(2010) 11 CAL CK 0022

Calcutta High Court

Case No: F.M.A. No"s. 65 and 66 of 2010

Paramount Leathers		APPELLANT
	Vs	
Regional Provident Fund Commissioner and Another		RESPONDENT

Date of Decision: Nov. 22, 2010

Acts Referred:

- Constitution of India, 1950 - Article 226
- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 1(3), 2, 7A, 7I

Citation: (2011) 2 CHN 28 : (2011) 129 FLR 322 : (2011) 4 LLJ 121 : (2011) LLR 597

Hon'ble Judges: Sambuddha Chakrabarti, J; Baskar Bhattacharya, J

Bench: Division Bench

Advocate: Mrinal Kanti Das and Subhabrata Das, for the Appellant; Mihir Kundu, for the Respondent

Final Decision: Allowed

Judgement

Sambuddha Chakrabarti, J.

These turn appeals arise out of a judgment and order, dated October 26,2009 passed in M/s. Paramount Leathers v. The Regional Provident Fund Commissioner and Anr. (W.P. 1318 (W) of 2008) and out of an order of the same date passed in M/s. Wu Leathers v. The Regional Provident Fund Commissioner and Anr. (WP 1312 (W) of 2008). The learned Trial Judge had dismissed the first writ petition and by a subsequent order His Lordship dismissed the second writ petition also holding that in view of the dismissal of the writ petition filed by M/s. Paramount Leathers nothing remained to be done in the second writ petition. The Petitioners of the two writ petitions feeling aggrieved have filed two appeals which have been re-numbered as FMA 65 of 2010 and FMA 66 of 2010 respectively. Since both these appeals raise the same questions of law they were analogously taken up for hearing and are being disposed of by a common judgment and

order.

2. M/s. Paramount Leather and M/s. Wu Leathers are two partnership firms having their respective offices in Matheswartala Road, Tiljala, Kolkata-16, in close proximity to each other. There is still another similarity between these two partnership firms i.e. both deal in leather and leather products. They have a common part-time employee as an Accountant as well.

3. The Provident Fund authorities sent a squad of officials in 2001 to these two establishments. They collected and seized some documents and registers. In 2003 these two establishments were jointly served with a notice whereby they were informed that as they had employed 24 persons in April, 1999 the provision of Section 1(3) of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (the Act, for short) was attracted and as such a code number was allotted to both these establishments together and the Appellants were directed to remit the dues and arrears as mentioned in the notice. The Appellants made their respective representations to the authorities contending inter-alia that they were not liable to be covered under the Act. Again the Provident Fund authorities in exercise of the power u/s 7-A of the Act by another Memo of 2003 summoned them to appear before the authorities on May 27, 2003 and asked them to give evidence and produce the documents mentioned in the notice and other relevant documents "for conducting an enquiry and determining the amount due" from them.

4. Ultimately, the Assistant Provident Fund Commissioner passed an order, dated December 14/18, 2007, by which he inter-alia held that real management and control belonged to the same owners and due to common supervision and control clubbing these two units was the right approach to extend the benefits of the Act and the scheme. He further held that the unity of ownership, management, supervisory control, infrastructure, employability etc. in both these units had been proved conclusively and hence these two establishments were rightly covered by the department by clubbing their entities. The Assistant Provident Fund Commissioner in exercise of the powers vested u/s 7-A of the Act accepted the request of the department and determined the dues to be paid by these two establishments from April, 1999 to "August, 2001 to the Provident Fund authorities.

5. This order, as already mentioned, was assailed in two writ petitions by the Appellants. The Provident Fund authorities had contested the writ petition by filing an Affidavit-in-Opposition. The learned Trial Judge dismissed the writ petitions on the ground of availability of alternative remedy.

6. We have gone through the relevant records, the writ petitions, the Affidavits and have considered the submissions of the learned Advocates for the respective parties.

7. The order impugned in the writ petitions is neither convincing nor does it appear to have been borne by the records. In other words, there is hardly anything to justify that one establishment is a part of or even remotely connected with the other establishment.

