
(2016) 04 CAL CK 0031
In the Calcutta High Court
Case No : W.P. No. 30825 (W) of 2014.

United Spirits Ltd.

APPELLANT

Vs

The Regional Provident Fund Commissioner-I & another

RESPONDENT

Date of Decision : 12-04-2016

Acts Referred:

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

Citation : (2016) 3 CalLT 131 : (2016) 2 CLR 415 : (2016) 150 FLR 195 :
(2016) 2 LLJ 635 : (2016) 6 WBLR 122

Hon'ble Judges : Sambuddha Chakrabarti, J.

Bench : Single Bench

Advocate : Soumya Majumder and Tarun Aich, Advocates, for the Appellant;
Mitali Bhattacharyya, Advocate Authority and Subsequently, S. C. Prasad,
Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Sambuddha Chakrabarti, J. - By and order dated the October 31, 2014, the Regional Provident Fund Commissioner -I, i.e., the respondent no. 1, had assessed the liability of Rs. 66,27,780/- as the dues payable by the petitioner in respect of the employees and directed the said amount to be remitted within a period of 15 days from the date of the receipt of the order. This order has been assailed by the petitioner in the present petition.

2. M/s. Shaw Wallace and Co. Ltd. which has now been merged with M/s. United Spirits Ltd., i.e., the petitioner, was covered under the provisions of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("the Act", for short). According to the petitioner, since November 1995 it had implemented three types of pension schemes in respect of its employees and the employees of its associates and group companies as they had resisted the implementation of Employees' Pension Scheme, 1995 ("the Scheme", for short). These three Schemes are:

(a) Shaw Wallace and Co. Ltd. and its Associate Companies Superannuation

Scheme in which the employer deposited 10 per cent. of the monthly salary of each executive employed by the associate companies, irrespective of salary structure.

(b) Shaw Wallace Associate Companies Covenanted Staff Superannuation Fund, under which 8.33 per cent. of the monthly salary of the employees belonging to the category of workmen of the principal company as well as its associate companies was deposited by the employer;

(c) Shaw Wallace Covenanted Staff Superannuation Scheme in which 15 per cent. of the salary of the executives of the principal company was deposited irrespective of their salary structure.

3. These Schemes envisaged execution of a Master Policy with Life Insurance Corporation of India ("LICI", for short) and the grantees/trustees were required to remit contributions in the form of a premium towards payment of pension for the beneficiaries. These were more beneficial measures and the employees of the petitioner as well as its associate companies felt themselves more protected than the Scheme of the Provident Funds authorities.

4. The company applied for exemption from the Scheme on the basis of Annuity Schemes introduced by it. The provident fund authorities informed the petitioner that the establishment whose employees were or were to be members of the Pension Scheme should submit the same by a certain date. Ultimately, the respondent no. 1 granted relaxation to the establishment from the operation of the Scheme of 1995 pending disposal of the exemption application.

5. Since then there have been series of correspondence between the petitioner and the respondents authorities. Several orders were passed by the respondents which were variously challenged by the petitioner No. 1. For the present purpose it is not necessary to go into the details of the same. Suffice, however, it to say that the petitioner had transferred a sum of Rs. 3,59,00,769/- to the respondent representing the amount towards pension contribution under the Employees' Pension Scheme, 1995 for the period from November 16, 1995 to October 31, 2003 after withdrawing the sum from the Superannuation Schemes maintained by the Company with the LICI in respect of the existing employees as in November 2003.

6. In the meantime, a proceeding under Section 7A of the Act which had been initiated by Provident Funds authorities for determination of the dues under the Scheme for the above-mentioned period culminated in the order dated May 9, 2008 directing the petitioner to deposit a sum of Rs. 2,29,22,175/- within 15 days from the date of the receipt of the order. Upon a challenge by the petitioner by way of a writ petition, the said order was set aside by this Court and the matter was remanded for fresh consideration. Thereafter, the respondent conducted a hearing and several reports have been submitted by the Enforcement Officer on behalf of the concerned department. Subsequently, the respondent no. 1 passed an order dated October 30, 2014 to which reference has

already been made.

7. The respondent no. 1 had opposed the application by filing an affidavit-in-opposition, affirmed by the Enforcement Officer (Legal). The affidavit re-states that the purpose of the legislature is for providing social security to employees working in any establishment engaging 20 or more persons on any day. The initial responsibility for making payment of contribution of the employer and the employees lies on the employer. Under Section 17B of the Act change of management does not affect the liability of an establishment towards payment of statutory dues. Any effort by the employer to deny the employees their legitimate dues is required to be looked upon with suspicion. In case of any failure on the part of the employer to deposit the legitimate dues has empowered the Provident Funds authorities to initiate appropriate proceeding.

