

(2001) 10 OHC CK 0012
In the Orissa High Court
Case No : O.J.C. No. 2851 of 2001

Industrial Development Corporation Orissa Limited and
Another

APPELLANT

Vs

Regional Provident Fund Commissioner-II and Another

RESPONDENT

Date of Decision : 09-10-2001

Acts Referred:

Companies Act, 1956 — Section 34, 4
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 22(1), 25

Citation : (2002) 93 CLT 475 : (2002) 112 CompCas 527 : (2002) 92 FLR 945 :
(2002) 1 OLR 34 : (2001) 2 OLR 593

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : R.K. Rath and N.R. Rout, for the Appellant; P.K. Khuntia, for the Respondent

Final Decision : Partly Allowed

Judgement

P.K. Mohanty, J.—The Petitioners assail the order of the Regional Provident Fund Commissioner under Annexure-3, the notice of attachment of movable properties given by the Recovery Officer, Employees' Provident Fund Organisation (Annexure-4), the notice of the R.P.F. Commissioner-11 (Complain and Recovery Officer), State of Orissa (Annexure-6) and the order of attachment issued by the Recovery Officer (Annexure-8) and for a declaration that any action in pursuance of the aforesaid notices are null and void and without jurisdiction.

2. Petitioner No. 1, the Industrial Development Corporation, Orissa Ltd. (In short "I.D.C.") is a Government owned company and petitioner No. 2 ABS Spinning Orissa Limited (In short "ABS Spinning") is a subsidiary of petitioner No. 1. The petitioners' case in short is that the proceedings were started by the Regional Provident Fund Commissioner against Petitioner No. 2, the ABS Spinning for recovery of Provident Fund dues and in those proceedings certain assessments were made fixing its liability. Petitioner No. 2 is an independent Company

registered under the Companies Act since 14.4.1990, having its own assets and liability and the said Company became a sick unit. The matter was referred to the Board of Industrial and Financial Reconstruction (hereinafter called "B.I.F.R.") and under the provisions of the Sick Industrial Company's (Special Provisions) Act, 1985, declared the company as a sick unit by order dated 25.9.1996, copy of which is Annexure-1. The BIFR directed petitioner No. 2 to submit the Rehabilitation Proposal and by order dated 22.4.1997 permitted the company to negotiate with private parties for disposal of its assets but though necessary step were taken by making the advertisement, no fruitful result could be achieved. The BIFR in its hearing dated 27.4.2000 declared that petitioner No. 2 be wound up u/s 20 of the Sick Industrial Company's (Special Provision) Act. However, the petitioners preferred appeal before the Appellate Authority u/s 25 of the Act, which is pending adjudication. Prayer has been made in that appeal to set aside the order under Annexure-2 regarding winding up proceeding and further time has been prayed for taking steps for rehabilitation.

3. The petitioners therefore claim that petitioner No. 2, the ABS Spinning Mills, Orissa Ltd. is a sick unit whose assets are now subjected to winding up proceeding before the Company Judge and also the subject matter of adjudication before the appellate authority under the Sick Industrial Company's (Special Provision), Act, 1985. Notices were issued by the Opp. parties on 8.1.2001, copy of which is Annexure-4. Reply was given under Annexure-5 on behalf of petitioner No. 2 and the pendency of the appeal before the BIFR were informed. It is averred that Section 22 of the Sick Industrial Company's Act, 1985 (hereinafter called as "the SIC Act") prohibits any action of legal proceedings, against the industrial company, which is sick. But however, repeated notices were given under Annexure-3 and the petitioner No. 1 was also communicated with such order, copy of which is Annexure-6.

4. It is the stand of petitioner No. 1 that it was not a party to the proceeding before the Provident Fund Authority in any manner nor any notice of how cause or hearing was ever given to it in regard to fixation of liability against petitioner No. 2 or even in regard to recovery of the outstanding dues allegedly pending against petitioner No. 2 and as such, the notice under Annexure-6 as against petitioner No. 1 to clear up the outstanding dues of petitioner No. 2 is illegal. It is specifically stated that if petitioner No. 2 has any liability, it was open to the Opp. parties to proceed against the assets of the petitioner No. 2, after the Appeal before the Appellate Authority under the SIC Act is over. In any view, according to the petitioner No. 1, the Opp. parties are free to proceed against petitioner No. 2 before the Company Judge in the winding up proceeding to recover its dues, in as much as when an appeal under the SIC Act is pending before the Appellate Authority, no further coercive measure should be taken, but in disregard to such provision of law, the Opp. parties illegally issued order of attachment dated 13.2.2001 in respect of the land, building and machinery of petitioner No. 2 and the copies of the notice is Annexure-8 series. However, it is stated that petitioner No. 2 with a lot of efforts arranged Rs. 25,00,000/- and

