(2009) 10 OHC CK 0034

In the Orissa High Court

Cuttack Development Authority APPELLANT

Vs

Regional Provident Fund Commissioner RESPONDENT

Date of Decision : 12-10-2009

Acts Referred:

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

Citation : (2010) 109 CLT 266 : (2010) 124 FLR 990 : (2010) 1 ILR (Ori) 518 : (2010) 2 LLJ 637 : (2009) 2 OLR 447 Supp

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.M. Das, J.—The Petitioner has filed the present writ application challenging jurisdiction of the Regional Provident Fund Commissioner in issuing notice as at Annexure-3 dated 3.9.1996 u/s 7 -A of the Employees Provident Fund & Misc. Provisions Act, 1952 (hereinafter referred to as ''the Act, 1952) on the ground that the provisions of the said Act, 1952 do not apply to the Petitioner. The Petitioner is the Cuttack Development Authority (in short ''C.D.A.''), which is a statutory body, constituted under the Orissa Development Authorities Act, 1982 (hereinafter referred to as ''C.D.A. Act''. The Petitioner (C.D.A.) is the successor of Greater Cuttack Improvement Trust, which was constituted under the provisions of Orissa Town Planning Improvement Trust Act, 1956 (hereinafter referred to as ''O.T.P.I.T. Act''). It is the case of the Petitioner that in consonance with Section 83 of the C.D.A. Act, a resolution was passed by the C.D.A. resolving that the employees working under the C.D.A. are entitled to the benefit of pension & G.P.F. with effect from 1.9.1983 i.e. the date on which the C.D.A. was constituted. Admissibility of pension & other retirement benefits to the employees of C.D.A. was before this Court in OJC No. 768 of 1990. This Court by Judgment dated 29.10.1990 interpreting Section 83 of the C.D.A. Act held that the employees are entitled to old age pension & other retirement benefits. It is averred by the Petitioner that in accordance with the provisions of Section 83 of the C.D.A. Act as well as the ratio of the decision referred to above, all the employees working in the establishment of C.D.A. are entitled to old age retirement benefits & the employees of C.D.A., who have retired in the meanwhile have been paid old age pension as payable to their counter parts working under other Government organizations pursuant to the resolution of the C.D.A. in their 34th meeting held on 7.3.1993.

2. Attention of this Court is drawn to Section 83 of the C.D.A. Act relying upon which it is submitted that the C.D.A. comes under the said Section & as prescribed in Section 16 (1) (c) of the Act, 1952, it shall not apply to any other establishment set up under any Central Provincial or State Act & whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits.

3. A counter affidavit has been filed by the Opp. Party, inter alia, stating that the ratio of the decision in OJC No. 768 of 1990 of this Court do not apply to the facts of the present case & further there is no scheme or rule by which a contractor''s employees & daily wage employees of the Petitioner are entitled to the benefits of Contributory Provident Fund or Old Age Pension. Thus, in such circumstances, the Petitioner cannot claim the benefits of Section 16(1) (c) of the Act, 1952. The further plea taken in the counter affidavit is that the proceeding pursuant to the impugned notice is pending & during pendency of such proceeding, the writ application is not maintainable. Any order passed by the competent authority in the said proceeding is appealable before the Provident Fund Appellate Tribunal, which has been constituted pursuant to the notification of the Government of India dated 30.6.1997. In view of such availability alternative remedy, this Court should not exercise its jurisdiction under Article 226 of the Constitution.

4. The Petitioner has filed a rejoinder affidavit reiterating its stand in the writ application & stating that a provision has been made for payment of pension & other retirement benefits pursuant to the Judgment of this Court in OJC No. 768 of 1990. The Petitioner has further stated that it being not covered under the Act, 1952, any such activities undertaken through the can tractors on execution of independent contracts are also not covered under the said Act. The contracts thus entered are not labour contracts nor the contractors provide labour to the C.D.A. The man power engaged by the contractors is not controlled by the C.D.A. nor there is any relationship of employer & employee between the C.D.A. & the persons working under such contractors. The notice itself having been issued without jurisdiction the availability of alternative remedy or the contention that proceeding is pending before the competent authority under the Act, 1952, can be a ground to contend that the writ application is not maintainable.

5. It would be apt to refer to Section 83 of the C.D.A. Act & Section 16 of the Act, 1952 for adjudicating the present dispute.

Section 83 of the C.D.A. Act is as follows:

83. Pension & provident fund -(i) The authority shall constitute for the benefits of its whole time paid members & of its officers & other employees in such manner & subject to such conditions as may be prescribed by rules & such pensions & provident funds as it may deem fit.

(ii) Where any such pension or provident fund has been constituted the State Government may declare that: the provisions of the Provident Fund Act, 1925 (19 of 1925) shall apply to such fund as if it were a Govt. Provident Fund.

