

(1988) 11 PAT CK 0001

In the Patna High Court

Case No : Letters Patna Appeal No. 44 of 1988

Cee Bee Stone Works

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-11-1988

Acts Referred:

Constitution of India, 1950 — Article 227, 266

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1, 1(2), 1(3), 1(4), 1(5)

Citation : (1992) 2 PLJR 584

Hon'ble Judges : D.K. Sen, C.J.; S.N. Jha, J

Bench : Division Bench

Advocate : S.K. Mishra, for the Appellant; Renuka Sharma, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Sen, C.J.—The material facts on record and the proceedings leading up to this Letters Patent Appeal arc, inter alia, that M/s Cee Bee Stone Works of Pakur, the Appellant, is a lessee under the Government of Bihar of a stone quarry. The said lease was granted in favour of the Appellant under the provisions of the Mines and Minerals (Regulation and Development) Act, 1957, and the rules framed thereunder. The operation carried on by the Appellant under the said lease is, inter alia, quarrying stones. The operation consists of blasting stones from the quarry by explosives. Big pieces of stones obtained on blasting are reduced in size by chipping after which the same along with boulders are pressed through mechanised crushers and reduced to small pieces known as "stone chips". The crushed pieces are graded according to sizes by passing them through sieves and thereafter disposed of.

2. On the 31st January, 1977, a notification was published in the Gazette of India dated the 15th February, 1977, under G.S.R. No. 204 whereby in exercise of the powers u/s 1(2)(b) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, the Central Government specified that an establishment of

stone quarries producing stone chips, stone sets, boulders and ballasts and employing 20 or more persons would be a class of establishment to which the said Act of 1952 would apply on and from the 28th February, 1977. Subsequently, a further notification dated the 19th February, 1977, being G.S.R. No. 305 was published in the Gazette of India dated the 5th March, 1977, whereby, in exercise of the powers conferred u/s 5 and Section 7(1) of the said Act of 1952 the Central Government in the Scheme known as the Employees Provident Fund (Amendment) Scheme, 1977, inserted sub-clause No. (LXXXII) in paragraph 1 (3)(b) thereof. The said sub-clause read as follows:

Stone quarries producing stone chips, stone sets, stone boulders and ballasts.

3. The Appellant contends that it is a factory within two meaning of Section 1(3) (a) and Section 2(g) of the said Act of 1952 and carries on manufacturing process u/s 2 (1-e) of the said Act and as such the Appellant and the industry, to which the Appellant belongs, can be brought under the purview of the said Act of 1952 only by including the said industry in Schedule I of the said Act in the manner as provided u/s 4(1) of the said Act of 1952. Till the above was done the inclusion of stone quarry under item LXXXII under Chapter I in paragraph 1(3) (b) of the said Scheme would be ultra vires the powers u/s 1(3)(a) of the said Act, 1952. The Central Government could not override the specific provisions of the said Act under which power was delegated to it. The Appellant contended before the Provident Fund authorities that the said Act of 1952 was not applicable to the Appellant.

4. The Appellant along with Ors. in the said industry filed a representation on the 15th April, 1982, which was rejected by the Regional Provident Fund Commissioner, Bihar by his order dated the 22nd April, 1982.

5. Being aggrieved the Appellant filed a civil writ petition under Articles 226 and 227 of the Constitution on the 18th May, 1982, praying, inter alia, for a writ in the nature of certiorari for quashing the impugned order of the Regional Provident Fund Commissioner dated the 22nd April, 1982, and the said notifications respectively dated the 31st January, 1977, and the 19th February, 1977. The Appellant also prayed for a writ for a declaration that Section 7A of the Act of 1952 was ultra vires the Constitution and further a writ in the nature of mandamus restraining the Respondents from taking any coercive steps, including criminal prosecution against the Appellant on the basis of the said impugned notifications.

