(2011) 05 PAT CK 0104

In the Patna High Court

Case No : CWJC No. 13932 of 2008

Bihar State Electricity Board — APPELLANT

Vs

Regional Provident Fund Commissioner, Regional Office, R Block, Patna-1 and Others — RESPONDENT

Date of Decision : 17-05-2011

Acts Referred:
Constitution of India, 1950 — Article 38, 39, 40, 41, 42
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16, 16(1), 16(1)(b)(c), 16(1)(c), 17

Citation : (2012) 3 PLJR 299

Hon'ble Judges : V.N. Sinha, J

Bench : Single Bench

Advocate : B.K. Kanth, V.N. Sahay and Arun Srivastava, for the Appellant; R.S. Pradhan for the Respondent: No. 1 to 3, Ms. Shivajee Pandey and Nalin Vilochan Tiwary for the Respondent: No. 4, for the Respondent

Judgement

V.N. Sinha, J.—Petitioner Bihar State Electricity Board (hereinafter referred to as the Board) is aggrieved by the order dated 15.1.2000, Annexure-2 passed by the Assistant Provident Fund Commissioner, Patna whereunder it has been held that provisions of Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act) is applicable to the Board as Board is not covered by sub-sections (b)(c) of Section 16(1) of the Act and has further held that the Board is liable to deposit a sum of Rs. 2,23,64,855/- towards the P.F. dues of the workers supplied by the contractor engaged in connection with handling of coal/removing of ash at Kanti Thermal Power Unit of the Board during the period between 1986-April, 2000. Board is also aggrieved by the order dated 23.2.2007, Annexure-1 passed by the Employees'' Provident Fund Appellate Tribunal, New Delhi upholding the order dated 15.1.2000, Annexure-2. It is submitted on behalf of the Board that the Board having entered into tripartite agreement with workers'' union of the Board dated 6.11.1987 extended the pension-cum-G.P.F. scheme applicable to the employees of the State Government to the employees of the Board under resolution dated 8.12.1987, Annexure-4 is not obliged to maintain the provident fund account of the workers of the contractor(s) serving Kanti Unit of the Board. Reliance in this connection, is placed over the provisions of Section 16(1)(b)(c) of the Act which inter alia provide that any establishment belonging to or under the control of the Central/ State Government or established under Central or State Act and whose employees are entitled to the benefit of contributory provident fund or pension in accordance with any scheme or Rule framed by the Central/State Government or under the Act, whereunder the establishment has been established is not covered by the other provisions of the Act. In the instant case, with reference to resolution dated 8.12.1987, Annexure-4 whereunder pension-cum-G.P.F. scheme of the employees of the State Government was made applicable to the employees of the Board, it is submitted that resolution dated 8.12.1987 is a regulation within the meaning of Section 79(C) of the Electricity (Supply) Act, 1948 and as the employees of the Board are covered by the pension-cum-G.P.F. scheme applicable to the employees of the State Government, the Board is not obliged to maintain the provident fund account of the workers of the contractor engaged at its Kanti unit and the provisions of the Act are not applicable to it by virtue of sub-section (c) of Section 16(1) of the Act. With reference to letter nos. 608, 561 dated 3.11.1995 and 20.10.1995 issued from the office of the Regional Provident Fund Commissioner, Bihar and annexed with the memo of appeal filed by the Board before the Employees Provident Fund Appellate Tribunal, New Delhi, Annexure-9 it is submitted by the counsel for the Board that the establishment of the Board is also exempted u/s 17 of the Act from the operation of the provisions of the scheme framed under the Act. In support of the aforesaid contention learned counsel for the Board relied on the judgment of the Division Bench of this Court dated 19.12.2000 passed in the case of Bata India Ltd. and Others Vs. Union of India (UOI) and Another, , and submitted that exempted establishment is not liable to maintain the P.F. account of the workers supplied by the contractor. Contractor employing 20 or more workers is within the purview of the Act and separate code number is to be provided to those contractors who supply 20 or more workers to the establishment. He further relied on the judgment of the Hon''ble Supreme Court in the case of Regional Provident Fund Commissioner vs. Sanatan Dharam Girls Secondary School and Others, reported in (2007) 1 Supreme Court Cases 268, paragraphs-27, 28 and 29 and submitted that the employees of the Board being covered by the pension-cum-G.P.F. scheme the Board is not enjoined with the duty to maintain provident fund account of the workers of the contractor(s) engaged at Kanti unit of the Board for handling of coal/removal of ash. He further relied on the Full Bench judgment of this Court in the case of Mohammad Zainul Abedin and Another vs. The State of Bihar and Others, reported in 1985 PLJR 58, whereunder the Full Bench of this Court considered the scope of Section 32 of the Bihar Panchayat Samitis and Zila Parishads Act, 1961 read with Bihar Panchayat Samitis and Zila Parishads (Conduct of Business) Rules, 1963 and held that Rule 7 of the aforesaid Rule is not self-contained code and not to be construed in isolation but as part of the mosaic of the other Rules providing for methodology of convening meeting which has to confirm to the general or special Rules for holding the meeting. Learned counsel further relied on the judgment of the Hon''ble Supreme Court in the case of Prakash H. Jain vs. Marie Fernandes (Ms.), reported in (2003) 8 Supreme Court Cases 431, and submitted that the provisions of Section 16 of the Act has overriding effect over the other provisions of the Act and as the employees of the Board are covered by the pension-cum-G.P.F. scheme applicable to the employees of the State Government, the workers supplied by the contractor for handling coal and removing ash at Kanti unit of the Board may be amenable to the scheme formulated under the Act but the responsibility to work such scheme is that of the contractor and not of the Board.

