

(1997) 08 OHC CK 0007

In the Orissa High Court

Case No : O.J.C. No's. 3037, 4476 and 4477 of 1994

Orissa Minerals Development Co. Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-08-1997

Acts Referred:

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

Citation : (1998) 2 LLJ 1034

Hon'ble Judges : Susanta Chatterji, J;C.R. Pal, J

Bench : Division Bench

Advocate : Bibhudendra Misra, R. Ray and P.C. Panda, for the Appellant; P.K. Khuntia, A.S.C. (Central), for the Respondent

Final Decision : Dismissed

Judgement

Susanta Chatterji, J.—The present writ petitions have been filed by the Orissa Minerals Development Co. Ltd., a Government Company within the meaning of the Companies Act, 1956 (for short "the Act") against Central Provident Fund Commissioner and Regional Provident Fund Commissioner, opposite party Nos. 2 and 3 respectively, besides the Union of India through its Secretary," Ministry of Labour.

2. The petitioner-company in O.J.Ss.4476 and 4477 of 1994 has prayed, inter alia, for the following reliefs:

To issue -

a. A writ/order and/or direction in the nature of mandamus commanding the opposite parties and each of them to show cause why the said notification dated May 17, 1989 being Annexure-1 to the petition and the order of the opposite Party No. 3 and Demand Notice Annexure-3 series should not be set aside and/or quashed.

b. A writ/order and/or direction in the nature of mandamus commanding the

opposite parties and each of them to refrain from giving effect to the impugned notification dated May 17, 1989 Annexure-1 to the petition and impugned order and Demand Notice of the opposite Party No. 3 being Annexure-8 series to the petition.

c. A writ/order and/or direction in the nature of certiorari directing the opposite Party No. 3 to certify and to send up to this Hon"ble Court all the records relating to the said impugned notification dated May 17, 1989 and the order of the opposite party No. 3 and Demand Notice (Annexure-8 series) and Demand Notice in (Annexure-9) so that the same may be quashed and conscionable justice be done.

d. Rule Nisi in terms of prayers (a) to (c) above and in the absence of cause or proper cause shown the same be made absolute.

e. Costs incidental to this application be paid by the opposite parties.

Such further and/or other order or orders be made and direction/directions be given as this Hon"ble Court may deem fit and proper....."

3. The petitioner-company in O.J.C. No. 3037 of 1994 has prayed, inter alia, for the following reliefs:

"To issue -

a. A writ/order and/or direction in the nature of mandamus commanding the opposite parties and each of them to show cause why the said notification dated May 17, 1989 being Annexure-1 to the petition and the Six Demand Notices Annexure-8 series should not be set aside and/or quashed.

b. A writ/order and/or direction in the nature of mandamus commanding the opposite parties and each of them to refrain from giving effect to the impugned notification dated May 17, 1988 Annexure-1 to the petition and impugned orders and six Demand Notices of the opposite party No. 3 being Annexure-8 series to the petition.

c. A writ/order and/or direction in the nature of prohibition prohibiting the opposite parties and each of them from enforcing and/or giving effect to and/or seeking to give effect to the said impugned notification dated May 17, 1989 being Annexure-1 to the petition and the said six impugned orders and six Demand Notices being Annexure-8 series to the petition.

d. A writ of and/or order and/or direction in the nature of certiorari directing the opposite party No. 3 to certify and to send up to this Hon"ble Court all the records relating to the said impugned notification dated May 17, 1989 and the six orders of the opposite party No. 3 and six demand notices (Annexure-8 series) so that the same may be quashed and conscionable justice be done.

e. Rule Nisi in terms of prayers (a) to (d) above and in the absence of cause or proper cause shown the same be made absolute.

f. Injunction restraining the opposite parties and each of them from enforcing and/or giving effect in and/or causing effect to and/or taking any steps and/or making any demand pursuant to the impugned Notification Annexure-1 and the six orders and the six Demand Notices Annexure-8 series of the opposite party No. 3 to the petition.

g. Ad interim orders in terms of prayer (f) above.

h. Costs and incidental to the application be paid by the opposite parties.

i. Such further and/or other order or orders be made and/or direction or directions be given as this Hon"ble Court may deem fit and proper....."

