged as convoy drivers. Thus, the findings rendered by the competent Tribunal and their bearing on the question had also to be considered by the Provident Fund Commissioner. Merely because the vehicles manufactured have to be taken in convoy to be delivered to various dealers at different centres, would not be enough to hold that TELCO is liable on the basis that it has employed convoy drivers through contractors in connection with the work of the establishment. We find that the Provident Fund Commissioner has not properly adverted to this aspect and has erred in assuming that the inclusive part of the definition applies to the case on hand. As we have noticed, he has to accept the finding that there was no relationship of employer and employee between TELCO and the convoy drivers. He has to properly investigate and answer the question with reference to the relevant materials; whether even then, TELCO can be made liable for contributions under the Act in respect of convoy drivers, by bringing them within the inclusive part of the definition of employees contained in Section 2(1) of the Act. We find force in the submission of learned counsel for TELCO that to attract the inclusive definition u/s 2(1) of the Act, it is necessary to prove the existence of the contractor, nexus between the contractor and TELCO and the employment of the employees by the contractor in connection with the work of the establishment and receipt of wages from the employer, directly or indirectly.

12. Since this part of the finding has been rendered by the Provident Fund Commissioner without the same being supported by proper application of mind and the required reason, the order of the Commissioner dated 23.6.1997 calls for interference.

13. We also find that the second order of the Provident Fund Commissioner dated 24.6.1999 fixing the quantum of liability also suffers from an illegality. The Provident Fund Commissioner refused to hear TTCA while fixing the quantum. He proceeded on the assumption that TELCO would be in a position to produce the documents maintained by TTCA and proceeded to decide the issue involved in the second order even without verification of the relevant documents. It must be noticed that TTCA was a participant in the proceedings when the order dated 23.6.1997 was passed and it was also a party to the Letters Patent Appeal and to the interim order thereon pursuant to which the Provident Fund Commissioner passed the second order dated 24.6.1999. We find that the Provident Fund Commissioner has acted clearly illegally in not giving an opportunity to TTCA and the Contractors constituting it, to put forward their case at the second stage. Even otherwise, since we find that the order dated 23.6.1997 holding that TELCO is liable is itself unsustainable, the second order dated 24.6.1999 has necessarily to fall to the ground.

14. Whether TELCO can be liable under the Act in the light of the inclusive

definition contained in Section 2(f)(1) of the Act has to be considered properly by the Provident Fund Commissioner with reference to the materials available in the case and that may be produced by the parties before it and accepting the finding of that Industrial Tribunal. The finding in that regard has to be entered after hearing TELCO. TTCA and the convoy drivers Union and after scrutinizing the relevant materials and discussing the materials in the proper perspective.

15. We are, therefore, satisfied that the matter requires to be re-considered by the Provident Fund Commissioner in the light of the finding rendered by the Industrial Tribunal, which, has attained a finality and the observations contained in this judgment.

16. In the view we have taken as above, CWJC No. 3275 of 1999 has also to be allowed to the extent of quashing the second order dated 24.6.1999 and remit the proceedings to the Commissioner. Obviously, in case he comes to the conclusion that TELCO is to be made liable, the Commissioner would be entitled to pass a combined order, both on the liability and on the quantum. As we have noticed earlier, the constitutional challenge to Section 2(f) of the Act was not pursued by TELCO.

17. We, therefore, allow these writ petitions and quash the orders of the Provident Fund Commissioner dated 23.6.1997 and 24.6.1999 and remand the proceedings to the Provident Fund Commissioner to consider the matter afresh in the light of what we have stated above and to pass a fresh order in accordance with law and after giving an opportunity of being heard to all the concerned parties to adduce any evidence that they may want and after hearing all of them. The Provident Fund Commissioner will expedite the rendering of a fresh decision.