2. Counsel for the Board further submitted that besides raising the objection that the Act is not applicable to the Board, request was also made to issue notice to the contractor(s) for furnishing the list of the workers supplied, but such request was rejected under order dated 10.9.1998, Annexure-A3 to the supplementary affidavit filed on behalf of the petitioner as the Union had already supplied the details of the workers of the contractor(s) pertaining to Kanti unit of the Board, copy whereof was handed over to the representative of the Board on 11.9.1996.

3. It is further submitted on behalf of the Board that after the order was passed overrulling the objection of the Board that Act is applicable to it, fresh opportunity should have been given to the Board to produce evidence so as to enable the Assessing Authority to record finding about the identity of the workers supplied by the contractor and the period of their engagement as on the basis of the list dated 14.8.1997, copy whereof was handed over to the representative of the Board on 11.9.1998 in the light of the request of Sri S.K. Singh, Director, Personnel of the Board definite finding about the identity and the duration of the engagement rendered by the workers supplied by the contractor(s) could not have been recorded for the entire assessment period i.e. 1986 April 2000. In this connection, learned counsel further relied on the judgment of the Hon''ble Supreme Court in the case of Food Corporation of India vs. Provident Fund Commissioner and Ors., reported in (1990) 1 Supreme Court Cases 68, paragraphs-7, 9 and submitted that the Assessing Officer is a statutory authority exercising powers to collect the relevant evidence for determining the amount payable under the Act. While assessing the amount payable under the Act, the Commissioner is authorized to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. In the instant case, the Assessing Authority has only decided the abstract question of law that the Act is applicable to the Board but has failed to identify the workmen supplied by the contractor at Kanti unit of the Board as also the duration of their engagement with reference to the evidence and other materials collected by the Assessing Officer. In this connection, specific instance is made of the list dated 14.8.1997, which could not have been the basis for receding finding that the workers named therein served

Kanti unit of the Board at the instance of the contractor(s) for the entire period of assessment i.e. 1986-April 2000, at best the list could have been useful for rendering finding about the engagement of the workers for the period between 1986 till the date of the list or at best till the date the list was handed over to the representative of the Board on 11.9.1998 to Sri Jai Shankar Prasad, L.D. Assistant of the Board at the request of the Director, Personnel of the Board made before the Assessing Authority on 10.9.1998.

4. Learned counsel finally submitted that during the pendency of the writ petition amount assessed by the authorities was recovered by attaching the Bank account of the Board. Notwithstanding such recovery Board also paid a sum of Rs. 82,00,000/- towards the P.F. dues to the workers of the contractor(s) in compliance of the interim orders of this Court dated 23.1.2009.