4. Basically the petitioner-company has challenged Notification No 5.36011/9/88-5-5-11 of May 17, 1989 issued by the Ministry of Labour, Government of India and order No. EMF/DR/33 dated December 3, 1993 of 1 the Regional Provident Fund Commissioner (D), Rourkela u/s 7A of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 as detailed in the writ application. There are several units of the petitioner-company and each unit has its own Code Number and they are to deposit provident fund dues in accordance with law. There is an allegation that the opposite party No. 3, viz. Regional Provident Fund Commissioner at Rourkela issued six show cause notices bearing Nos. 5406 dated September 16, 1982, 52% dated September 14, 1992, 5414 dated September 15, 1992, 5410 dated September 16, 1992, 5425 dated September 17, 1992 and 5421 dated August 17, 1992 in respect of petitioner's six establishments bearing P.P. Code Nos.DR/30, DR/31, DR/33, DR/34, DR/36 and DR/44, respectively, to which the petitioner filed a common reply dated September 19, 1992 as per Annexure-4 contending that the petitioner was not liable to implement the enhanced rate of provident fund contribution, i.e., at 10 per cent. for the reasons that the petitioner's accumulated losses stand at Rs. 5.85 crores as on March 31, 1992 which exceeded the net worth of the petitioner-company and it has also suffered cash losses to the tune of Rs. 44.28 lakhs, in the year 1990-1991 although the working results of the petitioner for the year 1991-1992 showed a meagre cash profit of Rs. 29.98 lakhs which the petitioner came to know on or about September, 1992 after completion of accounts by 1991-1992 on receipt of the audit report and audited accounts through the statutory auditors. The petitioner in the said reply to the show-cause notices sought for exemption from the liability of enhanced rate of contribution for the reasons that the purported notification dated May 17, 1989 in so far as the exemption Clause-III was concerned was unrealistic, unworkable and unreasonable in view of the conditions stipulated therein.

5. It is contended that the Regional Provident Fund Commissioner, Rourkela gave a personal hearing to the petitioner in respect of the aforesaid show-cause notices on September 30, 1992. The petitioner through its representative appeared for personal hearing and made necessary submission before the said R.P.F. Commissioner, U.P.3. Upon hearing the submissions made on behalf of the

petitioner-company, opposite party No. 3 passed a preliminary order to the effect that the enhanced rate of provident fund contribution, i.e. 10 per cent in place of 8 1/3 per cent would be applicable with effect from March 1991 payable in the month of April, 1991 and inter alia gave direction for determination of the difference between 10 per cent and 8 1/3 per cent which should be payable by the petitioner. A copy of such order of O.P. 3 is at Annexure-5 to the present writ application.

6. It is further placed on record that the petitioner-company at the personal hearing held on September 30, 1992 before opposite party No. 3, Regional Provident Fund Commissioner, inter alia, submitted that since the petitioner-company had sustained losses to the tune of Rs. 5.85 crores as on March 31, 1992, and loss exceeded its networth by Rs. 4.72 crores and further the petitioner had been suffering losses in the past several years and also suffered a cash loss of Rs. 44.28 lakhs in the year 1990-1991, immediately preceding the financial year 1991-1992, the impugned notification for enhanced rate of provident fund should not be made applicable to the petitioner as it cannot and should not be interpreted to mean that the Government intended to enhance the rate of provident fund contribution in respect of financially weak establishments, particularly the one which had suffered heavy losses for years together in the past and had sustained losses so much so that it exceeded the net assets of the company at the time of enforcement of the impugned notification. Developing all these points in depth the petitioner has sought the relief in the manner as indicated above.

