

(2010) 01 CAL CK 0045

Calcutta High Court

Case No: Writ Petition No. 16173 (W) of 2008

Aditya Birla Nuvo Ltd. and
Another

APPELLANT

Vs

Regional Provident Fund
Commissioner and Others

RESPONDENT

Date of Decision: Jan. 11, 2010

Acts Referred:

- Constitution of India, 1950 - Article 226
- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 7A, 7B
- Industrial Disputes Act, 1947 - Section 12(3), 2

Citation: (2010) 125 FLR 238 : (2010) 3 LLJ 627

Hon'ble Judges: Jayanta Kumar Biswas, J

Bench: Single Bench

Advocate: Partha Sarathi Sengupta, Shyamal Sarkar, Soumya Majumdar, Gopal Chakraborty and S.M. Obaidullah, for the Appellant; Mihir Kundu, for Respondent Nos. 1, 2 and 3, K.H. Dasan and Mala Chakraborty, for the Respondent

Judgement

Jayanta Kumar Biswas, J.

The petitioners in this Article 226 petition dated July 17, 2008 are questioning the orders of the Regional Provident Fund Commissioner, Sub-regional Office, Howrah dated May 18, 2007, Annexure-P10 at p. 106 and April 2, 2008, Annexure-P25 at p.220, and the direction of the Assistant Provident Fund Commissioner, Sub-regional Office, Howrah dated June 2, 2008, Annexure-P26 at p.223. While the orders were passed under Sections 7-A and 7-B respectively of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (the Act 19 of 1952), the direction was given calling upon the establishment concerned of the first petitioner to comply with the Section 7-B order and thus avoid legal complications.

2. Jaya Shree Textiles is a unit of the first petitioner. Jaya Shree is an establishment covered by the provisions of the Act 19 of 1952. Alleging that though it was required, it did not "extend Provident Fund membership to the workers engaged in loading/unloading/stocking in Cargo Ship for the period March 1, 1989 to July, 2006", the Commissioner initiated the Section 7-A proceedings in which he issued a summons dated August 21, 2006, Annexure P23 at p.204 and passed the impugned Section 7-A order. And by the impugned Section 7-B order the Commissioner rejected Jaya Shree's application for review of the impugned Section 7-A order.

3. Assailing the Section 7-A order, Mr. Sengupta, Counsel for the petitioners, has argued three points: (i) the Section 7-A order is vitiated by a jurisdictional error; (ii) even if the Section 7-A order is not vitiated by any jurisdictional error, it is vitiated by procedural impropriety; and (iii) even if the Section 7-A order is not vitiated by any procedural impropriety, then it is vitiated by non-consideration of the points urged. As to the Section 7-B order, Mr. Sengupta has argued that though the three points on which the Section 7-A order has been questioned were raised u/s 7-B, the Commissioner rejected the Section 7-B application citing the reasons recorded in the Section 7-A order.

4. The Commissioner, passing the impugned Section 7-A order, has held as follows:

It is evident from the memorandum of settlement arrived at between the management of Indian Rayon and Industries (Unit: Jayashree Textiles, Rishra, Hooghly) and their workmen represented by Calcutta Port Shramik Janata Panchayat, made before the Assistant Labour Commissioner u/s 12(3) of the Industrial Disputes Act, 1947, that both the parties agreed as follows: (Gist).

(i) The workmen shall be paid their wages and benefits.

(ii) Each of workmen shall be paid annual Bonus etc.

From the papers and the explanation given before me, it is clear that the workers are getting wages through contractor i.e. indirectly from the employer.

....

I do not find any force in the contention of the establishment regarding the employer and employee relationship are not coming to the establishment, when there is Tripartite Agreement made between the establishment with the workers Union in presence of Assistant Labour Commissioner and agreed for payment of wages, bonus etc., there is no doubt regarding employer and employee relationships.

5. In its letter to the enforcement officer of the provident fund organization dated November 20, 2006, Annexure-P5 at p.78, Jaya Shree said:

In all industrial matters we come under the purview of Labour Department, Government of West Bengal who is an appropriate authority of labour matters in

respect of us.

6. In para 12 of its supplementary dated November 5, 2007, Annexure-P17 at p. 181, to the Section 7-B review application dated July 6, 2007 Jaya Shree said:

12. Further, the licensed labourers are freelance and work for various CHA/FA and are not the employees of CHA/FA. The relationship between importer/exporter and the CHA/FA is on principal to principal basis. The CHA/FA is not a contractor of the importer/exporter.