8. The respondent no. 1 further stated that the establishment had applied for exemption from the Scheme under Paragraph 39 thereof. The application was rejected in the year 2001. The petitioner filed a writ petition and obtained an interim order of stay of implementation of the Scheme upon the establishment. Thereafter the establishment surrendered its own Pension Scheme to the respondent no. 1 and started its compliance under the Scheme with effect from November 1, 2003. It also transferred the past accumulation of pension fund contribution to the respondent no. 1 along with interest thereon only in respect of the existing members and the members who had left but not withdrawn their pension funds.

9. According to the respondent no. 1 the department was receiving grievances from the members who had left the service, members of the family of the deceased employees and others. In order to mitigate hardship regularisation of the members of the Scheme and assessment of their dues became necessary. The hearing which was re-started pursuant to the order of the Court was conducted after giving full opportunities of being heard to the establishment to justify their reasons behind the statutory default. The respondent no. 1 further stated that the Master Policy of the company which was maintained by the LIC was not sufficient as a beneficial policy in respect of the Scheme of the Act.

10. The respondent has laid stress on the language in the Policy endorsement that the scheme was not in lieu of the RPFC Pension Scheme. The authority conducted the hearing under Section 7A of the Act by following the principle of natural justice and full opportunity of being heard was given to the petitioner and all the objections have been considered in the order impugned in the writ petition. The establishment created Pension Scheme and got it approved by the tax authorities. However, it had not become sovereign to defy any other statutory provisions and the tax approval did not empower them to deny the provisions of the Act. Since, the establishment has been covered under the Act there is legal compulsion for the establishment to ensure exhaustive compliance under all the schemes framed thereunder. The petitioner had no power to create a separate Pension Scheme for its employees in lieu of the statutory scheme of

1995. The respondent no. 1 prayed for dismissal of the writ petition.

11. The petitioner in the affidavit-in-reply largely repeated and reiterated their stands in the petition. A point of objection to the affidavit affirmed by the deponent is that the latter did not have the power to affirm the affidavit-in-opposition on behalf of the respondent and as such no credence can be attached to the said affidavit. The petitioner has repeated that the answering respondents have grossly misconstrued the scope and object of the Act. More specifically, it has been denied that the scheme entered into by the petitioner with the LIC was divorced from the aspect of the applicability of the Scheme of 1995 to the employees of the company. The respondent has not also disclosed any single instance of grievance being made by any of the employees or the members of their families who had left the establishment with regard to the non-settlement of their pensionary scheme before the accumulation stood transferred to the respondent. The service conditions of the employees did not call for extension of pensionary benefits in the name of the benefits flowing from the schemes framed by the petitioner with the LIC. The premium payable by the grantees to the LIC is actually 8.33 per cent. of the annual salary of the members which is payable also under the Scheme of 1995 by the employer. The LIC had really acted as a substitute or an extended limb of Regional Provident Fund Commissioner-I in so far as the establishment of pension fund was concerned and even the respondent no. 1 accepted such position and granted relaxation to the establishment from the coverage under Para 39 of the Scheme. The answering respondent clearly admitted that only regularisation of the scheme was to be made after the company had remitted the entire amount lying in deposit with the LIC to the respondents.

12. With reference to the language in the policy, as mentioned in the affidavit-in-opposition, the petitioner's stand has been that it cannot be used as a seal by the respondent no. 1 since he himself acted on the basis thereof and granted relaxation to the establishment on being satisfied that the maintenance of the LIC Scheme called for relaxation pending disposal of the application for exemption.

13. The petitioner had reiterated that the respondent no. 1 while conducting the hearing under Section 7A of the Act violated the principle of natural justice by not providing the report under Section 7A proceeding although the same was relied upon by the respondent in reaching the conclusion. Moreover, the petitioner had already discharged the liabilities by paying the amount to the LIC which is equivalent to the benefits under the Scheme and, therefore, the question of escaping the liabilities does not arise.

14. It is true that the necessity for conducting the enquiry by the respondent no. 1 has been mentioned in the order impugned as grievances were received by the department from the members themselves as well as the members of their families who had left the services. In order to mitigate their hardship and to address their concern an assessment of dues under the Scheme became

necessary. The order refers to and relies on a report dated January 24, 2008 on pension contribution in respect of the existing employees as in November 2003. Based on the above inputs an order under Section 7A of the Act was passed on May 9, 2008 quantifying an amount of Rs. 2,29,22,175/-. The said order, as mentioned before, was set aside and it was remanded to the authorities for a fresh decision. A Division Bench of the Court had specifically made it clear that if any material or document were relied on by the commissioner the same must be supplied to the establishment.