6. A counter affidavit, affirmed by one Atul Chandra Jana, a Provident Fund Inspector, on 8th January, 1986, was filed in answer to the writ petition on behalf of Respondents Nos. 1, 2 and 3. It was contended in the said affidavit, inter alia, that the Central Government was competent and empowered u/s 1(3)(b) of the said Act of 1952 to include classes of establishments to which the Appellant belonged within the purview of the said Act. u/s 1(3)(a) and Section 4 of the said Act a separate power was given to the Central Government to include in

Schedule 1 of the said Act entire industries which would thereupon come within the purview of the Act. The provisions in the two sections were distinct and different. It was contended further that even assuming that the Appellant by carrying on the operation of crushing stones was running a factory yet the principal work of the Appellant was mining of stones and running of a stone quarry. It was alleged that though the Appellant failed to attend the proceedings u/s 7 A by which the Respondent No. 2 determined the applicability of the said Act of 1952 in the case of the Appellant, though prior thereto, seven notices were issued on the Appellant, ultimately the matter was decided ex parte.

7. It is a matter of record that the General Secretary of the Quarry Owners Association had moved a civil writ petition on behalf of some of the stone quarry establishments, including the Appellant earlier, being C.W.J.C. No. 649 of 1979, in this Court. The said writ petition was disposed of by an order passed on the 27th March, 1979, by which the dispute was remanded to the Regional Provident Fund Commissioner, with a direction upon him to examine all contentions raised by the said establishments. The Regional Provident Fund Commissioner passed the said order dated the 22nd April, 1982 on such remand by the High Court.

8. The said writ petition was disposed of by the judgment and order of a learned single Judge dated the 30th October, 1987. The learned Judge dismissed the said writ petition as also Anr. writ petition, being C.W.J.C. 2155 of 1988, which had been filed in this Court on the same grounds. The learned Judge held that a factory was also an establishment within the meaning of Section 1(3)(a), as also Section 1(3)(b) of the said Act and that a factory engaged in an industry not specified in Schedule I of the said Act would still be an establishment within the meaning of Section 1(3)(b) of the said Act. It was held further that even if the Appellant came within the definition of "factory" and otherwise belonged to an industry it would still be open to the Central Government to bring factories and establishments similar to those of the Appellant within the purview of the said Act of 1952 u/s 1(3)(b) of the said Act.

9. The present appeal is from the said judgment and order dated the 30th October, 1987.

10. To appreciate the controversy involved the relevant provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, may be noted.

Section 1.

Short title, extent and application (1) This Act may be called the Employees' Provident Funds and Miscellaneous Provisions Act, 1952....

(3) Subject to the provisions contained in Section 16, it applies

(a) to every establishment which is a factory engaged in any industry specified in Schedule 1 and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons of class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf

Section 2

Definitions. In this Act, unless the context otherwise requires.-

(g) "factory" means any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power;

(f) "industry" means any industry specified in schedule I, and includes any other industry added to the Schedule by notification u/s 4;

(i-c) "manufacture" or "manufacturing process" means any process for making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view of its use, sale, transport, delivery or disposal;

Section 4.

Power to add to Schedule I. (1) The Central Government may, by notification in the Official Gazette, add to Schedule I any other industry in respect of the employees whereof it is of opinion that a provident fund scheme should be framed under this Act and thereupon the industry so added shall be deemed to be an industry specified in Schedule I for the purposes of this Act.

(2) All notifications under Sub-section (1) shall be laid before Parliament, as soon as may be, after they are issued.

11. At the hearing of this appeal, learned Advocate for the Appellant submitted that the Appellant was factory within the meaning of Section 2(g) of the said Act of 1952 inasmuch as the Appellant carried on manufacturing and/ or executed a manufacturing process of trimming, breaking, and otherwise treating or adapting stones to produce stone chips to be sold or delivered or disposed of in accordance with its business.

