
(2015) 09 OHC CK 0049
In the Orissa High Court
Case No : O.J.C. No. 17347 of 1997

Subhendu Kumar Deo

APPELLANT

Vs

Regional Provident Fund Commissioner, Orissa

RESPONDENT

Date of Decision : 08-09-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 149 FLR 98 : (2016) 1 ILR (Ori) 190

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

Bench : Single Bench

Advocate : Srikanta Ku. Nayak (1), A.K. Baral, K. Ray and S.K. Nayak, for the Appellant; Deba Ranjan Ram, Basanta Ku. Jena and Jay Prakash Raut, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.N. Prasad, J—Heard learned counsel for the petitioner and learned counsel appearing for the Regional Provident Fund Commissioner.

2. In the present writ petition, the petitioner has challenged the order passed under Section-7-A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 by the Regional Provident Fund Commissioner, Orissa on 30th June, 1997 determining a sum of Rs. 14,59,785.00 upon M/s. Orissa State Housing Board, Jeypore Division, Jeypore for the period from 1987 to 1991.

3. Brief facts of the case is that the petitioner-Board was served with a notice to show cause on 08.11.1996 as to why action shall not be taken for contravening the provisions of E.P.F. and M.P. Act, 1952 (hereinafter referred to as 'the Act, 1952') while the petitioner was waiting for the show cause reply to show cause to be given on the very day issued notice under Section 7(A) of the Act directing the petitioner to attend the enquiry on 29.11.1996 to determine the dues towards payment of provident fund contribution, payment of family pension fund contribution, administrative charges, Employees Deposit linked Insurance,

Administrative charges etc for the period from 1987 to 1991.

4. After receipt of notice, the authorised representative of the petitioner-Board appeared before the opposite party No. 1 but without giving adequate opportunity and without applying judicious mind held that the petitioner is liable for payment of Rs. 14,59,785.00 towards provident fund, Employees Deposit Linked Insurance contribution, F.P. contribution, Administrative Charges etc. and accordingly a demand notice to that effect has been issued which is impugned in this instant writ petition.

5. Ground of challenge is that the opposite party No. 1 without waiting for show cause, issued notice under Section 7(A) of the Act, 1952. Hence the entire action is without any application of mind because of the reason that when liability to make contribution under the Act is disputed the enquiry under Section 7(A) will not be maintainable, the authorities have determined the amount without scrutinising the complete records of the case.

6. The petitioner-Board is not coming under the definition of 'industry' and the Schedule-1 appended to the Act, 1952 but in spite of all these having been raised before the opposite party No. 1 the same has not been considered and the impugned order has been passed.

7. It has contended that the petitioner - Board is neither a factory nor carries on any manufacturing process. Therefore, the provision of the Act, 1952 is not applicable.

On the other hand, learned counsel for the opposite parties has contested the case by filing detail counter affidavit stating therein that the writ petition is not maintainable on the ground of availability of alternative remedy as provided under Section 7(i) of the Act, 1952. Section 7(A) proceeding has been initiated against the petitioner for compliance of the provisions of the Act for the period from 1987 to 1991. The petitioner has been given several opportunities to put forth his case but no documentary evidence has been produced before the authorities concerned hence the opposite parties has passed an order to determine the dues taking into consideration the labour components as 30% of the actual value to protect and determine interest of the workers.

8. Normal activities of the petitioner - Board is to perform functions under the provisions of the Orissa Development Authority Act i.e., to acquire land and develop the same for sale or to construct houses/flats for sale to public as such activities were to carried out the development work through its regular employees, contractors employees, daily wages employees.

9. The notification dated 31.10.1980 of the Government of India extending the provisions of the Act to the Building and Construction industry attracting the petitioner's establishment. The petitioner has got no scheme or rules by which Contractors employees/daily wages employees who are entitled to the benefits of contributory provident fund or old age pension, a proceeding under Section 7(A)

of the Act was initiated with respect to the Contractors employees and 16 D.L.R. employees engaged by the petitioner for the period from 1987 to 1991 for whom the petitioner has not made any Scheme for old age pension.

10. It has been contended vide order dated 8.1.1994 under Section 19-A of the Act decided to apply to the employees of building and construction industries as per Section 2(f) of the Act with the observation that the Act is meant for extending the workers social security benefits.

11. Referring to the judgment rendered by the Hon"ble Supreme Court in the case of P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others, AIR 1987 SC 447 : (1985) 51 FLR 534 : (1986) LabIC 1410 : (1986) 1 LLJ 88 : (1985) 2 SCALE 860 : (1986) 1 SCC 32 : (1985) 3 SCR 55 Supp : (1986) 1 UJ 706 it has been held by clarifying the definition of 'employees' in the Act which includes not only persons directly engaged by the employer but also the persons employed through a Contractor.