5. Learned counsel for respondent nos. 1 to 3 as also counsel for respondent no. 4 the workers'' union submitted that workers of the contractor(s) employed in connection with the work of the establishment have all through been within the purview of the Act. In terms of Section 6 of the Act, it is the duty of the employer to deposit the contribution of the employer, employee including the workers of the contractor(s) in the pension fund in terms of paragraph-30, Chapter-V of the scheme, which inter alia provide the manner in which the contribution of the employer, employee is required to be deposited. With reference to the provisions contained in Section 16(1)(c) of the Act, it is submitted by the counsel for the respondents that in terms of Section 16(1)(c) which was inserted in the Act with effect from 1.8.1988 establishments which have been set up under Central/State Act and whose employees including the employees of the contractor(s) serving the establishment are granted the benefit of pension-cum-G.P.F. scheme in accordance with the provisions of the scheme or Rule framed under the Act governing such benefits are beyond the purview of the Act. In the instant case, Board having adopted pension-cum-G.P.F. scheme applicable to the employees of the State Government for its employees under resolution of the Board dated 8.12.1987, Annexure-4 is beyond the purview of the Act so far its employees are concerned. Board having not framed any pension-cum-G.P.F. scheme for the workers supplied by the contractor(s) and serving its different units is liable in terms of the provisions contained in paragraph-30 Chapter-V of the scheme to deduct the employer contractor(s), the employees contribution and to deposit the same in terms of the provisions of paragraph-30 Chapter V of the scheme. As regards exemption u/s 17 of the Act learned counsel for the respondents submitted that the Board having not produced any notification of the appropriate Government exempting the Board from the operation of all or any of the provisions of the pension-cum-G.P.F. scheme the submission with reference to the contents of letters dated 3.11.1995 and 20.10.1995 that the Board has been exempted from the operation of the provisions of the scheme is wholly misconceived.

6. Learned counsel for the respondents further submitted with reference to the

provisions'' of the Contract Labour (Regulation and Abolition) Act, 1970 and the Bihar Rules framed thereunder that in terms of Rules 72, 73 of the aforesaid Rules, it is the duty of the principal employer to ensure disbursement of the wages to the workers of the contractor(s) in presence of its representative who is obliged to record certificate at the end of the entries made in the wage register. In terms of Rule 74 of the aforesaid Rules, it is the duty of the principal employer to maintain the register of contractor(s). In this connection, reference was also made to the registration certificate of four contractor(s) dated 10.8.2000, Annexure-5 and submitted that the same is of no assistance for adjudicating the dispute raised before the Assessing Officer as also in the writ petition as from perusal of the registration certificate, itself it would appear that the same is for the period beyond the assessment year. Learned counsel for the respondents further submitted that notice dated 19.6.1998 u/s 7A alleging evasion of membership was issued/served on the petitioner, in response whereto petitioner''s reply was considered on 10.9.1998 in presence of Director, Personnel of the Board and request to issue notice to the contractor(s) for furnishing the list of the employees supplied by the contractor(s) was rejected and as per the desire of the Director, Personnel of the Board the list of the workers furnished by the union was given to the Director, Personnel of the Board for verification and filing of objection if any by the next date of hearing. The list dated 14.8.1997 was received by Sri Jai Shankar Prasad, Lower Division Assistant of the Board on behalf of the Director, Personnel on 11.9.1998. Notice dated 10.9.1998 was also issued to the General Manager of the concerned unit of the Board for production of evidence fixing 15.10.1998 as the next date in the proceedings. On 15.10.1998 neither the Director, Personnel nor the General Manager of the concerned unit of the Board disputed the contents of list furnished by the union, accordingly, petitioner establishment was given final opportunity to present its case and furnish information as per their records fixing 19.11.1998 as the next date in the proceedings. It appears from the original records that the proceeding was adjourned thereafter from one date to another, mean-while other list dated 10.9.1998 of the workers supplied by the contractor(s) was furnished by the Union. Taking into account the first list dated 14.8.1997 as also the subsequent list dated 10.9.1998 liability of the Board was fixed for the assessment period i.e. 1986-April 2000 and while fixing the said liability it was specifically help that the Board is amenable to the provisions of the Act so far the workers supplied by the contractor(s) serving the different units of the Board are concerned. In support of the impugned order learned counsel for the respondents relied on the judgment of the Hon''ble Supreme Court in the case of M/s P.M. Patel and Sons and Others vs. Union of India and Others, reported in (1986) 1 Supreme Court Cases 32, paragraph-3, Division Bench judgment of this Court in the case of Sk. Nasiruddin Bidi Merchant (P) Ltd. Vs. Regional Provident Fund Commissioner and Others and submitted that the home workers engaged by the contractor(s) for rolling the Bidi are the employees of the trade mark holder the principal employer who is amenable to the provisions of the Act and the scheme framed thereunder for contributing towards the P.F. dues of home workers. They also relied on the judgment of the Hon''ble Supreme Court in the case of Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner and Others, reported in (2009) 10 Supreme Court Cases 123, paragraph-30 and submitted that Act of social welfare legislation intended to protect the interest of the weaker section of the society i.e. the workers employed into factories and other establishments, it is imperative for the courts to give a purposive interpretation to the provisions of the Act keeping in view the directive principles of State Policy embodied in Articles 38-43 of the Constitution of India. With reference to the law laid down in the case of Maharashtra State Cooperative Bank Ltd. (supra) learned counsel for the respondents submitted that the validity of the impugned order be upheld as the Board itself has resolved under resolution no. 7341 bearing Memo No. 21 dated 30.1.1999 to deduct the contribution from the wages of the workers of the contractor(s) but such deduction together with the contribution of the Board is not being deposited with the provident fund authorities. In this connection, it is pointed out that in paragraph-6 of the memo of appeal, Annexure-9 filed by the Board against the impugned order before the Appellate Tribunal, the Board submitted that it had requested the provident fund authorities to provide code numbers to the contractor(s) so as to enable the contractor(s) to deduct the workers contribution from the wage paid to the workers as also the contribution on their behalf and to deposit the deduction alongwith the contribution with the provident fund authorities and until such code number is provided to the workers by way of interim measure by which the Board resolved under resolution no. 7341 bearing Memo No. 21 dated 30.1.1999 deduction is being made but illegally kept with the Board, which should be deposited with the provident fund authorities alongwith the contribution of the Board.

