

**(2016) 03 OHC CK 0033**  
**In the Orissa High Court**  
**Case No : W.P.(C) No. 19010 of 2011.**

|                                                            |            |
|------------------------------------------------------------|------------|
| M/s. Orissa Hydro Power Corporation Ltd.                   | APPELLANT  |
| Vs                                                         |            |
| Asst. Provident Fund Commissioner and OIC, SRO and another | RESPONDENT |

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**Date of Decision :** 31-03-2016

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3)(b), 7A

**Citation :** (2016) 2 CLR 216 : (2016) 150 FLR 654 : (2016) LabLR 771

**Hon'ble Judges :** S.N. Prasad, J.

**Bench :** Single Bench

**Advocate :** D.P. Nanda, R.K. Kanungo, S. Das and B.P. Panda, learned Advocates, for the Appellant; Mishra, Advocate, for the Respondent

**Final Decision :** Dismissed

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## Judgement

S.N. Prasad, J. - In this writ petition the order passed by the Appellate Tribunal as contained in Annexure-1 passed in ATA No.741(10) of 2005 as well as the order of assessment passed U/s.7-A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 as contained in Annexure-3 are under challenge.

2. The brief facts of the case of the petitioner is that being an establishment in the name of Orissa Hydro Power Corporation Ltd. the workers working in Quality Control Assurance Division of the Quality Control Division, Mukhiguda has been brought under the purview of determination of assessment by the authorities in exercise of power conferred U/s.7-A of the Employees' Provident Fund and Miscellaneous Provision Act, 1952 (herein after referred to as 'The Act, 1952') with respect to the period from 1/98 to 11/2001.

The ground taken by the petitioner in challenging the proceeding U/s.7-A is that the Quality Control Division was abolished w.e.f.31.3.2000 and during its

operation it was neither a factory till 23.9.1999 and as such will not come within the meaning of Section 2(g) of the Act, 1952, nor an establishment having been notified by the Central Government by official Gazette by virtue of power conferred under section 1(3)(b) of the Act, 1952, the authorities without any application of mind has brought the Quality Control Division of Orissa Hydro Power Corporation under the purview of Section 7-A of the Act, 1952, that to without providing adequate and sufficient opportunity of being heard, against which an appeal has been preferred before the EPF Appellate Tribunal raising the grievance regarding applicability of the Act, but the Appellate authority has not appreciated this aspect of the matter and affirmed the order passed by the authorities passed U/s.7-A of the Act, 1952.

The specific case of the petitioner is that in the Quality Control Division not more than 20 workmen have ever worked regularly and that is the requirement to bring an establishment under the purview of the Act, 1952. It has been contended that the establishment is a factory and it was yet to be commissioned for the manufacturing process and as such it cannot come under the purview of the Act, 1952.

3. Counter affidavit has been filed by the opposite parties, inter alia therein it has been stated that the provision of the Act, 1952 is well applicable and the authorities after going through the list of the employees working under the Quality Control Division from which the authorities have found that 21 numbers of workers are working, hence there is no dispute about the fact regarding applicability of the Act, 1952.

It has been contended that the petitioner has been provided with adequate and sufficient opportunity, the representative of the establishment put his appearance, relevant documents have been produced by him, like the wages particulars of 11 DLR, casual NMR, details of VSS employees, subsidiary cash book, acquittance roll or contingent Khalashi, salary bill of work-change employees, Guard file of NMR vouchers, etc. and on the basis of the above documents the authorities have come to conclusion that the petitioner-establishment is coming under the definition of employer as per the definition given U/s.2(f) of the Act, 1952.

It has been contended that the work in question were related to the work of the petitioner ? establishment and as per definition of ?employee? if any body has participated in the work of the establishment directly or indirectly such type of worker would be said to be employee of the said establishment.