Section 16 of the E.P.F. & M.P. Act, 1952 is as under:

16. Act not to apply to certain establishments.-

(1) This Act shall not apply -

(a) (b) xxx xxx xxx

(c) to any other establishment set up under any Central, Provincial or State Act & whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that act governing such benefits.

xxx xxx xxx

6. The impugned notice under Annexure-3 discloses that the Regional Provident Fund Commissioner issued the said notice u/s 7-A of the Act, 1952 mentioning therein that the C.D.A. is an establishment to whom the Act, 1952 apply, there is default in payment of (i) Provident Fund Contributions for the period from January, 1990 to December, 1995 for the contractors'' employees, (ii) payment of family pension contributions for the above period for such contractors'' employees, (iii) payment of administrative charges for the same period for such type of employees, (iv) payment of employees'' deposit linked insurance contribution for the above period for similar employees & payment of employees'' deposit linked insurance administrative charges for the same period for such employees, for which it has become necessary to determine the dues from the C.D.A. & it is proposed to afford the said C.D.A. a reasonable opportunity before any order determining the amount due is made. The said notice further discloses that the C.D.A. is informed that, to determine the dues, the enquiry u/s 7-A of the Act, 1952 shall be held in the office of the Regional Provident Fund Commissioner & the C.D.A. is summoned to remain present at the said enquiry to state their case as required u/s 7-A (3) of the Act, 1952 & produce all relevant evidence.

7. From the above notice, it therefore appears that contemplating that the C.D.A. is covered under the Act, 1952, the said notice was issued to only conduct an enquiry for assessing the dues of the C.D.A. towards contractors'' employees. Firstly, as stated by the C.D.A., such employees of the contractors, who have executed agreement with the C.D.A. Cor execution of the developmental work are not employees of the C.D.A. & there is no relationship of employer &

employee between such workers of the contracts & the C.D.A., more so when such contracts are not labour contracts. Hence, such employees of the contractors cannot be held to be covered under the Act, 1952. Section 2 (f) defines the word ''employee'' to mean any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment & who gets his wages directly or indirectly from the employer & includes any person employed by or through a contractor in or in connection with the work of the establishment etc. An interpretation of the above definition clearly shows that the contract for the purpose of Section 2 (f) between the establishment & the contractor must be a contract by which a contractor agrees & brings labour to be employed by the establishment. The contractor for the purpose of Section 2 (f) is purely a labour contractor & not an independent contractor who contracts to deliver a finished product to the establishment & who for purposes of manufacture of such a finished product, engages labour for his own purposes.

8. The view of a Division Bench of Andhra Pradesh High Court in the case of Karachi Bakery Vs. Regional Provident Fund Commissioner, is also similar. In the said case, the Division Bench was dealing with a writ appeal against an order or the Learned Single Judge of the said High Court dismissing the Writ Petition filed by the Appellant, Karachi Bakery. In the said Writ Petition, the Appellant challenged an order of the Regional Provident Fund Commissioner by which the Commissioner treated employees of two other firms to be employees of the Appellant firm for the reason that the Appellant had entered into contracts with those two firms for supply of certain bakery products & that the said contracts were in connection with the business of the Appellant firm within the meaning of Section 2 (f) of the Act, 1952.

The A.P. High Court in the said decision took the view that the words "whether they are employed by or through a contractor in or in connection with the work of the establishment", postulate that such persons must be employed by or through a contractor as "contract labour". In other words, the contract for purposes of Section 2 (f) between the establishment & the contractor is by which a contractor agrees & brings labour to be employed by the establishment. The contractor for purposes of Section 2 (f) is purely a labour contractor & not an independent contractor who contracts to deliver a finished product to the establishment &'' who for purposes of manufacture of such a finished product, engages labour for his own purposes. It further held that in the later case, the contractor cannot be treated as one who is employed to get labour for & on behalf of the principal establishment but will be an independent contractor who alone exclusively controls & supervises the work of his employees & directs what work is to be done & how it is to be done. On the above interpretation, the said High Court set aside the Judgment of the Learned Single Judge as well as the decision of the Regional Provident Fund Commissioner.

9. This Court while endorsing the above view of the Andhra Pradesh High Court

finds that in the instant case, as has been averred by the Petitioner, which has remained uncontroverted, the contractors'' employees arc engaged by such contractors to execute a work entrusted to them pursuant to the agreement executed between such contractors & the C.D.A.. Such contracts are not labour contracts to provide workmen to the C.D.A. Thus, in the facts of the case, such employees of the contractors cannot be governed under the Act, 1952.

10. Addressing to the question as to whether the C.D.A. is exempted from the application of the provisions of the Act, 1952, a bare reading of Section 16 (1) (c), as quoted above, clearly establishes that the C.D.A. having been constituted/ established under the C.D.A. Act & its employees having been made entitled to the benefit of old age pension in accordance with the resolution of the C.D.A. referred to above, the said establishment of the C.D.A. is clearly exempted from the application of the provisions of the Act, 1952.

11. In view of the above analysis, the irresistible conclusion would be that the Act, 1952 does not apply to the C.D.A. & as such, action of the Regional Provident Fund Commissioner in issuing notice u/s 7-A of the Act, 1952 in Annexure-3 to the Writ Petition being without jurisdiction is unsustainable. The said notice is, therefore, quashed.

The writ application is allowed, but in the circumstances, without cost.