paid it to the Opp. parties but in spite of that Annexure-8 was issued on 13.2.2001. The execution proceedings, according to the petitioner, are all illegal and in gross violation of Section 22 of the SIC Act. In para-7 of the writ petition, it is stated that in view of Annexure-6, petitioner No. 1 apprehends that illegal steps would be taken by the Opp. parties to attach the properties of petitioner No. 1 u/s 8(b) of the Provident Funds Act and in the process irreparable damages will be caused, when petitioner No. 1 was not a party to the proceeding by the Opp. parties against petitioner No. 2 in regard to determination of the provident fund dues nor the petitioner No. 1 is a certificate debtor. Thus, according to the petitioners, the action of the Opp. parties is in clear violation of principle of natural justice. It is further asserted that there is no provision in the Provident Funds Act to proceed against the holding Company or the guarantor in regard to the dues or the liabilities of the defaulting company or parties. Hence this writ application.

5. Opp. Parties 1 to 3 have filed a common counter affidavit denying and refusing the claims of the petitioners inter alia on the ground that the writ petition was not maintainable in as much as the determination of the dues have become final, it having not been challenged and therefore the recovery proceeding cannot be challenged in this writ application, M/s. A. B. S. Spinning Orissa Ltd. having defaulted in payment of provident fund and allied dues to the tune of Rs. 2,99,82,477/-, for its realisation. Total number of 16 certificate cases were registered against petitioner No. 2 and recovery proceedings were initiated by the Regional Provident Fund commissioner under Sections 8(b) to 8(g) of the Employees Provident Fund and Miscellaneous Provisions Act (in short "E.P.F. Act"). Notice was sent on 8.1.2001 to the Managing Director, A. B. S. Spinning (petitioner No. 2) to liquidate the outstanding dues and a copy of the letter was endorsed to the Chairman, I.D.C. Ltd. Petitioner No. 1 with the request to ensure compliance from its subsidiary units. Reminders were issued to liquidate the liability, so that statutory dues in respect of 726 employees, who have opted for V.R.S. on 31.10.2001 can be settled. A show cause notice was sent to the Chairman I.D.C. Petitioner No. 1 being the holding company in as much as it was declared to be a defaulter u/s 8F(3)(x) of the E.P.F. and M.P. Act and notice under C.P. 10 was also issued to Department of Public Enterprises. Thereafter, Bank Accounts of M/s. ABS Ltd. were attached on 5.2.2001 for Rs. 2,99,82,477/-, out of which Rs. 25 lakhs had been remitted by M/s. ABS Ltd. on 9.2.2001. In addition, Rs. 31,301,46 was collected through Bank attachment of M/s. ABS Ltd. on 12.2.2001, and therefore the total liability of Rs. 2,74,51,176/- is still lying against the defaulting company. According to the Provident Fund Authorities, merely because a company was registered under BIFR, it cannot be urged that no course of action can be taken against them. Moreso, it is not open to the Company to claim exemption from every kind of liabilities. Liabilities like the statutory dues under the Provident Fund and Miscellaneous Provision Act are not covered u/s 22 of the SIC Act.

6. The Opp. party-Provident Fund Authorities assert that about 726 employees of

M/s. ABS Spinning Mill have opted for voluntary retirement. If the provident fund and allied dues are not deposited with Regional Provident Fund Commissioner, they shall not be receiving any terminal benefits from the Employees' Provident Fund Organisation, in as much as it is the statutory duty of the E.P.F. Commissioner to settle the claim of the retiring employees within 30 days. If the company fails to deposit the above noted dues, the department shall fail in discharging its statutory liability of providing prompt and effective service to these employees of M/s. ABS Spinning Mill. The establishment of M/s. ABS Spinning Orissa Ltd. is the subsidiary Unit of the establishment M/s. I.D.C. and both the establishments are covered under the E.P.F. & M.D. Act, 1952 and allotted different Code No. for administrative convenience. M/s. ABS Spinning Orissa Ltd. having failed to remit the Provident Fund and allied statutory dues to the tune of Rs. 2,98,310.70 for realisation of the dues, 16 Certificate Cases were registered, recovery action was initiated under Sections 8B to 8G of the Act and subsequently attachment order was issued against petitioner No. 1 being the Holding Company of the defaulting establishment u/s 8B of the Act. Petitioner No. 1 was declared deemed defaulter by Opp. party No. 1 u/s 8F(3)(x) of the E.P.F. Act read with Certificate Proceeding Rules, 1989 and Rule 26(1)(iii) of the schedule of Income Tax Rule, 1961. Section 22 of the Act does not provide any blanket exemption to the Company from all its liabilities like the provident fund.