7. In the impugned Section 7-B order dated April 2, 2008 the Commissioner has said:

...He had challenged the employer and the employee relationship between Jayashree Textiles Ltd. and these workers. The undersigned thinks that the earlier order u/s 7-A dated May 18, 2007 had dealt with this plea of the employer. The workmen were engaged for doing the loading and unloading of export and import cargo of Jayashree Textiles Ltd. at Kolkata Port area. Hence all of them are entitled for getting the P.F. and pensionary benefits as per E.P.F. Act and Scheme provisions.

8. In para.3 of the petition the petitioners have stated as follows:

3. Your petitioner No. 1 occasionally imports wool, flax, linen fibres and also exports finished goods in the form of yarn and fabrics. For the purpose of export and import, for processing the papers with the customs authority and for loading and unloading of goods within the Port area, one has to appoint Customs House Clearing Agent (CHA) and Forwarding Agent (FA). The CHA are licensed by the customs authority to take all steps on behalf of the importer/exporter. The FA are registered by the Port Trust. Normally same firm function as CHA and FA. The loading or unloading of goods in the Port area is the responsibility of CHA/FA and outsiders cannot work there.

In para. 10 of their supplementary affidavit dated September 10, 2008 the petitioners have stated as follows:

10. It is stated that even before the respondents, a representation was made on behalf of the company on November 20, 2006 explaining that in respect of all industrial matters pertaining to the industry of the petitioner company, the appropriate Government will be the State Government. In view of such statement the said settlements/agreements could not have been looked into such submission was not even considered but the alleged settlement was relied upon, which vitiates the impugned orders and the notice under challenge in the writ petition.

The petitioners' case in para. 10 of the supplementary affidavit dated September 10, 2008 has been dealt with by the provident fund organization in para. 32 of its opposition dated December 10, 2008. The said para. 32 is as follows:

32. That the statements made in Paragraphs-6,7, 8, 9, 10, 11 and 12 of the said application are matters of records and I do not admit anything which are contrary

thereto and/or are inconsistent therewith.

9. The petitioners' case in para. 10 of their supplementary affidavit dated September 10, 2008 has been dealt with by the fourth respondent, Calcutta Port Shramik Janata Panchayat, in para. 39 of its opposition dated September 7, 2009. The said para. 39 is as follows:

39. The allegations contained in Paragraphs-10, 11, 12 and 13 of the said Supplementary Affidavit are all irrelevant and immaterial and intended to distort everything because all the Tripartite Settlement have already been acted upon by the petitioners without murmur and at this stage they cannot throw a challenge on the Tripartite Settlements which have been fully acted upon and/or duly implemented. It is denied that the order passed under Sections 7-A and 7-B of the E.P.F. Act, 1952 by the respondent No. 2 are based on any invalid settlement or the orders are perverse or without jurisdiction or liable to be quashed as alleged or at all. Unfortunately the provisions of law do not support such misconceived and untenable pleas of the petitioners.

10. Referring to Jaya Shree's case in its letter dated November 20, 2006 and the supplementary to the Section 7-B application, the petitioners' case in this petition, the case of the respondents in their respective oppositions, the provisions of Section 2(a) of the Industrial Disputes Act, 1947, the provisions of para. 1(3)(b)(xliv) of the Employees' Provident Funds Scheme, 1952 and relying on [Food Corporation of India Vs. Provident Fund Commissioner and Others](#), 1994-III-LLJ-1136, and [Sahu Jain Ltd. Vs. Deputy Secretary, Ministry of Finance and Others](#), Mr. Sengupta has assailed the impugned orders and direction.

11. Mr. Sengupta's contentions are these. The Commissioner, though was under a statutory obligation to collate all information and come to a proper conclusion whether the persons seeking benefit of the Act 19 of 1952 could be Jaya Shree's employees for the purposes of the Act 19 of 1952, it is evident from the orders that he did not do it. On March 2, 2007 Jaya Shree submitted an application, Annexure-P6 at p.80, requesting the Commissioner to implead all the agents concerned so that the actual relationship between the parties might be ascertained, but by an order dated March 2, 2007, Annexure-P7 at p.84, the Commissioner rejected the request.

12. The relevant part of the Commissioner's order dated March 2, 2007 is as follows:

Request of the company to summon the three intermediaries through which the payment was routed to the seventeen workers engaged at Calcutta Port Trust is not acceptable, Jayashree Textile has never denied that the payment was made by them to the workers whose name figure in the different agreement with Calcutta Port Shramik Janata Panchayat from 1989 onwards. The mechanism of payment is immaterial.

13. Mr. Sengupta has submitted that as will appear from the respondents' case stated in their respective oppositions, correctness of the petitioners' case stated in para.3 of the petition and para. 10 of the supplementary affidavit dated September 10, 2008 has not been disputed.