7. Having considered the submission of the parties in the light of the provisions of the Act, it is evident that the workers supplied by the contractor(s) to the different establishments of the Board are also entitled to the benefits in the light of the scheme framed under the Act. The contribution made by the workers together with the contribution of the employer (contractor) is required to be deposited by the contractor with the provident fund authorities after obtaining a code number from the authorities of the provident fund organization. Until such code number is taken by the contractor from the authorities, it is the responsibility of the Board (principal employer) to ensure that necessary deductions are made from the bills payable to the contractor and deposited with the provident fund authorities in the light of the provisions contained in Section 6 of the Act and paragraph-30 of Chapter-V of the scheme. Appreciating the aforesaid legal position the Board itself passed resolution no. 7341 bearing Memo No. 21 dated 30.1.1999 referred to in the last paragraph of page-2 of the impugned order dated 15.1.2000. Prior to the issue of resolution no. 7341 bearing Memo No. 21 dated 30.1.1999 no deduction/contribution towards the provident fund emoluments of the workers of the contractor(s) appears to have been made. The Union espoused the cause of the workers of the contractor(s) by

filing C.W.J.C. No. 10448 of 1996 which was disposed of after hearing counsel for the Board and the provident fund authorities under orders dated 14.7.1997, Annexure-6 directing the Board, respondent no. 4 the Union to furnish necessary information by way of list of workers/employees supplied by the contractor(s) so as to enable the provident fund authorities to pass appropriate order in accordance with law within two months of the receipt of the information from the Board and the Union. In the light of the order dated 14.7.1997 the Union submitted list dated 14.8.1997 on the basis of which proceedings under the Act was drawn on 15.6.1998 and notice dated 19.6.1998, Annexure-7 was issued to the Board. In response to the notice the Director, Personnel of the Board appeared before the Assessing Officer on 10.9.1998 and requested that the labour contractor(s) of the Board be noticed but such request of the Director was rejected in the light of the list of the workers supplied by the contractor(s) dated 14.8.1997. The Director, Personnel of the Board thereafter requested the Assessing Officer to grant him a copy of the list furnished by the Union for its verification and for filing objection, if any, which request of the Director, Personnel was allowed by the Assessing Officer under order dated 10.9.1998 and notice was also issued to the General Manager of the concerned unit fixing 15.10.1998 as the next date in the proceeding. On 15.10.1998 neither the Director nor the General Manager filed any objection to the list furnished by the Union containing the name of the workers supplied by the contractor(s). The Assessing Authority having noticed the fact that neither the Director nor the General Manager of the concerned unit have filed their objection to the list of the workers supplied by the contractor(s) dated 14.8.1997 furnished by the Union granted the establishment final opportunity to present its case and furnish information as per records maintained fixing 19.11.1998 as the next date in the proceedings. After 19.11.1998 the proceeding has been adjourned on several occasions but neither the Director nor the General Manager of the concerned unit nor any other functionary of the Board ever objected to the genuineness or otherwise of the list dated 14.8.1997 containing the name of the workers supplied by the contractor(s). The Board, however, raised the plea that in view of the resolution dated 8.12.1987, Annexure-4, whereunder pension-cum-G.P.F. scheme of the employees of the State Government having been made applicable to the employees of the Board, it was beyond the purview of the Act in the light of the provisions of Section 16(1)(c) of the Act and was not obliged to maintain the provident fund account of the workers supplied by the contractor(s). Aforesaid plea raised by the Board, in my opinion, has been rightly rejected by the Assessing/Appellate Authority In the light of the definition of the employees u/s 2(f) of the Act and the mandate of Section 6 of the Act which require the employer to deduct 10% of the wage payable to the employee and to contribute the same amount and thereafter to deposit the deduction and the