12. It has been contended that in para-30 of the EPF and MP Act, 1952 it provides that the principal employer shall pay both the contributions payable by himself also on behalf of the persons employed by him directly or by him through the contractor.

13. After hearing learned counsel for the parties and perusing the documents on record it is necessary to go through the relevant provisions of the Act, 1952 which has been incorporated by way of welfare legislation to impose duty upon the establishment for compulsory deposits of contributory provident fund in the industries enacting for the purpose that the employees who have not been covered with any statutory rule for extending benefit of pension or contributory provident fund may get some amount to sustain their life after retirement and for execution for the said purpose, the Act, 1952 has been enacted upon to be applicable to every establishment which is a factory engaged in any industry specified in Schedule-1 and to any other establishment employing 20 or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specified in this behalf.

For ready reference provisions of Section 1 of the Act, 1952 is being quoted herein below:-

1. "Short title, extent and application.-(1) This Act may be called the Employees provident Funds and Miscellaneous Provisions Act, 1952.

(2) It extends to the whole of India except the State of Jammu and Kashmir, subject to the provisions contained in Section 16, it applies-

(a) to every establishment which is a factory engaged in any industry specified in Schedule 1 and in which twenty or more persons are employed and

(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".

In pursuance to this provision of an establishment to which this Act applies shall continue to be governed by this Act.

14. The petitioner has raised an objection that the petitioner-Board is not coming under the purview of the Act, 1952 in order to examine this issue it is relevant to focus upon the provisions of Rule 1(b) of the Act, 1952 which provides applicability of the Act in any other establishment employing 20 or more persons or class of such establishments.

15. There is no dispute that the petitioner who is under the OSHB is performing duty for making construction of the house in order to provide house to the low income group or middle income group and for that purpose regular employees working in the construction work is being engaged simultaneously it is also executed through the Contractors by engaging daily wages workers. Considering the nature of work which is being performed by the petitioner-Board which is an establishment created by the State Government it cannot be said that the petitioner is not coming under the definition of 'establishment'.

16. Moreover, the issue is no more res integra in view of the judgment pronounced by the Hon"ble Supreme Court in the case of P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others, AIR 1987 SC 447 : (1985) 51 FLR 534 : (1986) LabIC 1410 : (1986) 1 LLJ 88 : (1985) 2 SCALE 860 : (1986) 1 SCC 32 : (1985) 3 SCR 55 Supp : (1986) 1 UJ 706 wherein at para-12 their lordships has been pleased to hold after taking into consideration the definition of the 'employees' as provided under Section 2(f) of the Act, 1952 by which it has been held that the provision of the EPF and MP Act and the Scheme shall be applicable not only to persons employed directly by the employer but also the persons employed through a contractor.

17. After the judgment laid down by the Hon"ble Supreme Court in the case of M/s. P.M. Patel and sons vrs. Union of India now there is no dispute regarding the recovery of the petitioner under the definition of the establishment.

18. So far as the contention of the petitioner is that without waiting for the show cause (Annexure-2) regarding determination of coverage of the petitioner ? Board a proceeding under Section 7-A has been initiated.

19. It is settled as has been held by the Hon"ble Supreme Court in the case of S.K. Nasiruddin Beedi Merchant Ltd. Vs. Central Provident Fund Commissioner, AIR 2001 SC 850 : (2001) 88 FLR 956 : (2001) 2 JT 432 : (2001) 1 LLJ 840 : (2001) 1 SCALE 496 : (2001) SCC(L&S) 479 : (2001) 1 SCR 692 : (2001) AIRSCW 515 : (2001) 1 Supreme 421 that after placing reliance upon the judgment in the case of Mangalore Ganesh Beedi Works vrs. Union of Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others, AIR 1974 SC 1832 : (1974) 28 FLR 177 : (1974) LabIC 1237 : (1974) 1 LLJ 367 : (1974) 4 SCC 43 : (1974) 3 SCR 221 and in the case of P.M. Patel and Sons and Others

Vs. Union of India (UOI) and Others, AIR 1987 SC 447 : (1985) 51 FLR 534 : (1986) LabIC 1410 : (1986) 1 LLJ 88 : (1985) 2 SCALE 860 : (1986) 1 SCC 32 : (1985) 3 SCR 55 Supp : (1986) 1 UJ 706 that the applicability of the Act to any class of employees is not determined or decided by any proceeding under Section 7-A but under the provision of the Act itself. When the Act become applicable to the employees in question the liability arises.