15. It appears from the order impugned that the respondent no. 1 had addressed the following issues at the hearing:

(a) To ascertain the exact volume of evasion in the Scheme by way of production of relevant documents in relation to the left, dead or retired employees during the period from November 16, 1995 to October, 2003 by the establishment;

(b) To judge the veracity of the records of the department as procured through the Enforcement Officer's report on various dates to quantify exact volume of evasion in relation to the left, dead and retired employees for the said period;

(c) To consider the submission of the establishment as furnished before the assessing authorities on various dates; and

(d) To judge the relevance of Group Superannuation Scheme being the Master Policy adopted by the petitioner through LIC in the light of the statutory provisions of the Scheme.

16. The respondent no. 1 observed that the pension settlement was not in lieu of the Provident Funds' Pension Scheme as per the policy endorsement which records "notwithstanding anything contained elsewhere in this policy to the contrary, it is hereby agreed and declared that the scheme is not in lieu of RPFC Pension Scheme".

17. From this it has been observed that the establishment has a legal compulsion to ensure exhaustive compliance under all the schemes framed thereunder and had no reason to wait for the reports of the Enforcement Officer of the Department. The LIC had emphatically recorded in the policy document that the Group Superannuation Scheme was not in lieu of the RPFC Pension Scheme. But in spite of that, the establishment had persistently argued the sanctity of the legal documents issued by the LIC. Thereby the establishment demonstrated a desire to deviate from statutory provisions. He concluded that the establishment was concealing that the dues in respect of 104 employees were payable under the Act. If the establishment was allowed to grab such unbridled power to design any Scheme as per its own whims the whole object of the Act and the Schemes framed thereunder would become obsolete.

18. To the stand taken by the petitioner that it got the Pension Scheme approved by the tax authorities, the assessing authorities recorded that by virtue of the approval of the said authority it had not become sovereign to defy another

statutory provision, viz., the Act. The establishment has assumed power to destabilize the whole of the statutory provisions under the Act seeking to render the object of the Scheme a non-entity. The assessing authority has described such alleged attempt on the part of the petitioner as "assumption of draconian power" by the establishment.

19. The submission of the petitioner that the pension benefits have been paid by way of withdrawal of benefits and accounts in respect of certain members have been settled, has been described by the respondent no. 1 as unreasonable and hollow which required to be rejected. He thought it necessary to remind the establishment that its own Pension Scheme did not have relevance in the eye of the Scheme. The law of the land does not permit overriding effect of its own Pension Scheme over the statutory Scheme of 1995. The establishment had been, in fact, exercising its powers on the basis of its presumption and assumption to decide the fate of the workers or the members of the scheme.

20. The establishment submitted that it could only submit the Pension claim in respect of one employee; but for the remaining 18 members, records could not be traced by the establishment. The Regional Provident Fund Commissioner placed its reliance on records which were submitted by the establishment on different dates as well as various reports furnished by the Enforcement Officer. The Regional Provident Fund Commissioner observed that the written submission of the establishment reflected an effort to feign ignorance of the list containing 104 names of employees. He even recorded that the establishment robbed and hijacked the powers of the authority of the LIC by raising question on the legal force as recorded in the policy document. According to him, the clear endorsement that the Scheme was not in lieu of the RPFC Pension Scheme has the legal force and sanctity and the contention of the establishment that such endorsement was entirely irrelevant as LIC was not the authority to decide whether such pension benefit was or was not in lieu of the RPFC Scheme has not found favour with the assessing authority. For him, the establishment has no regard for the law of the land and the very essence of law has been tarnished by not advancing any logic. Therefore, the pleas taken by the establishment was devoid of any logic and did not merit any consideration.

21. On the point of demand of report dated June 24, 2008 by the establishment, the assessing authority held that the list containing the names of 104 employees was advanced by establishment itself. Therefore, the point taken by them betrayed the establishment's resorting to technical and irrelevant issues leaving aside legal and bounden duty to come up with relevant documents.

22. The respondent no. 1 further observed that the establishment has dwelt on a fanciful imagination by overriding the Scheme of 1995 through its own Group Superannuation Scheme with LIC despite the latter's emphatic notification that the policy was not in lieu of the RPFC Scheme. The establishment knowing fully well that the scheme was a statutory scheme, had been trying to put on the garments of a judge to define the same as per its own understanding and design.