contribution in the fund of the Board as per paragraph-30 of Chapter-V of the scheme. Submission that in view of Section 16(1)(c) of the Act, the Act is not applicable to those establishments set up under Central/State Act whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rules framed under the Act under which those establishments were established is wholly fallacious, and misconceived as by adopting the pension-cum-G.P.F. scheme under resolution dated 8.12.1987, Annexure-4 the Board has provided pension-cum-G.P.F. scheme to its regular employees and not to the workers supplied by the contractor(s) and for them provisions have to be made in terms of the scheme framed under the Act. Impugned orders have been passed against the Board as it failed to ensure that the contractor(s) obtain code number in terms of the provisions of the Act. The Board having realized its mistake passed resolution no. 7341 bearing Memo No. 21 dated 30.1.1999 and with effect from the date of resolution deductions and contributions have been made by the Board, but for reasons best known to the functionaries of the Board not deposited in the fund. The plea of the Board that having rejected its objection about the applicability of the Act in view of the mandate of Section 16(1)(c) of the Act, no opportunity was given to the Board to file objection to the list of workers furnished by the Union dated 14.8.1997 is also misconceived as from the different orders passed by the Assessing Officer itself, it is clear that the Board does not have any record about the workers of the contractor(s) to dispute the contents of the list which was also confirmed by this court when it asked the representative of the Board present during the hearing of the case to ascertain from the Incharge of the unit concerned whether records are available for being produced before the provident fund authorities to dispute the list of the workers furnished by the Union dated 14.8.1997 representative of the Board present during hearing of the case thereafter sought instructions from the Secretary of the Board who in turn wrote letter dated 21.4.2011 asking the General Manager of the Unit concerned about the availability of record. In response to the request of the Secretary of the Board the General Manager of the unit concerned has reported under letter dated 22.4.2011 that the records are not available to dispute the list of the workers furnished by the Union dated 14.8.1997, copy of those letters have been taken on record.

8. Under the impugned order the Assessing Authority has fixed the provident fund liability of the Board as regards the workers supplied by the contractor(s) for the period between 1986-April, 2000 on the basis of the list of the workers furnished by the Union dated 14.8.1997 and 10.9.1998, which list, in my opinion, could not have been the basis for fixing the provident fund liability of the Board with respect to the dues of the workers supplied by the contractor(s) for the entire period of assessment i.e. 1986-April, 2000 as the Assessing Authority has not recorded a clear finding that the workers included in the two list continued to serve the concerned units of the Board even after submission of the list for the entire assessment period. The Assessing Authority while determining the amount due from the employer u/s 7A of the Act is required to identify the workmen who have served the employer during the period of assessment. From the assessment order it does not appear that the workers have been identified.

9. In view of my finding that the Assessing Authority has not identified the

workers supplied by the contractor(s) serving different units of the Board during the period of assessment, I remit back the matter to the Assessing Authority with direction to identify the workers supplied by the contractor(s) during the assessment period as early as possible, in any case within three months from today and thereafter to pay their P.F. dues from the amount already recovered by the Assessing Authority by attaching the Bank account of the Board. The amount paid by the Board to the workers directly during the pendency of the writ petition be, however refunded to the Board on their written undertaking that they shall make available the said amount as and when the same is required for payment of P.F. dues exceeding the recovered amount. In view of my findings in paragraphs-8, 9 and direction in paragraph-10 above, the impugned orders dated 15.1.2000, 23.2.2007, Annexures-2, 1 are, accordingly, modified. The writ application is disposed of.