12. Learned Advocate submitted further that the Appellant was also an establishment engaged in the aforesaid industry of manufacturing stone chips. u/s 1(3)(a) of the said Act the Central Government had power to include in Schedule I of the said Act of 1952 the industry in which the Appellant was engaged and the provisions of the said Act of 1952 would become applicable to the Appellant only if the industry, which was being carried on by the Appellant, was included in Schedule I, by an appropriate notification which would be issued by the Central Government u/s 4 of the said Act.

13. It was submitted that inasmuch as the Appellant was a factory and employed over 20 persons, the provisions of Section 1(3)(b) of the said Act could not be invoked by the Central Government to make the said Act of 1952 applicable to

the Appellant. It was submitted further that an establishment referred to in the said Section 1(3)(b) must be held to be an establishment, which was not a factory but employed 20 or more persons. Only such an establishment or a class of such establishments, which were not factories, could be brought within the purview of the said Act of 1968 by involving the power u/s 1(3)(b) of the said Act. It was submitted that any other interpretation would make the provisions of Section 1(3)(a) as also Section 4 of the said Act of 1952 nugatory and otiose. If the expression "any other establishment" as appearing in Section 1(3)(b) of the said Act was interpreted as including establishments which were also factories, then it would be open to the Central Government to by pass the provisions of Section 1(3) (a) and Section 4 of the said Act and by issuing notifications u/s 1(3) (b) the Central Government could bring all factories engaged in a particular industry within the purview of the said Act without including the relevant industry in Schedule I by suitable notification u/s 4 of the said Act. It was submitted that the provisions of Section 1(3)(a) of the said Act was a special provision applicable to the establishments which were factories and if such establishments were to be brought within the purview of the Act, the Central Government would have to invoke the special provision and not fall back upon the general and residuary provision contained in Section 1(3)(b) of the said Act

14. It was contended that the invocation of Section 1(3)(b) under the impugned notification in the case of the Appellant and the class of establishments, to which the Appellant belonged was ultra vires Sections 1(3)(a) and 4 of the said Act and should be struck down.

15. Learned Standing Counsel for the Central Government for the Respondents contended to the contrary. He submitted that the expression "establishment" had a wide import and included establishments which were factories. He submitted that the expression "any other establishment" in Section 1(3)(b) means establishments including factories which were not covered u/s 1(3)(a) of the said Act. The said expression necessarily included establishments which were not factories as also the establishments, which were factories, but were engaged in industry not included in Schedule I and all such establishments whether they were factories or not, could be brought under the purview of the said Act by a notification to be issued by the Central Government under the powers conferred u/s 1(3)(b). It was submitted that two exclusive and separate sources of power were provided under the Act to be applied into different situations and the power conferred u/s 1(3)(b) should not be held to be curtailed by the provisions of Section 1(3)(a) of the Act, unless it was specifically provided. It was submitted further that the Appellant was basically engaged in winning stones from a stone quarry, which was in essence a mining operation and not an industry as such. Only as a part of its quarrying operation the Appellant processed pieces of stones and boulders by crusher to obtain stone chips.

16. In support of the respective contentions of the parties the following decisions were cited at the Bar.

(a) The Associated Industries (P) Ltd. Vs. The Regional Provident Fund Commissioner, Kerala Trivandrum, . In this case the Associated Industries (P) Ltd. originally owned and run a tile factory. Subsequently, it also started an engineering work in the same premises under one licence issued under the Factories Act permitting the user of the said premises as one factory. On these facts it was contended before the Supreme Court that the provisions of Section 1(3)(a) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, did not apply in the case of the establishment inasmuch as the latter was not exclusively engaged in any industry included in Schedule I of the said Act of 1952. The Supreme Court following its earlier decision in the case of The Regional Provident Fund Commissioner, Bombay Vs. Shree Krishna Metal Manufacturing Co., Bhandara, , held that Section 1(3)(a) of the said Act will, apply even if the establishment was a factory which carried on more than one industry not all of which were included in Schedule I, if the said industries were independent and could not be treated as a part of the same industry. If, however, the establishment was engaged in one dominant and primary industry and the other industries carried on by it were subsidiary, minor or incidental industries to the primary industry, then the character of the dominant and primary industry will determine whether Section 1(3)(a) of the said Act will apply to the factory or not. If the dominant and primary industry in which the establishment was engaged was included in Schedule I then the fact that the subsidiary and minor industries were not included in Schedule I will make no difference to the position and the said Section 1(3)(a) will apply. If, however, the dominant and primary industry was not included in Schedule I but the subsidiary, minor or incidental and feeding industries were included in Schedule I then Section 1(3) (a) of the said Act of 1952 will not apply to the said establishment.