7. The writ application is opposed by the opposite parties. At the time of final hearing of the matter Mr. B. Misra, Learned Senior Advocate appearing for the petitioner submitted mainly that the acts of the opposite parties done and/or caused to have been done in issuing the demand notices are inherently bad in law. He has developed his argument by drawing attention of the Court that the principle in such matter had been decided in an earlier decision reported in K.R. Subbaier Vs. The Regional Provident Fund Commissioner, wherein a Single Judge of Madras High Court relying upon a decision reported in Aluminium Corporation of India Ltd. Vs. Regional Provident Fund Commissioner and Others, held inter alia as to the provisions relating to contribution by employer when to be made operative. In paragraph-4 of the said decision the learned single Judge has observed that the gist of these provisions is such as to make operative only on and from the point of time when the authorities hold that a particular unit is within the ambit of the Act and make a consequential demand in terms of the Act and the scheme. Any demand for a back period not only appears to be not illogical and oppressive, but also plainly inconsistent with the terms of the enactment, which are manifestly prospective in their operation. A positive reliance has been made on the decision reported in Aluminium Corporation of India Ltd. Vs. Regional Provident Fund Commissioner and Others, which was quoted therein.

8. Mr.Misra further submitted that this principle has much more elaborately been considered by the Apex Court in the case of The District Exhibitors Association, Muzaffarnagar and others Vs. Union of India and others, . Discussing the scope of provident fund employees contribution retrospective deductions, the Supreme Court has very categorically observed that under paras 30 and 32 the employer has to pay the contribution of the employees" share to provident fund account, but he has a right to recover that payment by deducting the same from the wages due and payable to the employees. The deduction is not from the wages payable for any period, but only from the wages for the period in respect of which the contribution is payable and no deduction could be made from any other wages payable to the employees. In other words, the payment of employees" contribution by the employer with the corresponding right to deduct the same from the wages of the employees could be only for the current period during which the employer has also to pay his contribution. Therefore, by retrospectively applying the Scheme the employer could not be asked to pay the employees contribution for the period antecedent to the impugned notification by which the Scheme was made applicable to the employer. The Act and the Scheme neither permit any such payment nor deduction. The employer cannot be saddled with the liability to pay the employees" contribution for any retrospective period, since he has no right to deduct the same from the future wages payable to the employees. The decision of the Allahabad High Court considered in the same judgment was reversed.

9. Mr.Misra applying the ratio of the said decision to the facts of the present case argues that the petitioner cannot be saddled with the liability as per the demand notices and the challenges made by the petitioner-company to the impugned notification vis-a-vis impugned demand notices should be sustained.

10. In addition to the aforesaid reported decision cited by him Mr.Misra has brought to the notice of the Court a circular of the Ministry of Labour, Government of India. For better appreciation and ready reference we quote the said circular:

"Waiver of recovery of the employees" share of contribution not deducted for pre-discovery period.-In exercise of the powers conferred by paragraph 78 of the Employees" Provident Funds Scheme, 1952,the Central Government hereby directs the waiver of the recovery of the employees" share of provident fund contribution which have not been deducted from the wages of the employees during the period mentioned below:

Pre-discovery period. - This will include the period commencing on the date from which the Act is legally applicable to the factory or establishment and the date on which a formal notice for coverage under the Act is served on the employer by the Provident Fund Authorities. In all such cases, the employees" share of contribution shall be payable from the first of the month, following the issue of the notice for coverage under the Act.

(Ministry of Labour, Circular No. R. 11025(25)/87-SS-II, dated October 6, 1989)".

11. Thus by relying and referring to the above reported decisions as also the circular issued by the Ministry of Labour, Mr. Misra argues that the case made out by the petitioner is well justifiable and there is no bar and/or impediment for the petitioner to obtain the relief in the manner as prayed for.

12. Mr. Khuntia, learned Additional Standing Counsel appearing for the Union Government and the provident fund authorities has made four submissions:

(i) The writ petitions are not maintainable as six different units of the petitioner-company have separate establishments having specific identity and they have different code numbers for payment of provident funds. Separate notices of demand were there and the petitioner-company cannot espouse the cause of the separate units being six in number in the present form.