The partners of the two firms are different, so also are the. employees except a part-time Accountant. The Provident Fund authorities did not record any material which might suggest that there was any unity of ownership in these two establishments or they have common employees. On the other hand what the Provident Fund authorities did was to rely upon the Enforcement Officer''s report where from it concluded that those two different addresses had merely been projected whereas on vouchers exactly reverse addresses had been mentioned. Real management and control in this case belonged to the same owners and the same infrastructure had been used. The authorities in the impugned order chose not to give any further details and had accepted merely the report of the Enforcement Officer. It is not clear how they arrived at such sweeping conclusions and the basis thereof. But still they clubbed these two establishments together only to bring them under the coverage of the Act.

8. The only common employee between the two establishments is a part-time Accountant. The learned Advocate for the Appellants has drawn our attention to the fact that such part-time employees frequently work in different organizations at the same time and look after the accounts of different establishments. The learned Advocate for the Respondents also could not deny the prevalence of this practice. Needless to say that functional integrality and inter-dependability of the two establishments are never proved by one common part-time employee only.

9. The Provident Fund authorities had further held that "unity "of ownership, management, supervisory control, infrastructure, employability and same nature of production in both the units is [sic] proved conclusively". Many establishments have the same nature of productions and produce the same or similar goods. Without anything more, this hardly proves or even remotely suggests that they are parts of the same establishment.

10. With regard to the other elements in respect of which unity has been claimed to be conclusively proved the authorities could not provide any substantive clue at all except its conclusions which are not based on any fact or documentary evidence. In the process, the Respondents had failed to consider the relevant areas of major differences between the two establishments which were specifically taken on behalf of the establishments at the hearing before- the Provident Fund authorities. For example, it did not consider that these two establishments ,were distinct and their separate entities have been recognized by different Government departments and statutory authorities like Directorate of Commercial Taxes, Ministry of Commerce (I.E. Code) etc. The employees of the two establishments were completely different and there was separate supply of electricity etc. Moreover, there is absolutely no discussion about inter-dependability and functional integrity of these two establishments which are the basic tests for determining whether me two establishments are separate or form part of one and the same establishment. It may, however, be mentioned that where the employees of the two establishments are not common the element of inter-dependability cannot be attracted.

11. The word "employer" has been defined in a restrictive manner in the Act. In Section 2(e) the word has been defined to mean inter alia in relation to an establishment which is a factory, the owner or occupier of the same including the agent of such owner or occupier. Thus, occupation of the factory premises and the inter se relationship between the occupiers of both the factories, if there could be any, was a relevant enquiry for the present purpose. We, therefore, directed the Appellants of file an Affidavit snowing their status in relation to the respective factory premises.

12. The Appellants have accordingly filed two Affidavits. It appears from the Affidavit filed on behalf of M/s. Paramount Leathers, i.e. the Appellant in F.M.A. 65 of 2010, that it carried on its business at 113/D/1, Matheswartala Road, Kolkata. M/s. Wu Brothers which was succeeded by M/s. Wu Leathers, was a lessee and/or Thika tenant under the erstwhile owner with right to induct subtenants. M/s. Paramount Leathers approached M/s Wu Leathers to let out a portion of the premises at 113/D/1, Matheswartala Road, Kolkata. This was granted at a monthly rent of Rs. 400/-.

13. The Affidavit of M/s. Wu Leathers in F.M.A. 66 of 2010 discloses that in the year 1974 by a registered deed of lease between M/s. East Calcutta Land Development Company Ltd. and M/s. Wu Brothers, the latter became the thika tenant under the former at 113/D, Matheswartala Road, Kolkata. M/s. Wu Brothers had erected structures and shifted its factory to the new address. The partnership firm of M/s. Wu Brothers was subsequently re-constituted and was named and styled as M/s. Wu Leathers. Their Affidavit further states that with the coming into force of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981, the right, title and interest of M/s. East Calcutta Land Development Company Private Ltd. had vested in the State of West Bengal and M/s Wu Leathers since then became the direct tenant under the State.