7. In view of the pleadings of the parties, the moot questions that call for consideration are (1) as to whether the provident Fund dues of a Sick Industrial Unit stand abated till final decision is taken by the Board of Industrial Finance and Reconstruction under the SIC Act in view of the provision of Section 22 of the SIC Act; and (2) whether for the default in payment of the provident fund dues under the E.P.F. Act by a subsidiary company, the holding company can be construed as a defaulter in terms of Section 8F(3)(x) of the E.P.F. Act read with Certificate Proceeding Rules, 1989 and Rule 26(1)(3) of the schedule of Income Tax Rules, 1961.

8. In order to properly appreciate the position, some relevant provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 may be considered. Section 5 of the Act empowers the Central Government to frame the Employees' Provident Funds Scheme for establishment of the provident fund under the Act for employees or for any class of employees and specify the establishment or class of establishment to which the said scheme is to apply. A fund is established on framing of a scheme which vests in and administered by the Central Board in terms of Section 5-A thereof. The contribution to be paid by the employer to the fund is, eight and one-third per cent of the basic wages, dearness allowances and retaining allowances, if any, for the time being is payable to each of the employees in terms of Section 6 thereof. The employees' contribution is equal to the contribution payable by the employer. Section 6 is with regard to the employees' pension scheme and Section 6-A is for the employees' deposit linked insurance scheme. Section 7-A of the Act empowers the Provident Fund Commissioner to determine the amount due from any

employer under the provisions of the Act and Section 11 requires priority of payment of contribution over other debts, whereas Section 12 contemplates that no employer shall, by reason only of his liability for the payment of any contribution under the Act or the scheme reduce, the wages of any employees" or the total quantum of benefits in the nature of old age pension, gratuity, provident fund or life insurance to which the employee is entitled to under the terms of his employment. Section 14 provides for penalty in case of breach of any of the provisions under the Act. Section 14-B of the Act is with regard to recovery of damages from the defaulting employer in payment of any contribution due from him.

9. It is not in dispute that the Employees Provident Fund Scheme is applicable to the employees of the Company and they are entitled to and the Company is liable to pay the contribution, whereas the Company is admittedly in default in payment of the contribution for some years, the employees contribution is deducted by the employer from the wages of the employees covered under the Scheme. Para 32-B of the Scheme is with regard to the terms and conditions for reduction or waiver of damages. The Central Board is vested with the power to reduce or waive the damages leviable u/s 14-B, subject to the conditions laid in Clauses (a), (b) and (c) thereof, Clause-B contemplates that such waiver can be made where the B.I.F.R. for reasons to be recorded in its scheme, recognises waiver of damages upto 100%, The employer before paying the Board his wages in respect of any period or part of it for which contributions are payable, deducting the employees" contribution from his wages which together with the employers" contribution as well as administrative charges shall be paid to the Fund within 15 days of the close of every month. The amount so recovered every month from the wages of an employee as well as the contribution made by the employer are required to be entered by the employer every month in the contribution card opened in the name of the members of the Scheme in accordance with the Para - 40 thereof. The scheme requires an account to be opened in the office of the Fund in the name of each member, to which the contribution of the member shall be credited along with the contribution of the employer and the interest thereon in accordance with Para - 59 of the scheme. The Commissioner is required to credit to the Account of each member with interest as may be determined by the Central Government.

