

(2016) 01 OHC CK 0054
In the Orissa High Court
Case No : W.P.(C) No. 574 of 2007

Regional Provident Fund Commissioner	APPELLANT
Vs	
Sreeji Combine Coke (P) Ltd. and Others	RESPONDENT

Date of Decision : 11-01-2016

Acts Referred:

Constitution of India, 1950 — Article 38, Article 43
Factories Act, 1948 — Section 7

Citation : (2016) 150 FLR 900 : (2016) 148 FLR 953 : (2016) 3 LLJ 209

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

Bench : Single Bench

Advocate : Gopabandhu Mishra, C.R. Mishra and H.K. Mallick, Learned Advocates, for the Appellant; Umesh Chandra Beura, B.B. Panda and P. Dutta, Learned Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

S.N. Prasad, J.—1. The petitioner being aggrieved with the order dtd. 4.3.2005 passed in ATA No. 651(10) of 2000 is before this court by which the order passed by the Regional Provident Fund Commissioner, Orissa, Bhubaneswar dtd. 15.3.1999 has been set aside while allowing the appeal.

2. Brief facts of the case of the petitioner who is Regional Provident Fund Commissioner, Orissa, Bhubaneswar is that opposite party No. 1 is an establishment running in the name of M/s. Shreeji Combine Coke Private Ltd., a private limited company situated at New Industrial Estate, Jagatpur, Cuttack, deals with conversion of imported coal into hard coke for industrial purposes and registered under the Factories Act. The products so manufactured out of the imported coal were sold to the industrial units even though the unit manufactured the same on profit basis.

3. Since the opposite party No. 1 is coming under the purview of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as The Act, 1952?) hence the Regional Provident Fund Commissioner, Orissa has

applied the applicability of the Act, 1952 upon opposite party No. 1 w.e.f. 31.7.1991 which was objected to by opposite party No. 1 by making representation u/s. 19(A) of the Act, 1952 and the matter was disposed of with the finding and by sending the matter to the Regional Provident Fund Commissioner Orissa to initiate proceeding U/s. 7(A) of the Act, 1952 and take decision after providing opportunity of being heard.

4. The opposite party No. 1 has disputed the decision of the authority by which the opposite party No. 1 - establishment has been brought under the purview of the Act, 1952 w.e.f. 31.7.1991 and the Regional Provident Fund Commissioner, Orissa has passed order on 15.3.1999 vide Annexure-5 holding therein the applicability of the Act upon the opposite party No. 1 w.e.f. 31.7.1991 which has been assailed by opposite party No. 1 before the E.P.F. Appellate Tribunal, new Delhi and the Appellate Tribunal has allowed the appeal by setting aside the order passed by the Regional Provident Fund Commissioner which was under challenge in this writ petition by the Regional Provident Fund Commissioner on the following grounds:

(i) The Act, 1952 is a welfare legislation and as such the broader meaning of the applicability of the Act is to be taken into consideration.

(ii) The Act provides definition of employer which means in relation to an establishment which is a factory.

"Employer" has also been defined. According to which any person who is employed for wages in any kind of work, manual or otherwise will come under the definition of employee.

"Factory" has also been defined which means any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on,

"Manufacture" or "manufacturing process" has also been defined which means any process for making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal."

Taking into consideration the meaning as indicated hereinabove the opposite party No. 1 being an employer have engaged employees more than 20 in number for manufacturing purpose since the opposite party No. 1 deals in conversion of imported coal into hard coke for industrial purposes in order to sale it for profit motive. Hence opposite party No. 1 - establishment will come under the purview of schedule 1 which has been brought by virtue of notification dtd. 7.3.1962 w.e.f. 30.4.1962 being trading and commercial establishment employing twenty or more persons each and engaged in the purpose, sale or storage of any good, including establishment of exporters, importers, advertisers, commission agents and brokers, and commodity and stock exchanges but not including banks or

ware - houses establishment under any Central or State Act.