14. The learned Advocate for the Respondents did not question the correctness of the statements made in the Affidavits and declined to file any counter to them.

15. Thus, the Affidavits make it obvious that there is neither any inter-. dependability between the two establishments nor with regard to the respective factories there is any unity of status of the occupiers.

16. Mr. Das, the learned Senior Advocate for the Appellants, relied on the judgment in Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers" Union and Its Workmen, for a proposition of law that for a decision on the question whether two units form part of an establishment it has to be considered how far there is "functional integrality" meaning thereby such functional interdependence that one unit cannot exist conveniently and reasonably without the other and whether in matters of finance and employment the employer has kept the two units distinct or integrated. This judgment was delivered in the factual context of the same owner owning a press and publishing a newspaper which was printed in the same press.

17. Mr. Das also referred to the case of Isha Steel Treatment, Bombay Vs. Association of Engineering Workers, Bombay and Another, There the Hon"ble Supreme Court relied on the case of Workmen of The Straw Board Manufacturing Co. Ltd. Vs. Straw Board Manufacturing Co. Ltd., for a proposition that unity of ownership, supervision and control and substantially identical conditions of service of workmen were not by themselves sufficient in the eye of law to hold that there was functional integrality between the two mills. Although these two cases were in the context of the Industrial Disputes Act, 1947 me principle laid down therein apply to the question involved in this case.

18. Applying these tests to the facts of the present cases it cannot be said that the Appellants before us are integral parts of one another or that there is inter-dependence between them so that one cannot exist reasonably or conveniently without the another.

19. The learned Trial Judge while dismissing the writ petition did not enter into the merits of the case. The writ petitions were dismissed on the ground of existence of alternative remedy in the form of an appeal as provided in Section 7-I of the Act. It appears from the judgment and order of the learned Trial Judge that it was argued before His Lordship that the impugned order was without jurisdiction and was made in violation of the principles of Natural Justice. Both these arguments have been found to be not sustainable and the learned Trial Judge found no reason to permit the Petitioners to avoid the statutory appellate forum. It has been observed that it is only in an exceptional case that one should be permitted to avoid the appellate forum and approach the Writ Court. Obviously, it is implied that the Trial Court did not consider the present case as an exceptional one.

20. We have considered the judgment and have not been able to persuade ourselves to agree with the findings of the Trial Court.

21. It is true that in some cases existence of alternative remedy has been found to be a sufficient cause for not invoking the writ jurisdiction. For example in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, the Hon"ble Supreme Court had clearly held:

14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. The power can be exercised by the High Court not only for issuing writ in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in part-III of the Constitution but also for "any other purpose

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a

bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of the Act is challenged". Thereafter, Their Lordships relied on some "old decisions of the evolutionary era of the constitutional law as they still hold the field". After relying on some of the cases of the 1950s and early 1960s, the Hon"ble Supreme Court held in the case of Whirlpool Corporation (supra): "20. Much water has flown [sic] under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

22. Thus it is evident from the cautious use of such words as "normally" or "at least" that the contingencies mentioned in the case of Whirlpool Corporation (supra) and followed thereafter in some cases do not operate as an absolute bar to the invocation of the writ jurisdiction. All that these judgments lay down is a broad enabling provision that at least in three contingencies a High Court may unhesitatingly entertain a writ petition. But their jurisdiction to entertain a writ petition is not compulsorily restricted the existence of these contingencies alone. A rule of discretion may not be stretched beyond a point of reasonableness. In many subsequent decisions the Hon"ble Supreme Court itself did not consider the availability of alternative remedy as a complete bar even in cases not covered by the "contingencies" mentioned above. In ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, it has been accepted that for valid or legitimate reasons a prerogative writ may be issued. Arid in U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, the Hon"ble Supreme Court held that exclusion of writ jurisdiction on the availability of alternative remedy is essentially a rule of policy, convenience and discretion and never a rule of law. Very categorically it has been held that if a strong case is made out to seek the writ jurisdiction despite existence of an alternative remedy writ can be invoked.