10. The relevant provision of the Sick Industrial Companies (Special Provision) Act, 1985 is required to be considered to appreciate the contentions raised by the learned counsel for the parties. Section 22 of the Act may be quoted hereunder:

"22. Suspension of legal proceedings, contracts, etc. : (1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration of a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending then, notwithstanding anything contained in the Companies Act, 1956 (1

of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

11. Sri Rajat Rath, learned counsel for the petitioners placed reliance on the decision of the Apex Court in *Tata Davy Ltd. Vs. State of Orissa and Others*, in support of his contention that provision of Section 22(1) of the SIC Act excludes application of all other laws and as such execution proceeding with regard to E.P.F. dues against the petitioner No. 2 could not proceed. In *Tata Davy's* case, the Apex Court held that the Industrial Act declares that it is for giving effect to the policy of the State towards securing the principles specified in Clauses (b) and (c) of Article 39 of the Constitution, namely that the ownership and control of the material resources of the community are so distributed as best to serve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. The Central Act does not impair or interfere with the rights of the States to legislate with respect to Sales Tax under Entry 54 of List II of the Seventh Schedule. In the larger interest of the industrial health of the nation, Section 22 of the Central Act requires all creditors seeking to recover their dues from sick industrial companies in respect of whom an enquiry u/s 16 is pending or a scheme is under preparation or consideration or has been sanctioned to obtain the consent of the said Board to such recovery. If such consent is not secured and the recovery is deferred, the creditors' remedy is protected for the period of deferment is by reason of Sub-section (5) of Section 22, excluded in the computation of the period of limitation. The words "any other law" in Section 22 cannot, therefore, be read so as to exclude all State Acts. The decision in *Corromandal Pharmaceuticals (1997) AIR SCW 1816* was distinguished on the ground that a Sick Industrial Company which was able to collect amount like sales tax after the date of the sanctioned scheme, legitimately belonged to the revenue and cannot be and could not have been intended to be covered u/s 22 of the Act. In the case of the present nature, the decision of the Apex Court in *Tata Davy's* case is inapplicable to this case. At this stage, the decision of the Apex Court in *Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others*, may be considered. The Apex Court held that the nature of Section 22 is certainly wide, but in the totality of the circumstances the liability or amount covered by the scheme will be taken in Section 22 of the SIC Act. It was clarified that during the proceeding before the BIFR or an appeal u/s 25 thereof only such of the those dues are reckoned or included in the sanctioned scheme, the legal proceedings are suspended. It was therefore, held that the amount collected by the Sick Industrial Unit after the date of the sanctioned scheme being legitimately due to the revenue are not covered u/s 22

of the Act. The Apex Court distinguished the earlier decision in *The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others*, and *Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another*, . Contention has also been raised that the decision relied on by the E.P.F. Commissioner in writ petition No. 1688 of 2000 of the Bombay High Court is contrary to the dictum of the Apex Court in *Tata Devy's* case (Supra) and that cannot come to the aid of the Opp. parties. The learned counsel reiterates that suspension of the proceedings would be applicable to all kinds of proceedings as the legislature could not have conceived all possible steps or measures that may be taken in as much as acceptance of the Bombay High Court judgment would mean exception has to be carved out to the bar to proceedings contemplated u/s 22 of the Act which will run against the statute, in as much as, in that case the party resorted to serious kind of fraud cheating and did not approach the BIFR in clean hands and, therefore, factually standing on a different footing. It is further stated that the reliance and aid taken from Section 14(B) of the E.P.F. Act in the Bombay High Court case was in a complete different field and comes to pay only when the case was recommended by the BIFR.

12. The learned counsel for the E.P.F. Commissioner strongly placed reliance in the unreported judgment of the Bombay High Court in writ petition No. 1688 of 2000, copies of which have been annexed as Annexure-A to the counter affidavit in support of his contention that Section 22 of the SIC Act does not take within its purview the legitimate wages or the E.P.F. dues as in the present case. The Bombay High Court in the unreported judgment placed reliance on its earlier judgments in *Baburao P. Tawade v. HES Ltd.*, Bombay, 1995 CLR 81, where the learned Single Judge of the Bombay High Court took the view that the bar in Section 22 of the SIC Act must be held to be applied only to such proceeding, which is not related to the day to day running of the Sick Industrial Company even of a sanctioned scheme or otherwise. In *Modi-Store Ltd. v. Dy. Commissioner of Labour*; 1999 (II) CLR 371, a view was taken that Section 22 would not apply in the field of wage, gratuity and other statutory benefits payable to the workman. In *Carona Ltd. v. Sitaram Atmaram Ghang*; 2000(3) LLN 167 it was held that the payment of wages and terminal benefits is a part of the right to live and consequently in enacting Section 22(1) of the SIC Act, the Parliament could not have contemplated that those dues which are part of the right to live of those workman under Article 21 of the Constitution, should not be recovered. Wages and terminal benefits to which workers are entitled must constitute and deem to be part of their right to live and they are the minimum required for their sustenance and sustenance of their family. The Allahabad High Court in *Modi Industries Ltd. v. Addl. Labour Commissioner, Ghaziabad*, 1993(11) CLR 963 has taken a similar view that the recovery of certificate dues towards the workers dues cannot come within the purview and restriction laid down u/s 22(1) of the Act.