5. The other ground as has been taken that even in view of the pronouncement of Hon"ble Apex Court in case of P.M. Patel Vrs. Union of India, , AIR 1987 (SC) 447 the daily rated employee/NMR employee has been brought under the purview of definition 2(f). Hence the broader meaning of the Act is to be taken into consideration and in that view of the matter since the appropriate Government has come out with notification dtd. 7.3.1962 regarding bringing trading and commercial establishment under the purview of the Act, 1952, hence the petitioner - unit will also come under the purview of schedule 1 as per the notification dtd. 7.3.1962 as because the opposite party No. 1 - unit deals in the process of conversion of imported coal into hard coke for industrial purpose for profit motive which will bring the opposite party No. 1 establishment under the purview of schedule 1.

6. While on the other hand learned counsel for opposite party No. 1 has submitted that the order passed by the Regional Provident Fund Commissioner, Orissa dtd. 15.3.1999 is without any application of mind in view of the fact that the opposite party No. 1 is not coming under the purview of section 1(3)(a) because under the purview of the said provision the opposite party No. 1 will not come as because the business in which the opposite party No. 1 deals is not included in schedule 1 and so far as the provision as contained in Sec. 1(3)(b) the same will not be applicable as because no notification has been issued covering opposite party No. 1 - establishment under the purview of the Act.

7. It has been contended that the order passed by the Regional Provident Fund Commissioner is not in consonance with law because the Regional provident Fund Commissioner has relied upon the definition of "trade" as defined in Monopolies and Restrictive Trade Practice Act, 1969 and while the Act, 1952 is a self contained Act hence reliance cannot be placed upon the other Act.

8. Heard learned counsels for the parties and perused the documents on record. The sole dispute raised by the parties regarding applicability of the Act, 1952 upon opposite party No. 1 - establishment who deals in conversion of imported coal into hard coke for industrial purpose being registered under the Factories Act for profit motive.

9. The whole case of the petitioner, Regional Provident Fund Commissioner is that since opposite party No. 1 - establishment has been brought under the purview of the notification as contained in G.S.R.346 dtd. 7.3.1962, applicable w.e.f. 30.4.1962 making itself applicable to other trading and commercial establishment employing 20 or more persons each and engaged in the purpose, hence opposite party No. 1 is coming under the purview of the Act, 1952 and is amenable to the applicability of the Act.

10. While on the other hand opposite party No. 1 contends that the establishment is not coming under the parameter of the Act, 1952 as because the opposite party No. 1 - establishment is not a factory as specified in schedule

1 of the Act, 1952 as provided U/s. 1(3)(a) and no notification has been issued by the Central Government as required U/s. 1(3)(b) of the Act, 1952 hence the Act is not applicable.

11. In order to appreciate the argument advanced on behalf of the parties it is necessary to refer some of the definitions i.e. "employer" which has been defined U/s. 2(e) which is being reproduced herein below:--

"2(e) "Employer" means-

(i) 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 a manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(ii) 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;]

The definition of "employee" as provided u/s. 2(f) which is 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;"

The definition of factory as provided u/s. 2(g) which is being reproduced herein below:

"2(g). "factory" means any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power;

The definition of "manufacture" or manufacturing process" as provided U/s. 2(ic) which is being reproduced herein below:

"2(ic) "manufacture" or "manufacturing process" means any process for making, altering, repairing, ornamenting, finishing, packing oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal;"

12. From perusal of these definitions it is evident that employer in relation to an establishment which is a factory, the owner or occupier of the factory.

13. There is no dispute that opposite party No. 1 is the owner or occupier of the factory hence he is employer within the meaning of section 2(e) of the Act, 1952.

14. From perusal of the meaning of "employee" as provided U/s. 2(f) it is evident that employee means any person who is employed for wages in any kind of work, manufacture or otherwise in or in connection of the work of an establishment and who gets his wages directly or indirectly from the employer.

There is no dispute that the opposite party No. 1 by way of an employer has engaged certain employee.

15. From perusal of the definition of "factory" as provided under section 2(g) which means any premises including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power.