He reminded that it is only the RPFC who is entrusted with the power through enactment and no other authority to decide the case under the provisions of the Act.

23. The respondent no. 1, based on the observations made in the order impugned, concluded that the establishment had scant regard for the 7A "Court". Placing its reliance on a judgment of the Delhi High Court, the assessing authority held that what the establishment did, was surely an act of "non-cooperation". He further observed that the establishment was in the habit of firing gunshot in the air so that the basic subject got frustrated.

24. I have given my anxious consideration to the respective cases made out by the parties and I am of the view that there is sufficient justification in the petitioner's feeling aggrieved. The substratum of the reasons for rejecting the contentions of the petitioner as well as for the determination of the amount in the order is undoubtedly the endorsement by the LICl in the notification that the policy was not in lieu of the RPFC Scheme. Mr. Majumder, the learned Advocate for the petitioner, submitted that the respondent no. 1 has misunderstood and mis-appreciated the documents relied on by the petitioner. Both Annuity Schemes as well as Trust Deed read together leave no manner of doubt that the same has been introduced towards the implementation of the Scheme.

25. The contention of the petitioner that the LICl did not have the competence to decide the issue, has been rejected by the respondent no. 1 on a ground which does not appeal to logic. A submission made by the establishment is never to be considered as "robbing" or "hijacking" the authority of the LICl. The authority instead of deciding the issue has practically condemned the effort of the establishment as lack of least care, honour and regard for the law of the land on the part of the establishment.

26. I fail to understand without discarding the contention of the petitioner with logic how such conclusion could be arrived at by the assessing authority. Once a point is taken by the establishment the authority must have to decide whether the point is right or wrong. Merely describing the same as an evidence of lack of respect for the law of the land is no answer, particularly when in coming to the conclusion the authority did not make any reference to either the Policy or the Trust Deed.

27. The words "in lieu of" came up for consideration before the Supreme Court in the case of Hindustan Construction Co. Ltd. v. V. S. Gaitonde and Another, reported in AIR 1965 SC 1316. Although the judgment had been delivered in the context of a refund under Section 49E of the Income Tax Act, the observation by the Supreme Court can be gainfully applied to the facts of the present case. Relying on a Queen's Bench Judgment in the case of Stubbs v. Director of Public Prosecution [(1890) 24 QBD 577] a five-judge bench of the Supreme Court held that in the case of Stubbs (Supra) it was held that where a liability had to be discharged by A in lieu of B, there must be a binding obligation of B to do it

before A can be charged with it. The Supreme Court observed that there must be a subsisting obligation to make the payment of refund before a person is entitled to claim set off under Section 49E of the Act. Likewise, the Provident Funds authority should have appreciated that it was not for the LIC to declare whether the obligation under the Employees' Pension Scheme 1995 subsisted or got extinguished by reason of the Annuity Schemes and the Trust Deed. The order passed by the respondent no. 1 conjures up an idea as if the petitioner was seeking for an estoppel against the statute. But this is not one such case. On the contrary, the respondent had acted in a certain manner and caused the petitioner to alter its position towards the grant of relaxation pending disposal of the application for exemption by the appropriate government. I find sufficient substance in the submission of Mr. Majumder that the prescribed authority has accepted the document as a step towards implementation or compliance of the Scheme of 1995.

Paragraph 39 of the said Scheme reads as under:

39. Exemption from the operation of the Pension Scheme.- The appropriate Government may grant exemption to any establishment or class of establishments from the operation of this scheme, if the employees of the establishments are either members of any other pension scheme or propose to be members of a pension scheme wherein the pensionary benefits are at per or more favourable than the benefits provided under this scheme. Where exemption is granted to any establishment or class of establishments under this paragraph, withdrawal benefits available to the credit of the employees of such establishment(s) under the ceased Family Pension Scheme, 1971 shall be paid, subject to the consent of the employees, to the Pension Fund of the establishment(s) so exempted. An application for exemption under this paragraph shall be presented to the Regional Provident Fund Commissioner having jurisdiction by the establishment or class of establishments together with a copy of the Pension Scheme of the establishment(s) and other relevant documents as may be called for by him. On receipt of such an application, the Regional Provident Fund Commissioner shall scrutinise it, obtain the recommendations of the Central Provident Fund Commissioner and submit the same to the appropriate Government for decision. Pending disposal of application for exemption under this paragraph employers' share of the contribution shall not be remitted to the Pension Fund as envisaged in sub-paragraph (1) of paragraph 3. An application for exemption presented under this paragraph shall be disposed of within a period of six months from the date of its receipt or such further time as may be extended for reasons to be recorded in writing. If the application for exemption is not disposed of within the period so specified, the exemption applied for shall be deemed to have been granted.

