(1969) 03 PAT CK 0018

In the Patna High Court

Thakur Das and Another APPELLANT

Vs

Regional Provident Fund Commissioner and Others RESPONDENT

Date of Decision : 11-03-1969

Acts Referred:

Constitution of India, 1950 — Article 227
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1, 2, 7A

Citation : (1969) 17 BLJR 530 : (1970) 1 LLJ 315

Hon'ble Judges : N.L. Untwalia, J;B.N. Jha, J

Bench : Division Bench

Judgement

1. Petitioner 1 is the proprietor of a cinema hall situated in the town of Giridih In the district of Hazaribagh, which is known as the Moti Picture Palace. Petition 2 is his son and petition 3 is the manager of the establishment. By notification No. GSR 827, dated 19 June 1961, issued by the Central Government, cinema halls were also included in the class of establishment to which the Employees'' Provident Funds Act, 1952 (Central Act 19 of 1952), hereinafter called the Act, applies.

2. The petitioners'' case is that under misapprehension of the law and under some coercion, petitioner 1 submitted to the jurisdiction of the Act and the Employees'' Provident Fund Scheme, 1962 (hereinafter under to as the scheme, framed thereunder, by depositing on 14 November 1962, a sum of Rs 96.50 towards provident fund constitution for the month of October 1962. Later on. realizing the correct position, he made a representation to the then Regional Provident Fund Commissioner that the Act did not apply to his establishment. Respondent 1 on being satisfied about the of the correctness of the stand of petitioner 1,issued a letter, dated 19 July 1963, a copy of which is annexure 3 to the writ application, releasing the petitioners'' establishment from the liability of the provident Fund imposed under the act. A certificate case filed for realization of provident fund in respect of the period August 1961 to September 1962, was cancelled by the certificate officer, Hazaribagh, at the request of respondent 1.In January 1967,however respondent 1 issued a notice dated 16 January 1967,

asking the establishment to appear before him on 18 January 1967, In connexion with the enquiry to determine the amount due from the petitioners'' establishment. The notice was received actually on 19 January 1967, at 2.30 p.m. It was impossible to comply with it on 18 January 1967. A reply was, accordingly, sent on 23 January 1967. A copy of the notice, dated 16 January 1967, is annexure 4 and that of the reply, dated 23 January 1967, is annexure 5. The petitioners'' case further is that without giving any farther or reasonable opportunity of representing their case, an amount of Rs. 8,106 was determined as the total of the employer and employees'' contributions and administrative charges by respondent 1, by his order, dated 20 October 1967, a copy of which 1b annexure 6. Petitioner 1, thereafter, represented his case to the Central Provident Fund Commissioner, New Delhi, who. finally informed him by his letter dated 23 May 1968, a copy of which in annexure 7, that his establishment has rightly been covered under the Act with effect from 31 July 1931. A certificate case (No. 49 of 1968) has been filed before the certificate officer of Hazaribagh for realization of the sum of Rs. 8 521.79. A further notice, dated 4 June 1968, has been issued asking petitioner 1 to attend the office of respondent 1 on 2 July 1968, in connexion with the determination of the amount payable under the Act and the scheme, for the period from September 1967 to April 1988.

3. The main contention put forward on behalf of the petitioners is that their establishment is not one to which the Act can apply. Hence, the determination of the amount to the tune of Rs. 8.000 and odd or any amount for future is without any justification or basis and is ultra vires. The further attack 1b that no reasonable opportunity was given to the petitioners to represent their case as required by Sub-section (3) of Section 7A of the Act.

4. In response to the show-cause notice served upon the respondents, cause has been shown by filling a counter-affidavit) and the learned Government Advocate has appeared to place their case against the rule issued on them.

5. It is undisputed that the petitioners'' establishment is an establishment of the kind to which the Act has been applied from 19 June 1961. For application of the provisions of the Act and the scheme, however, requirement of Clause (a) of Sub-section (3) of Section 1 of the Act has got to be fulfilled, which says that We provisions would apply to every establishment specified or included in Sch. I in which twenty or more persons are employed. The term "employee," under Clause (f) of Section 2 of the Act, means-

any person who is employed for wages in any kind of work, manual or otherwise, in or in connexion 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 connexion with the work of the establishment.