(b) Radhakrishnan Narayandas, a firm Vs. Regional Provident Fund Commissioner and Another, . In this case the Petitioners were engaged in the business of manufacture and sale of Bidis. A notification was issued by the Central Government u/s 1(3)(b) of the Act of 1952 by which every trading and commercial establishment employing 20 or more persons engaged in the purchase, sale or storage of any goods, including establishments of exporters, importers, commission agents and brokers and commodity and stock exchanges were brought under the purview of the said Act of 1952. It was contended by the Petitioner, who filed a writ petition in the Madhya Pradesh High Court, that the Central Government while exercising the powers u/s 1(3)(b) of the said Act, must be held to have referred to trade and commercial establishments including industry specified in Schedule I of the said Act and as Bidi was not an industry specified in Schedule I such notification could not be held to have made the said Act applicable to the Petitioner's trading and commercial establishments. The establishment of the Petitioner, it was submitted, was registered as a factory under the Factories Act and even if the Petitioner purchased raw materials for manufacture of Bidi and sold the products, the same did not justify the splitting up of the establishment of the Petitioner into a factory establishment and trading

and commercial establishments. As the establishments of the Petitioners were one unit and were factories within the meaning of the Act and the industry carried by the said factories was not specified in Schedule I, the said notification would not apply to the Petitioner.

A Division Bench of the Madhya Pradesh High Court rejected the contentions of the Petitioner but observed as follows:

...The plain language of Clauses (a) and (b) of Section 1(3) of the Act shows that whereas by Clause (a) the Act has been made applicable to every establishment which is a factory engaged in any industry specified in Schedule I and in which the prescribed minimum of persons are employed, Clause (b) makes a provision for the applicability of the Act to "any other establishment employing twenty or more persons or class of such establishments which the Central Government may by notification specify in that behalf. The expression "any other establishment occurring in section 1(3)(b) is in contradistinction to the word "factory" used in Clause (a) and means any establishment which is a non-factory establishment....

...Clause (b) clearly gives to the Central Government the power to apply the Act to any other establishment" that is to say, an establishment which is not a factory establishment, no matter whether the "any other establishment" belongs to an industry specified or not specified in Schedule I.

...It must be noted that Clause (b) does not give to the Central Government the power to extend the applicability of the Act to factory establishments not specified in Schedule I. It only enables the Central Government to make the Act applicable to non-factory establishments....

(c) Kumar Brothers (Bidi) Private Ltd. and Ors. v. the Regional Provident Fund Commissioner, Bihar reported in 1968 Lab.I.C. 1578. In this case the writ Petitioners before the Patna High Court were manufacturers of Bidi. By a notification issued u/s 1(3)(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the class of establishments engaged in the stemming and redrying of tobacco leaves were sought to be brought within the purview of the Act and it was contended by the Regional Provident Fund authorities that the Petitioners were covered by the aforesaid notification. It was contended on behalf of the Petitioners that the said notification was not applicable to the Bidi factories of the Petitioners. The Petitioners thereafter moved the Patna High Court under Article 226 of the Constitution for quashing the proceedings for assessment of contribution towards provident fund and restraining the authorities from giving effect to the said Act of 1952 and the Scheme made thereunder to the Petitioners. One of the points urged before the High Court was that the Petitioners, which were factories for the purpose of manufacturing Bidi, came u/s 1(3)(a) of the said Act of 1952 and unless the industry of manufacture of Bidi was included in Schedule I of the said Act of 1952 by a suitable notification u/s 4, the Petitioners could not be brought within the purview of the Act by issue of a notification u/s 1(3)(b) thereof.