In *Palliworld Ltd. v. R.P.F. Commissioner*, Writ Petition No. 1688 of 2000 of Bombay High Court (supra), Annexure-A to the counter affidavit filed by the

Commissioner, the learned Single Judge on examining the earlier decisions of that Court and of Allahabad High Court as discussed earlier, held that recovery of provident fund and other dues under the E.P.F. Act, 1952 does not fall within the scope and purview of Section 22 of the SIC Act, 1985. This view was expressed taking into aid the ratio of the judgment in Corromandal's case (Supra) also.

13. In the context and the purpose for which Section 22(1) of the Sick Industrial Companies (Special Provision) Act, 1985 is enacted as would be apparent from the discussions made in the decision of the Apex Court in Tata Devy's case, to keep the proceedings for the winding up or for execution distress or the like against any of the properties of the Sick Industrial Company or for appointment of a receiver in respect thereof under suspension till the proceeding before the BIFR or AIBFR u/s 25 thereof are pending in absence of the consent of such authorities. In other words, to protect a Sick Industrial Company from further ruin financially from the creditors seeking to recover their dues from such Sick Industrial Unit. The recovery remains deferred, but the creditors' remedy is protected for the period of deferment by reason of Sub-section (5) of Section 22, which provides exclusion of that period from the computation of the period of limitation. The framers of the provision, the Parliament could never have contemplated to defer the payment of due wages or the like to the workmen serving in those Sick Companies indefinitely till the proceeding before the authorities under the Act are completed may be after years. The workers or the employees of a Company, who are members of the Fund under the E.P.F. Act contribute their share to the fund and such share is deducted from their salary which would otherwise mean that it is a part of salary or the wages of such employees and the other half, matching the employees' contribution is required to be paid by the employer company to the Fund. In such view of the matter, the provident fund etc. dues of a workman or an employee in the Company are a part of the legitimate wages. Such employees cannot be deprived of their legitimate statutory dues by way of provident fund entitlements. Wages are paid to its workers for day to day running of the business, and the business, otherwise cannot run without workers. It can never be construed as the purpose or intention of the enactment, to deprive or defer the payment of wages to an employee during which the Company becomes sick and a scheme remains pending with the BIFR or in an appeal as against the decision of the BIFR, before the Appellate Authority. It is in this context, the position of Section 22(1) of the SIC Act has to be construed and so construed it has to be held that the statutory dues of an employee covered under the provident fund scheme, which is a part of his legitimate claim of wages are not intended to be indefinitely deferred under Sub-section (1) of Section 22 of the Act. A similar view is taken by a learned Single Judge of the Bombay High Court, in Paid wolo Ltd. v. R.P.F. Commissioner (supra).

14. In such view of the matter, it has to be held that the provident fund dues of an employee and steps like certificate or recovery proceeding taken by the Provident Fund Commissioner for realisation or recovery of such dues under the

provisions of the Employees' Provident Fund and Miscellaneous Provisions Act cannot be held to be covered under the exception contemplated in Section 22(1) of the Sick Industrial Companies (Special Provision) Act, 1985 and, therefore, cannot stand suspended till after completion of such proceedings before the BIFR or ABIFR, the appellate authority.

15. In the present case in hand, it is not in dispute that about 726 employees of petitioner No. 2 company, M/s. ABS Spinning Mills Ltd. have already opted for voluntary retirement, but the Regional Provident Fund Commissioner, is not in a position to settle their claims because of the default committed by petitioner No. 2 in depositing both employees' share of contribution and the employees share, even if, the Company has deducted the employees' share from their salaries/wages. Under the Employees Provident Fund and Miscellaneous Provisions Act, 1952, the Commissioner is required to settle such claim within a period of 30 days. The petitioner No. 2, M/s. ABS Spinning Mills Ltd., under the cover of a Sick Industrial Unit, approaching Board of Industrial Finance and Reconstruction (BIFR) and the appellate authority u/s 25 of Sick Industrial Companies (Special Provisions) Act, cannot claim immunity like suspension of execution proceedings or distress under Sub-section (1) of Section 22 of the Act, to avoid payment of the legitimate claim or entitlements of Provident fund dues under the E.P.F. & M.P. Act as has been held earlier in this Judgment. In such circumstances, I find no illegality or infirmity in the action of the Provident Fund Authorities in instituting recovery proceedings under the E.P.F. & M.P. Act. The question as to whether for the default of petitioner No. 2, petitioner No. 1 also can be proceeded against within the scope and ambit of the Act, shall be considered in the later paragraphs.