The definition, as it is, is very wide, but, it has to be read with Para. 26 of the scheme, Sub-para. (1) (a) of which read as follows:

Every employee employed in or in connexion with the work of a factory or other establishment to which this scheme applies, other than an excluded employee shall be entitled and required to become a member of the fund from the beginning of the month following that in which this paragraph comes into force in such factory or other establishment, if on the date of such coming into force he has completed one year''s continuous service or has actually worked for not less than 240 days during a period of twelve months or lass in that factory or other establishment or in any other factory or other establishment to which the Act applies under the same employer, or partly in one and partly in the other.

A Bench of this Court, in the case of Kumar Brothers (Bidi) (Private), Ltd. v. Regional Provident Fund Commissioner 1968 LIC 1578 had the occasion to consider as to what kind of employees, labourers or workers are included in the definition of the word "employee," read with Para 26 of the scheme. On an elaborate and careful consideration of the matter, it has been pointed out (at p. 1585-Col. 1) that

this definition includes all employees who are engaged is or in connexion with the work of to the establishment, including a person employed by or through a contractor in such work, provided they have completed the period of working days laid down in the scheme for entitling an employee to the benefits of the fund. But a casual labour falls outside the scope of Sub-section (3) of 8.1 of the Act, inasmuch as the service of a casual worker would not be ''continuous service'' within the meaning of this expression contained in Expln. I to Para. 26 of the scheme.

On behalf of the petitioners it is asserted that In their establishment, at no point of time, there have been more than nineteen employees and respondent 1, by including the casual labourers in the category of the employees, has erroneously held that at the relevant time there were more than twenty employees working in the petitioner'' establishment. Prima facie, this contention of the petitioners finds some support from two annexures to the counter-affidavit, which are:

(1) a copy of a loiter of the Inspector of Provident Funds, Dhanbad, dated 18 July 1967, to the Regional Provident Fund Commissioner (annexure D), and

(2) a copy of a letter dated 6 August 1967, addressed to petitioner 1, by respondent 1 (annexure F).

In the latter, there is a statement to the following effect:

In fact, in the month of July 1961, you had 18 workers on the regular strength and three casual workers-vide pp. 153 and 203 of your cash book.

The pages aforesaid of the cash book are found mentioned in annexure D wherein; after stating the number of employees as per the figures given in the attendance registers for the months of July to December 1961, to be 18 or 19, the Inspector of the Provident Funds has further stated that two casual workers, Ramu and Mahabir, worked for 6 and 61/2 days, respectively, on 27 August 1961, as would appear from p. 153 of the cash book, and these workers had been regularly employed as evidenced by p. 203 of the cash book. About a third worker, it is said that on 26 August 1961 one coolie was employed for publicity work and thus the total strength of workers in August 1961, was 21.

6. From the facts stated, either is annexure D or in annexure F, it is not quite clear to us as to whether two or three workers, over and above the strength of 18 or 19 as regalarly mentioned in the attendance registers, were casual workers, as explained In Kumar Brothers case 1968 LIC 1578 (vide supra) or, whether they could come under the definition of "employee" given in Section 2(f) of the Act, react with Para. 26 of the scheme. An employee might have been paid his wages on daily basis ; that will not make him a casual worker. For the application of the provisions of the Act and the scheme, however, the employees must belong to the class of employees entitled and required to Join the fund in accordance with Para. 26 of the scheme. On the findings as recorded in the impugned orders, we are not satisfied that respondent 1 arrived at the necesary finding of fact to hold that the Act applied to the petitioners'' establishment. Unless that finding is clearly records, no amount due under the Act or the scheme can be determined u/s 7A of the Act. On the materials placed before us. we are unable, nor is it advisable for us to investigate the questions of fact, to record a definite finding and say either way in regard to the application of the Act to the petitioners'' establishment. We are not impressed by the argument put; forward on behalf of the petitioners that; merely because on 19 July 1963, respondent 1 had issued a letter (annexure 3) that the petitioners'' establishment could not be covered by the Act and the scheme framed thereunder, it is not open to the said respondent to arrive at a correct state of affairs. Firstly, it has to be pointed cut that Section 7A was introduced in the Act by Central Act 28 of 1963, with effect from 30 November 1963. The communication contained is the letter, dated 19 July 1963, a copy of which is annexure 3 to the writ application, was leaned before the coming into force of the said section providing for the machinery for the determination of the amount under the Act and the scheme. Secondly, as has been said in the subsequent orders, the letter (annexure 3) was issued on misrepresentation of facts and not on a corract appreciation of them. This Court would not have agreed to exercise the writ jurisdiction to quash the subsequent order, if otherwise it was fit to be upheld merely because en an earlier occasion a letter was issued by respondent 1 stating therein that the petitioners'' establishment was not covered by tb.9 Act and the scheme.