A Division Bench of this Court construed the relevant sections of the said Act of 1952 and held that a notification issued u/s 1(3)(b) applied to non-factory industries only. It was noted that it was not disputed that the establishments of the Petitioners were factories but the submission was that even so if the factory was engaged in an industry, which was not specified in Schedule I, the same may come within the purview of Section 1(3)(b).

It was held on construction of the said section 1(3) that it was intended by the Legislature to include industries which were factories in Clause (a) of Section 1(3). Under the said section control was given to the Parliament. All notifications u/s 4 had to be placed before the Parliament to include an industry in Schedule I. It was held that this power of control given to the Parliament was not meant to be circumvented by the Central Government by resorting to Section 1(3)(b) of the Act. The Court also looked into the statements of objects and reasons of the amending Act 94 of 1956, by which the present section 1(3) of the said Act of 1952 was amended. It was recorded in the said statement, *inter alia* that Section 4 provided for application of the Act to factory industries only and that there was no provision in the Act enabling its extension to other establishments like plantation, mines, commercial establishments, etc. and, therefore, it was proposed to include an enabling provision in that Act that the same would apply to any establishment or class of establishment as may be specified by the Central Government by notification. It was held that the factories of the Petitioners were covered by Clause (a) and not by Clause (b) of section 1(3) of the said Act of 1952.

(d) *Varjivandas Hirji and Co. Vs. D.T. Ghatpande and Another*, . In this case a partnership firm engaged in the business of manufacturing and dealing in Asafoatida was sought to be brought within the purview of the Employees' Provident Funds and Miscellaneous Provisions Act, 1983, by a notification issued by the Central Government u/s 1(3)(b) of the said Act, whereby the provisions of the said Act were made applicable to every trade and commercial establishment employing twenty or more persons. It was contended on behalf of the said firm that as they were establishments which were factories engaged in the manufacture of Asafoatida, they did not come within the mischief of the said notification, which would only apply to the establishments which were not factories. In a writ petition filed before the Bombay High Court it was contended further that the dominant activity of the said firm was manufacturing of a product and dealing with the same was a minor activity. It was contended that in any event Section 1(3)(a) of the said Act could not be applied to establishments which were factories.

A Division Bench of the Bombay High Court construed the relevant provisions of the said Act of 1952 and held, *inter alia*, as follows:

...We cannot say that on a plain reading of section 1(3) alone it is not possible to come to the conclusion that the expression "any other establishment in Clause (b) could mean any establishment which did not fall in Clause (a), whether such

establishment be an establishment which is a factory or in establishment which is not factory....

... u/s 4 the Central Government can by a notification add to Schedule I the entire industry, while u/s 1(3)(b) they can extend the Act even to a single establishment or a class of establishments. Clause (b) permits of classification within the industry, which Section 4 does not. u/s 4 either the entire industry has to be included or not included. Section 16 provides that the Act is not to apply to certain establishment. Sub-section (2) of Section 16 provides that if the Central Government is of the opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient to exempt any class or establishments from the operation of the Act, it may by a notification do so. This would indicate that "there could be several considerations such as financial position of any class of establishments or other circumstances due to which the Central Government may rightly like to extend the provisions of the Act only to a specified establishment or a specified class of establishments. Section 1(3)(b) will enable the Central Government to do this. They could possibly not do this u/s 4. The two provisions fulfil a distinct purpose, and there is no substance in the argument that the interpretation suggested by Mr. Rangenekar will render Section 4 meaningless.