There is no dispute about the fact since it has been pleaded that opposite party No. 1 deals with conversion of imported coal into hard coke for industrial purpose by way of manufacturing process out of the imported coal which were used to be sold in the industrial units on profit basis which means that opposite party No. 1 is factory within the meaning of 2(g).

16. Before holding as to whether opposite party No. 1 is concerned with manufacturing process or not, it will be relevant to discuss the definition of manufacture or manufacturing process as defined U/s. 2(ic) which means any process for making, altering, repairing, ornamenting, finishing, packing oiling, washing, cleaning, breaking up, demolishing or otherwise.

17. From the record it is evident that opposite party No. 1 - establishment deals with conversion of imported coal into hard coke for industrial purpose by engaging more than 20 employees and since there is process of conversion of imported coal into hard coke the nature of imported coal is being altered as hard coke hence there is a manufacturing process having been conducted by opposite party No. 1 - establishment and as such the opposite party No. 1 - establishment will be said to be factory doing the work of manufacturing process.

18. The Government of India has come out with a notification dtd. 7.3.1962 by which the applicability of the Act has been made to every trading and commercial establishment employing 20 or more persons who are engaged in the process, sale or storage of goods including establishment of exporters, importers, advertisers, commission agents and brokers, and commodity and stock exchanges but not including bank or ware houses establishment under any Central or State Act. This has been brought by virtue of notification as contained in G.S.R.346 dtd. 7.3.1962 applicable w.e.f. 30.4.1962.

19. The contention of opposite party No. 1 - establishment is that it is not a

trading and commercial one rather it is basically a manufacturing unit and it is a factory U/s. 2(M)(1) of the Factories Act, 1948 and since it covers under the Employees' State Insurance Act, 1948 as a factory having manufacturing process and not a commercial establishment, hence the Act will not be applicable but this contention of the learned counsel appearing for opposite party No. 1 cannot be accepted because of the reason that it is the admitted case of the opposite party No. 1 that they deal with the conversion of imported coal into hard coke by way of a process by altering the imported coal into hard coke which according to the definition of Section 2(ic) will be said to be manufacturing process and as such will come under the purview of "factory" as defined U/s. 2(g) of the Act, 1952.

20. At this juncture it is relevant to discuss the provision as contained in Section 1(3)(a) and 1(3)(b) along with provision of Sec. 4 which are being reproduced herein below:--

"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.

4. Power to add to Schedule I.--(1) The Central Government may, by notification in the Official Gazette, add to Schedule I any other industry in respect of the employees whereof it is of opinion that a provident fund scheme should be framed under this Act, and thereupon the industry so added shall be deemed to be an industry specified in Schedule I for the purposes of this Act.

(2) All notifications under sub-section (1) shall be laid before Parliament, as soon as may be, after they are issued."

21. U/s. 4, Central Government can by notification add to Schedule I the entire industry while U/s. 1(3)(b) they can extend the Act even to a single establishment or a class of establishments. Clause (b) permits of classification within the industry, which Section 4 does not. Under Section 4 either the entire industry has to be included or not included. Section 16 provides that the Act is not to apply to certain establishments. Sub-section (2) of Sec. 16 provides that if the Central Government is of the opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient to exempt any class of establishments from the operation of the Act, it may by a notification do so. This would indicate that there could be several considerations such as financial position of any class of establishments or

other circumstances due to which the Central Government may rightly like to extend the provisions of the Act only to a specified establishment or a specified class of establishments. Section 1(3)(b) will enable the Central Government to do this by notifying the provision as contained in Section 4.

22. The word "establishment" is used in sub-section (4) & (5) of section 1 and also in Sections 16 and 17 and may be in other parts of the Act, indicating that the word "establishment" is used as genus, of which a factory is a species. It may be that to a certain extent the provisions of section 4 may overlap the power of the Government U/s. 1(3)(b).