7. We, however, think that the petitioners did not get a reasonable opportunity to represent their case, as required by Sub-section (3) of Section 7A of the Act. The defect which we find in this regard is that the first notice which was is issued on 16 January 1967, was received by the petitioners on 19 January 1967, after the expiry of the date 18 January 1967, fixed by the said notice. This fact is not controverted in the counter-affidavit. In the impugned order (annexure 6) there is a statement of fact that in spite of repeated reminders and personal contacts, the petition did not comply with the notice. In support of the above statement of

fact, we get only annexure E to the counter-affidavit which refers to the letter dated 23 January 1967 (28 January 1967 is a mistake in the copy-on verification we found from the original that the date is 23 January 1967) written by the petitioners, a copy of which is annexure 5, and stated that their request for the examination of the records at Giridlh was rejected and they were directed to produce all the relevant records on 25 May 1967, at the Patna office of respondent 1. The statement in Para. 7 of the counter-affidavit is that a similar notice asking the petitioners to produce the records was issued on 18 May 1967, but the petitioners did not produce the records. There is no statement that the said notice was received by or served on any of the petitioners. In Paras, 7 and 9 of the affidavit-in-reply, the assertion is that no other notice was received by the petitioners, except the one dated 16 January 1967, On examining the office copy an annexure E from the file which was produced by the learned Government Advocate at oar direction, we find that the draft was prepared under the initial of respondent 1 on 27 April 1967, it seems to have been issued on 18 May 1967. There is nothing further to indicate, how it was sent to the petitioner and when was it received by or served on them. I this view of the matter, we are not satisfied that the petitioners were given any reasons opportunity of representing their case before passing of the impugned order dated 20 October 1967 (annexure 6). A representation sent to the Central Provident Fund Commissioner, or his reply dated 23 May 1968 (annexure 7) may merely explain same delay in the filing of the writ application and cannot be of any other use to either party, as there is no provision in the Act far filling of any representation, appeal or revision before the Central authority from an order of the Regional Provident Fund Commissioner, passed u/s 7A of the Act.

8. For the reasons stated above, in exercise of the powers of this Court under Article 227 of the Constitution, we set aside the order, dated 20 October 1967, of the Regional Provident Farad Commissioner, Patna (respondent 1), a copy of which is annexure 6, remand the case back to him and direct him to reascertain the question of the applicability of the Act and the scheme to the petitioners'' establishment in the light of the Bench decision of this Court in Kumar Brothers case 1968 LIC 1578 referred to above, and in the light of what has been said by us in our judgment. He may proceed thereafter to determine afresh the amount due from the petitioners'' establishment under the provision of the Act or the scheme in accordance with Section 7A of the Act. The matters must be determined after giving a fresh and reasonable opportunity to the petitioners. It follows, as a result of the quashing of the order dated 20 October 1967, of respondent 1, that Certificate Case No. 49 of 1968, pending in the Court of the certificate officer, Hazaribagh, has to be withdrawn or cancelled and such steps as may be warranted by end appropriate under the law have got to be taken by respondent 1 in regard to the various criminal cases filed under the Act against the petitioner or their establishment in the Courts of the various magistrates at Giridih. There will be no order as to costs.