We also find by going through the Act that the word "establishment" is used in Sub-sections (4) or (5) of Section and also in Section 16 and 17 and may be in other parts of the Act, indicating that the words "establishment" is used as genus, of which a factory is a specie. It may be that to a certain extent the provisions of Section 4 may overlap the powers of the Government u/s 1(3)(b). But this we suppose would be a necessary measure as a matter of abundant caution to cover cases which would not fall u/s 1(3)(b). But as we have pointed out that Section 1(3)(b) permits of not only classification but of application of the Act to an individual establishment, this provision serve a distinct purpose. There is nothing inconsistent in the scheme of the Act with the view that Section 1(3)(b) applies to all establishments whether such establishments are or are not factories. The expression "any other establishment" in Clause (b) is capable of the interpretation that the reference is to any establishment that does not fall under Clause (a), whether such establishment is or is not a factory. We have therefore no hesitation in accepting that interpretation, as that interpretation will extend the benefit of this beneficent piece of legislation to a larger number of persons.

(e) Andhra University Vs. Regional Provident Fund Commissioner of Andhra Pradesh and Others, . In this case the Supreme Court considering the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, observed as follows:

... In construing the provisions of the Act, we have to bear in mind that it is a beneficent piece of social welfare legislation aimed at promoting and securing the well being of the employees and the Court will not adopt a narrow interpretation

which will have the effect of defeating the very object and purpose of the Act....

17. It appears to me that different views have been expressed by different High Courts in respect of the construction of Section 1(3) of the said Act of 1952. The Madhya Pradesh High Court and the Patna High Court have taken one particular view whereas the Bombay High Court in its later judgment has taken Anr. view. In my view, the decision of the Patna High Court in Kumar Brothers (Bidi) Private Ltd. (Supra) requires to be reconsidered by a larger Bench in the context of the subsequent decision of the Bombay High Court in an appropriate case.

18. The present application may be disposed of on a different point altogether. It is the admitted case of the Appellant that it is carrying on business of quarrying stones under a mining lease. A major part of such operation consists of blasting stones at quarry by explosives. After the stones are blasted out from the quarry, they are sized, either manually by chipping or by utilising a mechanical crusher resulting in stone chips.

19. The operations carried out by the Appellant are not disassociated with each other and form part of a continuous process, so far as the Petitioners quarrying stone under a mining lease is concerned, the same, in my view, cannot be held to be an operation of manufacturing carried on by a factory as an industry. After obtaining stones from the quarry no doubt, the same is reduced in size by process of crushing, but the same appears to be an ancillary or incidental operation. Though the Appellant claims to be a factory nothing has been produced at the hearing to show that it is being treated as a factory. Not even a licence under the Factories Act has been relied on by the Appellant. Even assuming that the Appellant is a factory, it is also the admitted position that the Appellant also runs an establishment of a stone quarry which class of establishments have been sought to be brought within the purview of the Act under the impugned notification dated the 12th February, 1977, issued u/s 1(3) (b) of the said Act of 1952. In my view the operation of reducing stones into smaller sizes is a subsidiary and incidental industry to the primary activity of the Appellant, that is, running a stone quarry. It was held by the Supreme Court in Associated Industries (P) Ltd. (supra) that it was dominant and primary industry which will determine the applicability of the said Act of 1952. Even if we assume that it is not possible to ascertain specifically whether the operation of running a stone quarry was the dominant and primary activity of the Appellant and whether the operation of reducing the stones obtained from the quarry to smaller sizes by mechanical or manual operations was an incidental or subsidiary activity it seems that the Petitioners cannot claim to be exclusively a factory within the meaning of Section 1(3)(a) of the said Act.

20. The said Act of 1952 is a beneficial social legislation and in case of any doubt or ambiguity the same should be given a wider ambit so that the benefit conferred by the statute is extended to larger number of persons.

21. For the reasons above I see no reason to interfere with the judgment and

order dated the 30th October, 1987, under appeal. The appeal is accordingly, dismissed, without any order as to costs.

S.N. Jha, J.

22. I agree.