16. The next contention of Sri Rath, the learned counsel for the petitioners is that petitioner No. 2, ABS Spinning Mills Ltd., against whom the provident fund dues were outstanding for which the execution/certificate proceeding was levied, being a Registered Company it has its own independent identity and liability in terms of the Companies Act. Petitioner No. 1 may be the holding company, but the liabilities of a subsidiary company cannot be levied as against the holding company, in as much as, the holding company in the present case, a shareholder and the status of share-holder of the Company are different. The further contention is that Section 8F of the E.P.F. Act, which has been resorted to by the Opp. parties without any notice is without authority of law. The plea advanced, that petitioner No. 1 was the employer in respect of the workers of the petitioner No. 2-company by relying on Section 2(e) of the E.P.F. Act is misconceived. It is the contention of the learned counsel that during the proceeding u/s 7 of the Act for realisation of the E.P.F. dues, the petitioner No. 1-company is not a party nor it was asked to show cause and as such after the matter is determined as against petitioner No. 2, a certificate proceeding cannot be initiated against petitioner No. 1 for realisation thereof. Order for realisation of the dues from petitioner No. 1 on behalf of petitioner No. 2 is without hearing petitioner No. 1 and in violation of principle of natural justice, which justifies setting aside of all actions. The

contention is that the amount realised from petitioner No. 1 in O.J.C. No. 2852 of 2001 has thus to be refunded. The learned counsel for the E.P.F. Commissioner however submits that the liability of petitioner No. 2 had been admitted in as much as petitioner No. 2 had requested for some time to pay the entire dues and since the dues could not be recovered invoking the power u/s 8F(2) and (3)(ix), petitioner No. 1 could be made liable for the same. It is contention that the liability of the subsidiary company can be recovered from the holding company and as such, petitioner No. 1 cannot otherwise escape from the liability.

17. A company is defined u/s 3(1)(i) of the Companies Act to mean a company formed and registered under the Act or an existing company as defined in Clause (ii), Section 4 of the Act defines a "Holiday Company" and "Subsidiary" and a Government Company is defined u/s 617 to mean any Company in which not less than fifty one per cent of the paid up share capital is held by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Government Company. In Section 34 of the Companies Act, the effect of registration has been contemplated. Section 34 of the Companies Act may be quoted hereunder:

"34. Effect of Registration : (1) on the registration of the memorandum of a company that the company is incorporated and, in the case of a limited company, that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, such of the subscribers of the memorandum and other persons, as may from time to time be members of the company shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act."

Undisputedly, petitioner No. 1 is a Government Company and petitioner No. 2 is its subsidiary. It is also not disputed that petitioner No. 2; M/s. ABS Spinning Mills Orissa Ltd. is a company registered under the Companies Act since 1.4.1990, having its own assets and liabilities and it has become a sick unit, being declared as such by the Board of Industrial and Financial Reconstruction (BIFR) under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985. An appeal u/s 25 of the SIC Act is pending adjudication before the appellate authority. Thus, in view of the provisions of Section 34 of the Companies Act from the date of incorporation, the ABS Spinning Mills, Orissa Ltd. is a body corporate, capable of exercising all functions of an incorporated company having perpetual and common seal with such liability on the part of its members to contribute to the assets of the Company in the event of its winding up in accordance with the provisions of the Act. In view of such clear provision of law, there can be no manner of doubt that the petitioner No. 2-Company is an

independent company having its independent identity, assets and liabilities. In such view of the matter, the liability of the petitioner No. 2 so far as it relates to the payment of provident fund dues of its workers are on it and under law it cannot be saddled or imposed on the petitioner No. 1 which is its holding company except as provided under the Companies Act. Then comes the question as to whether, in view of the provision of Section 2(e), 2A and 8E(3)(x) of the Employees Provident Fund and Miscellaneous Provisions Act, the liability of petitioner No. 2 can be recovered from the petitioner No. 1 Company. Clause (e) of Section 2 defines employer to mean in relation to an establishment which is a factory; the owner or occupier of the factory; including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and. where a person has been named as Manager of the factory under Clause (f) of Sub-section (1) of Section 7 of the Factories Act, 1948 the person so named; in relation to any other establishment, the person who or the authority which, has the ultimate control over the affairs of the establishment and where the said affairs are entrusted to a Manager, managing director or managing agent, such manager, managing director or managing agent.

