
(1998) 12 OHC CK 0023
In the Orissa High Court
Case No : O.J.C. No. 6620 of 1997

Sri Mayur Biscuit Co. (P) Ltd.

APPELLANT

Vs

Regional Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 08-12-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 16, 16(1), 7A, 7A(1)

Citation : (1999) 81 FLR 581 : (1999) 2 LLJ 163

Hon'ble Judges : Susanta Chatterjee, J; P.K. Misra, J

Bench : Division Bench

Advocate : D. Mohanta, for the Appellant; P.K. Khuntia, for the Respondent

Judgement

P.K. Misra, J.—The petitioner has filed this application seeking for a direction that it is entitled to the infancy protection u/s 16 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act") and for direction to opposite party No. 1 not to proceed with the inquiry u/s 7A of the said Act before disposal of the objection filed by the petitioner as per Annexure 3.

2. The petitioner is a Private Limited Company. It purchased through auction the unit previously known as M/s. Konark Biscuits Pvt. Ltd. which has been seized by the Orissa State Financial Corporation (hereinafter referred to as the "OSFC"). Thereafter, it obtained registration from the District Industries Centre, under the Orissa Sales Tax Act and Central Sales Tax Act and under the Factories Act and went ahead with the renovation of the Unit which had remained idle for a long period. The petitioner- Company started its production in October, 1994. On July 4, 1996 it received a notice from the Regional Provident Fund Commissioner (opposite Party No. 1) as per Annexure 2 wherein it was intimated that the petitioner Unit had been brought under the purview of the Act and the Schemes framed thereunder with effect from October 31, 1994 and a Code number had been allotted. On receipt of the said notice, the petitioner filed objection as per

Annexure 3 wherein it was indicated that the petitioner-Company was entitled to the infancy protection as envisaged u/s 16 of the Act. Thereafter, fresh notice was served on November 18, 1996 as per Annexure-4 on the petitioner-company to show cause as to why the petitioner shall not be prosecuted u/s 14 of the Act. The petitioner was also called upon to submit records for determination of the amount of contribution. Thereafter, the petitioner was served with summons issued by opposite party No. 1 indicating that inquiry u/s 7A of the Act shall be held and the petitioner- Company was directed to remain present. After receiving the said notice, the petitioner replied that its earlier objection dated August 10, 1996 was yet to be disposed of and as such, it was not possible on the part of the petitioner to participate in the inquiry u/s 7A of the Act. The petitioner's representative also personally appeared before the authority and reiterated the stand that the petitioner was entitled to the infancy protection. However, the petitioner-Company was called upon to produce the records for determination of its liability. Thereafter the petitioner has filed this writ application for the reliefs already indicated. It is contended in the writ application that the petitioner-Company is entitled to the protection as envisaged u/s 16(1)(d) of the Act and till the objection filed by the petitioner claiming the protection u/s 16(1)(d) is disposed of, opposite party No. 1 has no jurisdiction to fix the liability u/s 7A of the Act, nor the power to initiate any action u/s 14 of the Act. It is also asserted that the petitioner is entitled to the protection u/s 16(1)(d) of the Act.

3. Opposite party No. 1 in its counter affidavit has stated that the petitioner Company being a transferee the previous owner, its liability to pay contribution must be taken to be in continuation of the liability of the old establishment. It has been contended that the subsequent change of ownership would not start a fresh date of establishment of the factory for the purpose of Section 16(1)(d) of the Act.

4. Section 16(1)(d) of the Act provides that the Act shall not apply to any establishment newly set up until for a period of three years from the date on which such establishment is set up. Relying upon the decisions reported in *The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry*, *Jagannath Sahu v. The Regional Provident Funds Commissioner, Bhubaneswar* 1988 (1) O.L.R. 201 and *Konchada Lakshminarayana Subudhi & Sons v. The Regional Provident Fund Commissioner Orissa* 68 1989 C.L.T.844 the learned counsel for the petitioner-Company states that the petitioner-Company is entitled to the protection as envisaged u/s 16(1)(d) of the Act and the petitioner-Company should not be taken to be a continuation of the previous establishment. This submission is resisted by the counsel for the opposite party No. 1, who relying upon the decision reported in *Sayaji Mills Ltd. v. Regional Provident Fund Commissioner* (1985 1 LLJ 288) (SC) submits that merely because there had been stoppage of production for some period and the Unit was subsequently purchased by the petitioner it cannot be said that there is a new establishment for the purpose of Section 16(1)(d) of the Act.

