
(2006) 03 OHC CK 0012
In the Orissa High Court
Case No : Misc. Case No. 55 of 2005

OEL Extrusions Limited

APPELLANT

Vs

Asst. Provident Fund Commissioner

RESPONDENT

Date of Decision : 03-03-2006

Acts Referred:

Companies Act, 1956 — Section 445(3), 449, 457
Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3),
1(4), 14B, 17A, 17B

Citation : (2006) 1 OLR 439 Supp

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

Bench : Single Bench

Advocate : P. Mukherjee, for the Appellant; Piyusa Mishra, for the Respondent

Judgement

M.M. Das, J.—This is an application filed by the purchaser-company, OEL Extrusions Limited, seeking for a direction to the Provident Fund Commissioner to issue a fresh Code to the purchaser-company to enable it to deposit the provident fund contributions with the Commissioner.

2. An affidavit by way of objection to the aforesaid Misc. Case has been filed on behalf of the Assistant Provident Fund Commissioner.

3. By order dated 17.2.2006, this Court restrained the opp. party from issuing any attachment orders attaching any of the accounts of the Petitioner (purchaser company). On perusal of the Misc. Case petition and the affidavit filed on behalf of the opp. party, it appears that the purchaser company has not been issued with a new Code and a demand has been raised by the Provident Fund Commissioner for payment of arrear amounts due on the company M/s. Orissa Extrusions Limited which has been wound up by orders of this Court and the Petitioner has purchased the same in an auction sale.

4. Mr. Piyusa Mishra, learned Counsel appearing for the Provident Fund Commissioner drawing the attention of this Court to Section 7-I of the

Employee's Provident Funds and Miscellaneous Provisions Act, 1952 (for short, "the Act") submits that if the Petitioner is aggrieved by the action of non-issuance of a fresh Code, it should have filed an appeal before the Tribunal as per the said Section 7-I of the Act or would have approached this Court under Article 226 of the Constitution of India. He further submits that the Company Court lacks jurisdiction to issue such direction to the Regional Provident Fund Commissioner for issuing a fresh Code in a favour of the Petitioner. The other contention raised by Mr. Mishra is that u/s 17B of the Act, the purchaser-company, i.e., the present Petitioner is jointly and severally liable to pay the contributions and other sums due from the employer under any provision of the Act and, as such, the Petitioner being severally liable to pay the arrear dues outstanding against the company which has been wound up, unless the said arrear dues are cleared up, the Petitioner even cannot be allowed to utilize the Code which was granted to the company which has been wound up.

5. Mr. P. Mukherjee, learned Counsel per contra submits that neither Sections 7-I nor 17-B of the Act are applicable to the facts of the present case. According to Mr. Mukherjee, the appeal to the Tribunal as provided u/s 7-I of the Act is not against an order refusing to allot a new Code to a company and, further, there being no transfer of establishment as contemplated u/s 17-B of the Act, the question of liability of the company which has been wound up and the assets of which has been purchased by the Petitioner company being carried forward to the Petitioner company does not arise.

6. For appreciation of the contention raised before this Court, it is necessary to quote Sections 7I and 17B of the Act, which are as follows:

7I. Appeals to Tribunal - (1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to Sub-section (3), or Sub-section (4) of Section 1, or Section 3, or Sub-section (1) of Section 7A, or Section 7b (except an order rejecting an application for review referred to in Sub-section (5), thereof), or Section 7C, or Section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under Sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed.

17B. Liability in case of transfer of establishment - Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or the Family Pension Scheme, as the case may be, in respect of the period up to the date of such transfer:

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

7. A bare reading of Section 7I goes to show that if a person is aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any authority under the proviso to Sub-section (3), or Sub-section (4) of Section 1, or Section 3, or Sub-section (1) or Section 7A or Section 7B or Section 7C or Section 14B, can prefer an appeal to a Tribunal against such notification or order. A reading of the above Sections referred to in Section 7I of the Act goes to show that the order refusing to allot afresh Code cannot be appealed against before the Tribunal u/s 7I of the Act as the said order is not passed under any of the Sections referred to in Section 7I of the Act.