4. It has been contended rebutting the argument by learned counsel for the petitioner that since 20 workers have never performed their duties regularly, hence the requirement given U/s.1(3)(b) has not been fulfilled. But it has been contended by learned counsel representing the opposite party that it is not that if a worker working under the establishment if renders service only for one or two days will not get the coverage of the provision of the Act, 1952 and to

substantiate his argument he has referred para 26 of the Act, 1952.

He further submits that the petitioner has raised all his point before the regional authority in course of hearing of the proceeding under section 7-A of the Act, 1952 and even before the appellate authority and thereafter the concurrent finding has come and as such this court may not interfere in order to reverse the fact finding given by the authorities concerned by assuming the power of an appellate court.

He contends that the purpose of the Act is to be seen which has been meant for benefit of the poorer section of the workers for whom there is no benefit to be given in course of service or after their retirement. In the light of this submission it has been submitted that the order needs no interference by this court.

5. Heard the learned counsels for the parties and perused the documents on record.

The sole grievance raised by the petitioner in this writ petitioner is that the petitioner ? establishment is not coming under the purview of the Act, 1952. In order to appreciate this argument it needs to refer Section 1(3)(b) of the Act, 1952, the definition of employee as given under section 2(f) and para 26 of the Act, 1952 which are reproduced herein below:-

"2(f) "employee" means 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, and who gets his wages directly or indirectly from the employer, and includes any person,-

(i) Employed by or through a contractor in or in connection with the work of the establishment;

(ii) Engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment;"

"1.(3)(a) To every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and

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

Provided that the Central Government may, after giving not less than two months? notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification."

"[26. Classes of employees entitled and required to join the fund.-

(1)(a) Every employee employed in or in connection with the work of a factory or other establishment to which this scheme applies, other than an excluded

employee, shall be entitled and required to become a member of the Fund from the day this paragraph comes into force in such factory or other establishment.

(b) Every employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies, other than an excluded employee, shall also be entitled and required to become a member of the fund from the day this paragraph comes into force in such factory or other establishment if on the date of such coming into force, such employee is a subscriber to a provident fund maintained in respect of the factory or other establishment or in respect of any other factory or establishment (to which the Act applies) under the same employer:

Provided that where the Scheme applies to a factory or other establishment on the expiry or cancellation of an order of exemption under section 17 of the Act, every employee who but for the exemption would have become and continued as a member of the Fund, shall become a member of the fund forthwith.

(2) After this paragraph comes into force in a factory or other establishment, every employee employed in or in connection with the work or that factory or establishment, other than an excluded employee, who has not become a member already shall also be entitled and required to become a member of the Fund from the date of joining the factory or establishment.

(3) An excluded employee employed in or in connection with the work of a factory or other establishment, to which this Scheme applies shall, on ceasing to be such an employee, be entitled and required to become a member of the Fund from the date he ceased to be such employee.

(4) On re-election of an employee or a class of employees exempted under paragraph 27 or paragraph 27-A to join the Fund or on the expiry or cancellation of an order under that paragraph, every employee shall forthwith become a member thereof.

(5) Every employee who is a member of a private provident fund maintained in respect of an exempted factory or other establishment and who but for exemption would have become and continued as a member of the fund shall, on joining a factory or other establishment to which this Scheme applies, become a member of the fund forthwith.

(6) Notwithstanding anything contained in this paragraph [an officer not below the rank of an Assistant Provident Fund Commissioner] may, on the joint request in writing, of any employee of a factory or other establishment to which this Scheme applies and his employer, en-roll such employee as a member or allow him to contribute more than rupees [rupees six thousand and five hundred] of his pay per month if he is already a member of the Fund and thereupon such employee shall be entitled to the benefits and shall be subject to the conditions of the Fund, provided that the employer gives an undertaking in writing that he shall pay the administrative charges payable and shall comply with all statutory

provisions in respect of such employee.]"

From perusal of the provisions it is evident that in an establishment if a factory engaged in any industry specified in Schedule I in which twenty or more persons are employed and to any other establishment employing twenty or more persons or class of such establishments which the Central Government may by notification in the official gazette specified in its behalf will come under the purview of the Act, 1952.