Thus, on a consideration of the aforesaid provisions of law, the petitioner No. 1 a holding company would not come within the scope or ambit of employer as contended by the learned counsel for the E.P.F. Commissioner, Section 2-A of the Act declared that where an establishment consists of different departments or has branches, whether situate in the same place or in different places all such departments or branches shall be treated as parts of the same establishment. This provision equally is inapplicable to the present case since a subsidiary, independently registered as a company would not be construed to be a Department or a branch of an establishment meaning a holding company. Section 8-F of the E.P.F. Act contemplates mode of recovery. Under Clause (i) of Sub-section (3) thereof, the Provident Fund Authorities so authorised may by notice require any person from whom money is due or may become due to the employer or as the case may be, the establishment or any person who holds or may subsequently hold money for or on account of the employer or as the case may be; the establishment, to pay to the Commissioner either forthwith upon the money becoming due, or being held or at or within the time specified in the notice so much of the money as is sufficient to pay the amount due from the employer in respect of the arrear or the whole of the money when it is equal to or less than that amount. Under Clause (x), if a person to whom a notice under the sub-section is sent, fails to make payment, the Provident Fund Commissioner or any other person may take further proceedings for the realisation of the amount as if it were an arrear due from him, in the manner provided. It cannot be construed from this provisions that the petitioner No. 1-Company either has held money or may subsequently hold money for or on account of the subsidiary so as to come within the purview thereof, to bind itself to pay the dues of petitioner No. 2.

18. Subsidiary Company or subsidiary under Sub-section (47) of Section 2 of the

Companies Act means a subsidiary company within the meaning of Section 4. u/s 4, a Company subject to the provision of Sub-section (3) is deemed to be a subsidiary of another if the other controls the compositions of its Board of Directors or the other hold more than half in nominal value of its equity share capital and I am, therefore, of the considered opinion that construing the aforesaid provision from any angle would not take within its scope, the liability of a subsidiary company specially in view of the provision of Sub-section (2) of Section 34 which contemplates that from the date of incorporation it becomes a body corporate by the name contained in the memorandum capable of exercising of all functions of an incorporated company and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act. In any view of the matter, I cannot subscribe to the view and the contentions raised on behalf of the Provident Fund authority to hold that the liability of petitioner No. 2 in the event of its default, becomes the liability of the Company meaning holding the Company of which the liable company is a subsidiary.

19. In view of what has been held in the foregoing paragraphs, notice issued by the Recovery officer, employees" Provident Fund Organisation (Annexure-4) to the Chairman-cum-Managing Director, I.D.C. Ltd. to withhold the amount from the pending bills of the Certificate Debtor i.e., ABS Spinning Mills Orissa Ltd. on the premise that the said I.D.C. Ltd. is the holding company and as such liable to pay the dues of the subsidiary company being misconceived in law has to be quashed. Similarly, the notice in Annexure-6 of the R.P.F. Commissioner-II (Compliance and Recovery Officer, State of Orissa) addressed to the Chairman-cum-Managing Director, I.D.C. (Petitioner No. 1) declaring it to be a deemed defaulter in view of Section 8-F of the Act read with the Certificate Rules, 1989 is misconceived in law and has to be quashed. However, I find no illegality or infirmity in the order of the Commissioner directing the petitioner No. 2-M/s. ABS Spinning Mills Orissa Ltd. in Annexure-3, and the order of attachment in Annexure-8 and as such the Provident Fund Authorities are free to proceed in accordance with law thereon. It is made clear that the liability of the petitioner No. 1, if any, in the event of the winding up of the petitioner No. 2-9ompany has to be worked out in accordance with law as and when such occasion arises, on which I expressed no opinion.

The writ petition is thus allowed in part to the extent indicated, but in the circumstances, without any order as to cost.