Explanation. - For the purpose of this paragraph the period of six months will count from the date on which the application for exemption is given in complete form to the satisfaction of the Regional Provident Fund Commissioner.

28. A bare reading of the said paragraph is convincing that the whole purpose was to provide for specific obligations to be discharged by the respondent no. 1 after an establishment makes an application for exemption. The statutory authority had discharged its duties which resulted in a substantial alteration by the petitioner of its position. The steps taken by the statutory authority in terms of paragraph 39 form part of the process of scrutiny.

29. Again, if one reads paragraph 39 of the Scheme in the proper context one is not left with no alternative but to hold that it prohibits remitting of employer's share of contribution to the pension fund pending disposal of the application for exemption. The respondent no. 1 does not appear to have addressed himself to this issue from the context of the prohibition contained in paragraph 39.

30. The petitioner made a very big grievance that the statutory authority had induced the establishment to believe that the application for grant of exempting was acceptable and by furnishing various documents and allowing the establishment to make contribution under the Annuity Scheme at the rate of 8.33 per cent. of employee's share, the statutory authority had induced the petitioner to substantially alter its position.

31. In the case of H.R. Basavaraj (Dead) by his LRS and Another v. V.S. Canara Bank and Others, reported in (2010) 12 SCC 458 it has been held that estoppel as a principle is applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his position. In such a case, the former shall be estopped from going back on the word given. The principle of estoppel is, however, only applicable in cases where other party has changed his position relying upon the representation thereby made. Estoppel is based on the principle that a party is not to be heard to allege the contrary. This relates to a species of presumption where the fact presumed is taken to be true, not as against all the words, but against a particular party and that only by reasons of some act done. Relying on this judgment, it has been sought to be argued that when the respondent no. 1 had himself considered the Annuity Schemes to be a substitute till the implementation of the Scheme and directed transfer of the accumulation lying in the trust to the pension fund he cannot take a different stand subsequently.

32. The petitioner also relied on the case of Jai Narain Parasrampuriah (Dead) and Others v. Pushpa Devi Saraf and Others, reported in (2006) 7 SCC 756 for a proposition that while applying the procedural law like the principle of estoppel or acquiescence the court would be concerned with the conduct of a party for determination whether he can be permitted to take a different stand in a subsequent proceeding unless there exists any statutory interdict. The Supreme Court further observed that the doctrine of estoppel by acquiescence was not restricted to cases where the representer was aware both of what his strict rights were and that the representee was acting on the belief that those rights would not be enforced against him. Instead, the court was required to ascertain whether in the particular circumstances it would be unconscionable for a party to

be permitted to deny that which, knowingly or unknowingly he had allowed or encouraged another to assume to his detriment. Accordingly, the principle would apply if at the time the expectation was encouraged, both the parties were acting under a mistake of law as to their rights.

33. The respondent no. 1 should have considered that the petitioner establishment could not be doubly saddled with the same liability for the period. But the effect of the order will be exactly the same.

34. A more pressing question, however, appears to have been entirely overlooked and consequently unanswered by the respondent no. 1. Paragraph 39 of the Scheme makes it very clear that the grant of exemption to an establishment is ultimately dependent upon two contingencies, viz., the employees of the establishment are members of any other pension scheme or propose to be members of a pension scheme and the pensionary benefits are at par or more favourable than the benefits provided under the Scheme.

35. The impugned order, in compliance of the statutory requirements, as a pre-requisite for disposing of the petitioner's application was to take these aspects as primary considerations before a final decision was taken. The order, however, dwells on various aspects largely unconnected with the relevant considerations. It appears to have been more concerned with the petitioner's alleged sovereign approach or the so-called hijacking the law of the land. Leaving aside these two aspects the respondent no. 1 deprecated the petitioner's application on factors extraneous to the issues germane for the purpose.

36. In such view of it, I set aside the order dated October 31, 2014 and send the matter back to the Regional Provident Fund Commissioner for a re-examination of the matter in the context of Paragraph 39 of the Scheme and as well as the observations made in this judgment after giving the petitioner a fresh opportunity of being heard. The Regional Provident Fund Commissioner -I shall complete the exercise within twelve weeks from the date of communication of the order without granting any adjournment, unless absolutely necessary, and being uninfluenced by his earlier stand. The interim order granted earlier on November 27, 2014 stands vacated.

37. There shall be no order as to costs.

38. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.