6. From perusal of Annexure-A/1 which is the list of 21 employees furnished by the representative of the petitioner-establishment duly been signed by the concerned Executive Engineer and other documents reference of which has been made in the order passed U/s.7-A of the Act like the wages particulars of 11 DLR, casual NMR, details of VSS employees, subsidiary cash book, acquittance roll or contingent Khalashi, salary bill of work-change employees, Guard file of NMR vouchers, etc. it is evident that the authorities have taken a conscious decision regarding applicability of the Act.

7. The submission of learned counsel representing the petitioner that the list as contained in Annexure-A/1 is not a list of the workers working regularly under the establishment and if the workers are not working regularly they cannot be taken into consideration as the strength of the worker cannot be taken into consideration for bringing the establishment under the purview of the Act. But this submission cannot be accepted for the reason of the specific wording of Section 1(3)(a) or (b) which stipulates that the establishment will come under the purview of the Act if 20 or more persons are employed. There is no reference regarding the period.

8. This has further been clarified from the definition of "employee" as contained under Section 2(f) which means 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, and who gets his wages directly or indirectly from the employer, even if employed by or through a contractor or in connection with the work of the establishment.

9. Thus if a worker will be engaged for the purpose of taking his service for an establishment the worker will be said to be an employee within the meaning of Section 2(f) and after taking into consideration this definition of employee the authorities on perusal of the list of the workers as contained in Annexure-A/1 and other relevant documents as has been referred herein above has come to a specific finding regarding applicability of the Act, 1952 to the establishment.

10. The contention of the learned counsel for the petitioner that it is Quality Control Division and the work has not yet been commenced, but that does not help the petitioner for the reason that the Quality Control Division is also a division of the petitioner ? establishment and the work of the workers have been taken even for the construction work which has been found to be substantiated by various documents as has been referred in the order passed under section 7-A.

11. Even the manufacture process has been brought under the purview of the Act, 1952 by virtue of the Government notification in exercise of power conferred U/s.1(3)(b) of the Act as because building and construction has also been brought under the purview of the Act by virtue of notification issued by the Government of India dated 31st October 1980.

12. It has not been disputed by the petitioner that the Quality Control Division is not a part of the petitioner ? establishment, only dispute raised that the manufacturing process or the function of the Quality Control Division has not yet started but the same is immaterial for the purpose of applicability of the Act, 1952 in view of the definition of "employee" as given U/s.2(f) of the Act as referred herein above.

13. The contention of learned counsel appearing for the petitioner is that the authorities while passing the order U/s.7-A or under section 7-I has not appreciated all these aspects of the matter, hence the matter needs hearing afresh.

14. But this argument has got no force for the reason that the authority in course of enquiry U/s.7-A and the Appellate Tribunal has taken into consideration all the document which has been produced by the representative of the establishment and after making reference of the same and on application of the statutory provision finding has been given regarding applicability of the Act, 1952 and thereafter assessment has been made.

15. The order passed U/s.7-A has been affirmed by the Appellate Tribunal after appreciating the submission advanced on behalf of learned counsel for the petitioner ? establishment and after taking into consideration the judgments pronounced in this regard by the various High Courts and come to the conclusion that no inconsistency noticed in the order passed by the authority and in view of the fact that this court sitting under Article 226 of the Constitution of India and in exercise of power of judicial review is only required to see whether the decision making process is proper or not.

16. In the light of the discussion made herein able, in my considered view the authority and the Appellate Tribunal have passed a well reasoned order based upon various documents placed before him after providing sufficient opportunity which is in consonance with the rule and it would not be proper for this Court to reverse the fact finding based upon the relevant documents to reverse the fact finding sitting against an appellate Court.

17. In view thereof there is no merit in this writ petition.

18. Accordingly, the case is dismissed being devoid of merit.