8. With regard to the question as to whether the liability of the company which was wound up and the assets purchased by the Petitioner company would be the liability of the Petitioner company, depends on the question as to whether it can be said that there is a transfer of establishment in favour of the Petitioner company as contemplated u/s 17B of the Act. The word "establishment" has not been defined in the Act though the said word has been used in several provisions of the Act. An "establishment" therefore, must be given its ordinary meaning. According to Black's Law Dictionary, the word "establishment" means an institution or place of business, with its fixtures and organized staff. In the case of Rengachari M.N. v. RPFC, 44 FJR 506 (Madras High Court), the Madras High Court held that an establishment is something which runs along with the trade or business to which it is irretrievably connected and if there is a business, there is an establishment, if there is no business, it would be difficult to conceive of an establishment, for it would be purposeless to have an establishment in those circumstances. Further, it is settled position of law that the Act applies to an establishment only when it is shown that it had in the regular course of business employed twenty or more persons.

9. u/s 449 of the Companies Act, 1956, the Official Liquidator is to be appointed as the liquidator on winding up order being made in respect of a company, by virtue of his office. u/s 457 of the Companies Act, 1956, it is provided that the liquidator in a winding up proceeding shall have power, with sanction of the Court, to do such act as prescribed therein including sale of whole of the undertaking of the company as a going concern. In the instant case, however, upon winding up order being passed, a sale notice was published for sale of the assets of the company under winding up along with actionable claims. The Petitioner being the successful bidder, sale was confirmed in its favour. It is, therefore, clear that in the instant case, the company under winding up has not been sold as a "going concern". Thus, by applying Sub-section (3) of Section 445 of the Companies Act, 1956, it would be seen that on the order of the winding up being notified in the Official Gazette by the Registrar, it is deemed to be a notice of discharge to the officers and employees of the company under winding up.

10. In view of the above provisions of law, the purchase of the assets of the company which has been wound up, by the Petitioner, cannot be said to be a transfer of an establishment as per the provisions of Section 17B of the Act.

Thus, the liability, if any, of the company which has been wound up, cannot be said to have been taken over by the purchaser, i.e., the Petitioner company and such liability can only be recovered by the Regional Provident Fund Commissioner by lodging a claim before the Official Liquidator as per the provisions of the Companies Act, 1956. The Petitioner having purchased the assets along with actionable claims of the company which is wound up only if it has started operating the factory and has engaged twenty or more employees, can be treated an establishment under the Act and would be entitled to get a fresh Code from the Regional Provident Fund Commissioner. Even in the event the erstwhile employees of the company which has been wound up are given employment by the Petitioner (purchaser), then also, in view of Sub-section (3) of Section 445 of the Companies Act, 1956, the employment of such persons would be treated to be fresh employment under the establishment of the Petitioner-company. But, however, under the Act, contributions in respect of those employees would be transferred in their favour with a fresh Code being allotted to the Petitioner-company as contemplated u/s 17A of the Act.

11. No doubt, Mr. Mishra, learned Counsel appearing for the Regional Provident Fund Commissioner is correct in contending that the Company Court has no jurisdiction to direct the Regional Provident Fund Commissioner to allow a fresh Code to the Petitioner-company. But, however, in view of the interpretation of various Sections of the Act and the provisions of the Companies Act, 1956 made above, this Court is sure that if an appropriate application is made by the Petitioner-company to the authority under the Act for allotment of a fresh Code, the same will be considered as per law and in the event, the Act applies to the establishment of the Petitioner-company, a fresh Code would be allotted. It is, however, open for the Petitioner-company to approach the appropriate forum/ Court for redressal of its grievance in the event its prayer for allotment of a fresh Code is refused.

12. With the above observation, the Misc. Case is disposed of.