14. In *Sahu Jain Ltd. v. Deputy Secretary, Ministry of Finance and Ors.* (supra) question arose whether case stated by Sahu Jain in its Article 226 petition was denied and disputed by the respondents in the case. Referring to the pleadings of the parties the Single Bench said (in para. 11):

Now, "not admitted" is not denial. If any authority is needed reference may be made to the judgment, dated February, 2, 1949 by A.K. Sarkar, J. in Suit No. 366 of 1937 (1) *Jogendra Nath Mullik v. Kanto Mohan Mullik* "No knowledge" is worse than "Not admitted". That may only indicate how uninformed the respondents are. Bare denial does not serve any purpose, where an allegation of fact need be specifically denied.

15. Mr. Kundu, Counsel for the first, second and third respondents, has argued that in view of the settlements between the parties, the Commissioner rightly concluded that the members of the fourth respondent were Jaya Shree's direct employees. According to him, there was no need to add or summon the persons named in Jaya Shree's application submitted before the Commissioner on March 2, 2007.

16. According to Mr. Dasan, Counsel for the fourth respondent, the fact that the members of the fourth respondent are Jaya Shree's direct employees posted in Calcutta Port was proved by submitting written deposition; with respect to the members of the fourth respondent Jaya Shree, of its own accord, ought to have complied with the provisions of the Act 19 of 1952, when the parties entered into numerous settlements from the year 1989; and unless the persons concerned were Jaya Shree's employees, the parties could not enter into the settlements referred to and relied on by the Commissioner.

17. I find that before the Commissioner Jaya Shree specifically took the point that the benefit seeking members of the fourth respondent employed by the agents employed by Jaya Shree, on the facts, could not be considered Jaya Shree's employees working through its contractors in connection with the work of its establishment. The question is one of jurisdiction, and hence the Commissioner was under an obligation to decide it.

18. The Commissioner was required to decide the question after collating all materials. There was absolutely no evidence before the Commissioner to conclude that the persons concerned were principally working for Jaya Shree through its contractors. In spite of Jaya Shree's application the Commissioner decided not to involve the agents whom Jaya Shree gave the works concerned, and who in turn employed the members concerned of the fourth respondent.

19. The Commissioner decided to go only by the settlements. He has not decided the question whether Jaya Shree was right in contending that the settlements to which the Central Government was a party, though it was not the appropriate Government in relation to Jaya Shree for the purposes of the Industrial Disputes Act, 1947, could not be decisive. The Commissioner proceeded on the basis that the settlements by themselves proved the fact that the members of the fourth respondent were Jaya Shree's employees. Proceeding on this basis, the Commissioner held that the members of the fourth respondent were being paid by Jaya Shree through its contractors. The findings are self-contradictory.

20. It is evident that the Commissioner himself was not sure what was the actual relationship, if any, between the parties. When Jaya Shree was seriously contesting the case of the provident fund organization that the agents whom it gave the works were not its contractors, and when the fourth respondent, espousing the cause of its members, came with a case that the persons seeking benefit were Jaya Shree's direct employees, in my opinion, the Commissioner ought to have made a thorough enquiry involving the agents and scrutinising all records of the agents for ascertaining what was their relationship with Jaya Shree and the members of the fourth respondent.

21. In view of what was held in *Food Corporation of India v. Provident Fund Commissioner and Ors.* (supra) the Commissioner was under a statutory duty to collate all materials for deciding the questions. In *Food Corporation of India v. Provident Fund Commissioner and Ors.* (supra), the Provident Fund Commissioner called upon the Corporation to deposit contributions for the workers engaged by its contractors. The Section 7-A order was questioned by the Corporation before the High Court under Article 226. The petition was dismissed.

22. Allowing the Corporation's appeal, their Lordships of the Supreme Court said:

9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person.

23. In the review proceedings once again the jurisdictional question was bypassed by the Commissioner. The Commissioner, instead of deciding essential questions of fact, has just referred to the principles of law explained by the Courts. I am, therefore, of the view that Mr. Sengupta is fully justified in arguing that the Section

7-A order is vitiated by a jurisdictional error, a procedural impropriety and non-consideration of the points urged; and that in spite of request, by rejecting the Section 7-B application the Commissioner has refused to act according to law.

24. For these reasons, I allow the petition, set aside the impugned orders dated May 18, 2007 and April 2, 2008 and direction dated June 2, 2008. The Commissioner will be at liberty to proceed afresh with the Section 7-A proceedings. If he decides to proceed afresh, then he shall give final decision in the proceedings after making a detailed enquiry, asking the agents concerned to appear before him with all relevant records, examining all necessary witnesses, scrutinising all relevant records, and giving all parties reasonable opportunity of presenting their respective cases. No costs. Certified xerox according to law.