For ready reference part of Para-6 is being quoted herein below:-

"6. The applicability of the Act to any class of employees is not determined or decided by any proceeding under Section 7-A of the Act, but under the provisions of the Act itself. When the Act become applicable to the employees in question the liability arises. What is done under Section 7-A of the Act is only determination of quantification of the same. Therefore, the contention put forth on behalf of the appeal that liability was attracted only from the date of determination of the matter under Section 7-A of the Act does not stand to reason. Indeed."

20. Thus the submission advanced by the learned counsel for the petitioner is that without waiting for the outcome of the show cause proceeding has been initiated under Section 7-A that cannot be accepted in view of the provision as laid down in the case of S.K. Nasiruddin Beedi Merchant Ltd. (supra).

21. Moreover, the fact is evident from the order also because the petitioner-Board has already been covered under Code No. OR/1743 which also suggests that the petitioner-Board is coming under the parameter of the Act, 1952.

22. In this regard reference to the order dated 08.01.1994 passed under Section 19-A of the Act, 1952 as has been made by the opposite parties in the counter affidavit is worth to be considered which empowers the Government of India to make applicable the provision of the Act and accordingly the building and construction industry has been brought under the purview of the Section 2(f) of the Act which specifically provides the definition of the 'employees' according to which 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. For ready reference Section 2(f) of the EPF and MP Act, 1952 is being 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 or under the standing orders of the establishment".

23. Now which has been raised by the learned counsel for the State is that the writ petition is not maintainable in order to assess this aspect of the matter there is no denial of the fact that there is provision of appeal provided under Section 7-I of the Act, 1952 to approach before the Tribunal. For ready reference the said provision is being reproduced herein below:-

"7-I. Appeals to Tribunal-(1) Any persons 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".

24. In this case the order having been passed on 30.06.1997, the writ petition has been filed on 10.12.1997, the same has been pending for final hearing. Interim order has been passed, affidavits exchanged between the parties.

25. There is no denial in the settled proposition of law that if there is any alternative remedy available under the statute the High Court under Article 226 should not interfere since the same will amount snatching the power of the appellate authority but however, there is no straight jacket formula rather it depends upon discretion of the Court. It is self-imposed restriction upon the High Court.

26. The writ petition was pending before this Court i.e., from 10.12.1997. Thus 18 years has been lapsed. If after lapse of 18 years this Court will not entertain the writ petition on the ground of availability of alternative remedy, after exchanging the affidavits in between the parties it would not be proper in this regard reference of the judgment of the Hon"ble Supreme Court is worth to be seen delivered in the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, AIR 1971 SC 33 : (1970) 78 ITR 26 : (1970) 2 SCC 355 : (1971) 1 SCR 683 wherein their lordships has been pleased to hold which is being quoted herein below:-

"We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on merit."

Further in the judgment in the case of Durga Enterprises (P) Ltd. and another vrs. Principal Secretary, Government of U.P. and others reported in (2004) 13 SCC 665 wherein their lordships has been pleased to pass an order that the writ petition was pending for a long period of thirteen years when summarily dismissed on the ground that there is remedy of civil suit by the High Court.

Their lordships in that judgment were of the view that the High Court should not have dismissed the writ petition without deciding the writ petition on merit.

27. After considering the fact that during pendency of the writ petition, this Court has passed an interim order to maintain status quo with regard to possession of property in question.

28. Taking into consideration the facts as indicated hereinabove and the views of Hon"ble Supreme Court and if the facts of this case will be compared from the views of Hon"ble Supreme Court in the cases indicated above after lapse of 18 years when this Court has entertained this writ petition, passed an interim order to take no coercive action, affidavits has been exchanged, thereafter it would not be proper for this Court to summarily reject the writ petition on the ground of availability of alternative remedy otherwise the question of period of limitation will arise and also in order to avoid further litigation it would be appropriate to decide the case on merit.

29. In view of the above reasons in stead of sending the matter before the alternative remedy of appeal i.e., before the Tribunal, the writ petition is being decided on merit.