23. Thus the broader meaning of the factories is to be taken into consideration for the fact that the intent of the legislation in promulgating the Act, 1952 because the purpose of legislation suggests that the Act is beneficial in giving financial help to the employees after their retirement. It needs to refer here the judgment rendered by Hon'ble Supreme Court in case of Maharashtra State Cooperative Bank Ltd. Vrs. Assistant Provident Fund Commissioner and Others, , (2009) 10 Supreme Court Cases 123. While discussing the intent of the promulgation of the Act, 1952 Hon'ble Apex Court has been pleased to hold at paragraph 30 of the judgment as follows:--

"30. Since the Act is a social welfare legislation intended to protect the interest of a weaker section of the society i.e. the workers employed in factories and other establishments, it is imperative for the courts to give a purposive interpretation to the provisions contained therein keeping in view the Directive Principles of State Policy embodied in Articles 38 and 43 of the Constitution....."

Thus there is no denial about the fact that the Act is admittedly for welfare legislation for the needy people and it is also evident from Schedule I that all the industries have been brought under the purview of the Act, 1952 and the other establishments which has not been specifically incorporated in Schedule I, the Central Government has come out with notification dtd. 7.3.1962 for including the trading and commercial establishments and if the argument of learned counsel for opposite party No. 1 would be accepted then the entire purpose of the Act, 1952 would be vitiated so far as it relates to the employees working in other trading and commercial establishments.

Hence the broader meaning of trading and industrial establishment is to be taken in the light of the intent of the Act, 1952 but the same has not been considered by the appellate authority.

24. From perusal of the case of opposite party No. 1 that the establishment deals with manufacturing process by conversion of imported coal into hard coke which certainly will come under the definition of manufacture or manufacturing process and in consonance thereof opposite party No. 1 will be said to be factory within the meaning of Section 2(g) and for the reason that opposite party No. 1 - establishment is dealing with trading and commercial activities by employing 20 or more persons hence there is a notification by Government of India through its

Ministry of Labour and Employer issued on 7.3.1962, applicable w.e.f. 30.4.1962 hence the opposite party No. 1 - establishment will certainly come under the parameter of Section 1(3)(b) of the Act, 1952.

25. The Appellate Tribunal while passing the order has observed that Section 1(3) (a) and 1(3)(b) will be read independently and cannot be intermixed. There is no denial about the fact but the fact remains that there is a notification issued way back on 7.3.1962 but this has not been taken into consideration by the Appellate authority and merely by interpreting section 1(3)(a) that since opposite party No. 1 - establishment is not coming under the purview of factory as defined under the Act, 1952 and since there is no notification notified by the Central Government has stipulated U/s. 1(3)(b) hence opposite party No. 1 - establishment will be held not to cover under the Act, 1952 but this finding is contrary to the fact as has been stated herein above.

26. The appellate authority has also failed to consider the fact regarding the nature of the activities which was being done in the premises of the opposite party No. 1 - establishment and the fact which was very crystal clear and cannot be ignored that imported coal was being converted into hard coke for industrial purposes for profit motive which itself suggests that the manufacturing process was going on in the establishment and hence opposite party No. 1 - establishment will be said to be a factory within the meaning of section 2(g).

27. So far as finding regarding intent of the legislation to treat a factory as any other establishment then there is no need of sub-section 3 into two parts but the appellate authority has failed to appreciate the fact that Sec. 1(3)(a) stipulates regarding coverage of any establishment which is a factory and section 1(3)(b) conferred power to the Central Government to bring out any establishment by notification power conferred u/s. 4 and in view thereof the Central Government has issued a notification on 7.3.1962 bringing all the trading and commercial establishment under the purview of the Act, 1952 and since the opposite party No. 1 - establishment is coming under the purview of factory dealing with manufacturing process hence by virtue of the notification dtd. 7.3.1962 the opposite party No. 1 will be said to be covered under the Act, 1952.

28. In view of the totality of the facts and circumstances as stated hereinabove the order passed by the Appellate Authority is not sustainable and hence quashed.

29. Accordingly the consequential order shall be passed by the competent authority in accordance with law.