(ii) The decisions reported in K.R. Subbaier Vs. The Regional Provident Fund Commissioner, as well as in The District Exhibitors Association, Muzaffarnagar and others Vs. Union of India and others, are quite distinguishable. There is no dispute as to the fact that an Act cannot be retrospective so far as collection of provident funds dues is concerned. By referring to the facts of the case, as dealt with in the aforesaid two reported decisions, he has highlighted that the facts of the present case are quite distinguishable and separate. In the earlier reported cases, namely K.R. Subbaier Vs. The Regional Provident Fund Commissioner, : where a case of Allahabad High Court has been discussed by the Supreme Court, the arrear claimed retrospectively was not sustained for the reasons discussed therein. However, in the present case, the Act is there which is prospective, and the notification is there which is also prospective, the period of demand is subsequent. The coverage of the Act is well made. The dispute is as to payment of the enhanced rate between 8 1/3 per cent and 10 percent retrospectively. The liability of making payment at the rate of 8 1/3 per cent is not in dispute.

(iii) There is complete adjudication u/s 7A. While the finality was made under the provisions as envisaged u/s 7A steps were taken to recover the dues by issuing demand notice as if in the case of an executing proceeding, the petitioner cannot ask to go behind the impugned demand and the claim already adjudicated u/s 7A proceeding and the entire writ petition is misconceived.

(iv) The writ Court is obviously a Court of equity and it has to consider the decision making process. Neither it can entertain any disputed question of fact nor can it consider anything which is not perverse or without jurisdiction. Effective steps were taken by opposite party No. 3 and the jurisdiction exercised under the Act is not perverse in nature. Moreso, he has submitted that the exemption sought on the ground of profit making or loss sustaining is also not correct.

13. Taking all these points it is submitted that the acts of the Provident Fund authorities do not suffer from any inherent defect and no indulgence can be

extended to the petitioner-company.

14. Patiently we have heard both Mr. B.Misra and Mr. Khuntia at length. We have perused the materials on record. We have carefully gone through the decisions cited and the circular placed on record. Essentially we find that the petitioner-company is well covered by the Employees' Provident Funds Scheme and the Act. The impugned notification is of the year 1989. The period of demand is from March, 1991. The reported decisions are quite distinguishable. In two decisions steps were taken to recover amount for the period prior to which salary was paid to the employees concerned. It was made clear that the employer is not entitled to deduct wages for any past period or for any future period. For the relevant period the employer has since paid wages to the employees concerned. The liability of the employer arises only when the employer is entitled to deduct from the wages payable to the employees. But in the instant case, we find that the impugned notice is quite prospective in nature, in the writ application more emphasis is laid that the petitioner-company has sustained huge loss and for such reason it has to be exempted and not to be saddled with any liability. At the time of argument this aspect was not very much argued or highlighted.

15. So that as it may, we find that the predisccovery period as referred in the circular of the Ministry of Labour describes inter alia that this will include the period commencing from the date when the Act is legally applicable to the factory or establishment and the date on which a formal notice for coverage under the Act is served on the employer by the Provident Fund authorities. In all such cases, the employees' share of contribution shall be payable from the first of the month following issue of the notice for coverage under the Act. This circular of the Ministry of Labour is numbered R.11025(25)/87-68-II, dated October 6, 1989. Thus we find that the notification as well as the circular under the Employees' Provident Fund Scheme were in the field on and from 1989. Our problem at hand is whether the demand should be from March, 1991 or from September, 1991. The company and its units as aforesaid being fully covered by the Act and the scheme being fully aware of the notification as well as the circular of the Ministry of Labour cannot take a different stand to challenge the demand notice. The demand notices being served and show-causes being filed, stand was taken for exemption on the ground of sustaining losses. This is obviously a factual matter. It was argued that an appeal in the matter could have been preferred, but at the time the writ application was filed there was no scope for appeal. Besides the writ application was entertained in 1994. It will not be wise to ask the petitioner- company to seek an alternative forum and prefer appeal. But since we find that the notification is prospective in nature and demand notices were issued with sufficient opportunities, we do not find that the impugned order u/s 7A suffers from any inherent defect. If the order u/s 7A is sustained, consequently the demand for recovery cannot be defeated. Having considered all the aspects, we are not inclined to interfere in the matter. For the foregoing reasons, the writ applications fail and the same are dismissed. However, there will be no order as to costs.

C.R. Pal, J.

16. I agree.