23. Mr. Kundu, the learned Advocate appearing for the Respondents authorities, has cited several decisions in support of his contention that availability of alternative remedy operates as a bar to the invocation of the writ jurisdiction. He has relied on the case of S.A. Khan Vs. State of Haryana and others, In this case the writ Petitioner was under an order of suspension and he inter-alia prayed for a direction for setting aside the order of suspension passed against him. Criminal investigation against the Petitioner was under way and the Hon"ble Supreme Court in that context declined to make any observation, as that was likely to prejudice or to be detrimental to either of the parties in future adjudication relating to the suspension order. The Hon"ble Supreme Court dismissed the writ petition on the ground that the impugned order was only an order of suspension and that there was a statutory remedy available to the Petitioner. This is clearly no authority

on the proposition mat availability of alternative remedy completely bars the invocation of the writ jurisdiction.

24. Mr. Kundu also relied on the case of Sanjay Kumar and Others Vs. Narinder Verma and Others, which has absolutely no manner of application to the facts of the present case. He also relied on two judgments of this Court on the point of alternative remedy. In view of the decisions of the Hon''ble Supreme Court these decisions may not separately be dealt with.

25. We are of the view that the order impugned in the writ petitions is one such where the writ jurisdiction should be invoked. We have already seen the nature of the order. It''s not merely a wrong order. It''s an order while passing which the authority clearly failed to exercise its jurisdiction seen in the perspective of the requirements of the tests to be applied by a statutory authority. The authority in Section 7-A of the Act is required to "decide" the dispute of applicability of the act to an establishment. The order passed was not a speaking order. It narrated the respective cases of the parties and without anything more formed its opinion that the two firms were in fact two units of a single establishment. This ought to have been preceded by a discussion of the materials on the basis of which the conclusion had been drawn. There is no factual substance in the arbitrarily arrived conclusion. A finding of fact without any evidentiary back up is a perverse one. Equally, the Hon''ble Supreme Court in the case of The Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity and Others, has reiterated a very well known axiom that administrative and judicial orders must be supported by reasons. It has further proceeded to hold that recording of reasons is a principle of Natural Justice.

26. Viewed from that perspective the order impugned in the writ petitions satisfies the "contingencies" mentioned in the case of Whirlpool Corporation (supra). In the facts of this case it is difficult to appreciate how the Respondents authorities could discover fundamental unity between the two establishments. The specific averments in the writ petitions to this effect have been very feebly met by the Respondents in their Affidavit-in-Opposition. Reliance has been placed on the report of the Enforcement Officers without annexing the same to the Affidavit. Moreover, it is curious to note that in the Affidavits to both the writ petitions-one filed by M/s Paramount Leathers and the other by M/s Wu Leathers-it has been persistently mentioned that only one factory in fact was being run by the Petitioner, leaving one to guess which Petitioner the authorities after all meant, as two writ petitions were filed by two partnership firms.

27. We do not think that this was a fit case where the writ petitions could be dismissed on the ground of alternative remedy. That apart, there was no disputed question of fact to be decided in the writ petitions. This is all the more so, as the Respondents had used Affidavits. When the Respondents use an Affidavit it is not wholly just and proper to dismiss a writ petition on the ground of the availability of alternative remedy, notwithstanding whether the question of maintainability was kept open or not.

28. In such view of the matter both the appeals stand allowed. The order impugned in both the writ petitions are quashed and set aside. A Division Bench of this Court while disposing of the applications for stay in connection with the appeals directed each of the Appellants to deposit Rs. 2.5 lakh with the Respondents authorities as a condition for the Respondents not proceeding with the demand of Rs. 3.18 lakh against the Appellants. The learned Advocate for the Appellants informed us that such amount has been deposited. The Respondents are directed to refund the same with interest @ 10% per annum from the date of such deposit to the date of refund. This exercise should be completed fifteen days from the date of the communication of the order.

29. The Respondents are directed to pay Rs. 5,000/- as costs to each Appellant.

Urgent Xerox certified copy, if applied for, will be supplied within seven days from the date of the application.

I agree.