30. So far as merit of this case is concerned, admittedly the petitioner-board has deposited the statutory dues in respect of work charged employee upto 10/96 but the petitioner-board has taken service of 16 DLR employees but no deposits have been made in respect of DLR employees on the ground that Head Office is taking care of such employees and reported under Code No. OR/1743 and when a notice was issued to the petitioner-board under Section 7-A of the Act, 1952, appearance was made and it was informed to the authority that appropriate steps were being taken with respect to 16 DLR employees by the Head Office, Bhubaneswar since code has already been opened bearing Code No. OR/1743 and accordingly when directed by the Board to give the certificate regarding details of payment made under Code No. OR/1743, no compliance has been made by the Secretary, OSHB hence the benefit has not been extended to the DLR employees by their Head Office at Bhubaneswar and assessment of dues in respect of these 16 DLR employees was pending hence in order to take conscious decision in this regard has directed the Secretary, OSHB and the representative of this establishment to submit a detail list of contractors by whom the 16 DLR workers have been engaged and accordingly name and address of 24 contractors were furnished. All the contractors have been impleaded as parties out of them only two contractors namely Sri Ramesh Ch. Biswal and Sri Mihir Kumar Jena attended the proceeding on 29.01.1997, filed detail submission whereas other contractors though file Hazira but not presented themselves while the case was taken up. Accordingly the principal employer was also directed to submit a detail statement of payments made to the contractors showing the work order number and the amount paid to the contractors for the said period as the contractors failed to appear before the authority for proper determination of the dues.

31. But the principal employer as well as the contractors failed to arrange the production of records during the pendency of the proceedings, the representative of the Orissa State Housing Board, Bhubaneswar who has appeared on 28.04.1997 was advised to issue suitable instruction to the Executive engineer, OSHB, Jeypore Project Division to represent their case properly and accordingly appropriate direction was issued to the Executive Engineer but not appeared, the case was adjourned on 23.05.1997/26.05.1997.

32. Thereafter, the Project Engineer in-charge had appeared, filed detail list of the contractors, value of agreement, date of commencement of project, date of completion of project and the actual value of work done by the contractors, accordingly the authority since relevant record has not been produced has drawn adverse inference though imposed 30% of the actual work value has been taken as labour component to determine in respect of employees engaged by or through the contractors and accordingly the amount has been assessed.

33. From perusal of the order impugned, there is no dispute after going through the same that Code bearing No. OR/1743 has been opened by the OSHB which has been meant for DLR workers.

34. The opening of the Code itself suggests that the petitioner-Board has come under the purview of the 'establishment' and hence there is no need to conduct further enquiry regarding determination of the fact that whether the Board is coming under the definition of 'establishment' or not.

35. The authority with full substance and after full satisfaction that the petitioner-board is coming under the purview of the establishment as prescribed under the Act, 1952 has initiated proceeding under Section 7-A issued notice to the Board, in spite of several opportunities not appeared, when appeared the Divisional Officer, Orissa State Housing Board, Jeypore Division has requested the authority to implead the Executive Engineer or the petitioner-board, Jeypore Division as party to the proceeding, prayer was allowed then Project Engineer has appeared after several adjournments, disclosed the details of the contractors.

36. Hence, the Court has taken adverse inference, thereafter came to definite finding for determination of claim of the petitioner by taking 30% of the actual work value as labour component and accordingly the amount has been assessed.

37. Scope of judicial interference under the proceeding 7-A of the act, 1952 is very limited because the same depends upon the determination of the value on the basis of evidence produced before the authority.

38. The authorities have tried their level best for production of the documents by granting several adjournment but the documents have not been produced. This has been taken as adverse inference and the amount has been assessed by taking 30% of the labour component.

39. The spirit of the Act is purely beneficiary in nature, in order to sustain the employees who have got no support under any statute so that they may sustain

their life at old age.

40. The petitioner-board being beneficiary of the State Government since constituted by the order passed by the State Government is supposed to follow the provisions of the Act, 1952.

41. From the record and from the reason given hereinabove, there is no dispute that main function of the Board is to construct building to provide it to the needy people of the State in subsidised rate and for that purpose contractors are being engaged who are engaging labourers for execution of the work.

42. The board being the principal employer was duty bound to give proper implementation of the Scheme, the Scheme is that the workers who are working either under the principal employer or through contractors for the purpose of construction of work of the principal employer it is the duty of the board to deposit the statutory contribution as per the Act, 1952 so that it may be disbursed to the workers/employees.

43. There is also no dispute after the pronouncement of the judgment in the case of M/s. P.M. Patel and sons vrs. Union of India (supra) that even in the construction work of a house the work is being taken by the contractors has to deposit the amount in the contributory fund.

44. There is also no dispute after the pronouncement of the judgment in the case of S.K. Nasiruddin Beedi Merchant Ltd. (supra) that the scope of Section 7-A is for determination of the amount and not to determine as to whether a particular body is coming under the definition of the establishment or not since it is to be decided under the Act itself.

45. Hence, taking into consideration all these aspects of the matter and for the foregoing reasons, I find no reason to interfere with the impugned order.

Accordingly, the writ petition is dismissed.