5. The question as to whether the petitioner-Company is to be considered as a new establishment and entitled to infancy protection as envisaged u/s 16(1)(d) of the Act for a period of three years from the date of its establishment, is dependent upon the determination of the question as to whether the petitioner-Company can be considered to be a new establishment depending upon the facts and circumstances of the case. The petitioner has approached this Court at a stage when it has received a notice u/s 7A of the Act. The petitioner has filed an objection indicating that it is entitled to the protection u/s 16(1)(d) of the Act for a period of three years, but admittedly the said objection has not been disposed of Section 7A(1) of the Act provides as follows-

"7A Determination of moneys due from employers-

(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,-

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the Family Pension Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary."

6. From the provisions contained in Section 7A(1)(a) it is clear that if any dispute arises regarding the applicability of the Act, jurisdiction has been vested on the Regional Provident Fund Commissioner to decide such issue. Sub-section (3) of Section 7A provides that no order under Sub-section (1) shall be made unless the employer concerned is given a reasonable opportunity of representing his case. Any order passed by the authority u/s 7A(1) of the Act is appealable u/s 7(1) of the Act which inter alia, provides that any person aggrieved by an order passed by any authority under Sub-section (1) of Section 7A may prefer an appeal to the Tribunal against such order. Even otherwise, where no such appeal is preferred, any person aggrieved by an order u/s 7A(1) of the Act may take recourse to the provisions for review, as contemplated u/s 7B. The question as to whether a particular establishment comes under the purview of the Act or is entitled to the protection u/s 16 of the Act is dependent upon certain factual aspects. Whether the Act is applicable to an infant industry as envisaged u/s 16(1)(d) of the Act is also a question which can be determined u/s 7A(1)(a) of the Act. Section 16(1)(d) of the Act reads as follows:-

"16. Act not to apply to establishments belonging to Government or local authority and also to infant factories.

(1) This Act shall not apply-

(d) to any other establishment newly set up, until the expiry of a period of three years from the date on which such establishment is, or has been, set up.

Explanation - For the removal of doubts, it is hereby declared that an establishment shall not be deemed to be newly set up merely by reason of a change in its location."

In other words, such a question is also a question as to the applicability of the Act to an establishment. Since Section 7A of the Act specifically provides for determining such issue and there is provision for review or appeal, as the case may be, it is evident that the petitioner has got ample scope for agitating the question now raised before the statutory forum as envisaged in the Act. As observed in the decision reported in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, Article 226 of the Constitution is not meant to short-circuit or circumvent statutory procedures. It is only where the statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, the extraordinary jurisdiction under Article 226 of the Constitution may be invoked by-passing the statutory remedy available. However, where the statute itself provides for an efficacious, alternative remedy, the High Court should not interfere in exercise of jurisdiction under Article 227 of the Constitution, particularly when some disputed questions of fact are to be determined. One of the prayers of the petitioner is to issue a direction to opposite party No. 1 not to proceed with the proceeding u/s 7A until deciding about the protection available to the petitioner u/s 16(1)(d) of the Act. As a matter of fact, in view of the specific language in Section 7A of the Act, there cannot be any doubt that before determining the amount due from the employer, as envisaged in Section 7A(1)(b) of the Act, the concerned authority has to decide the dispute relating to the applicability of the Act, as envisaged in Section 7A(1)(a) of the Act. The very fact that the petitioner after receiving the notice has filed objection claiming the protection u/s 16 of the Act, opposite party No. 1 is required to determine such question. However, to clear any possible confusion in the matter and to allay the apprehensions of the petitioner, it is specifically directed that while deciding about the liability, as envisaged in Clause (b) of Section 7A(1) of the Act, the Regional Provident Fund Commissioner is required to determine the question of protection available u/s 16(1)(d) of the Act, as claimed by the present petitioner, and the petitioner shall be afforded reasonable opportunity to bring all the materials on record in support of its contention and the matter has to be decided by opposite party No. 1 in accordance with law. The petitioner may file any further written statement within a period of one month and thereafter it shall be given opportunity to produce all relevant materials including the documents, if any, in support of its contentions.

7. Subject to the aforesaid direction, the writ application is disposed of. There will be no order as to costs.

Susanta Chatterjee, J.

I agree.