(2017) 12 OHC CK 0063

In the Orissa High Court

Case No : 15152 of 2001

Tata Refractories Employees Co-Opeerative Society Ltd. APPELLANT

Vs

Assistant Provident Fund Commissioner(C) and others RESPONDENT

Date of Decision : 08-12-2017

Acts Referred:

Constitution of India, Article 226 - Power of High Courts to Issue certain writs

Employees Provident Funds and Miscellaneous Provisions Act, 1952, Section 7, <a href=9602

Citation : (2017) 12 OHC CK 0063

Hon'ble Judges : B.R. Sarangi

Bench : SINGLE BENCH

Advocate : A.K. Parija, S.P. Sarangi, B.C. Mohanty, P.P. Mohanty, V. Mohapatra, P.K. Parhi

Judgement

1. Tata Refractories Employees Co-operative Society Limited situated at Belpahar in the district of Jharsuguda, has filed this application challenging order dated 30.10.2001 passed by the Assistant Provident Fund Commissioner (C), Sub-Regional Office, Rourkela-opposite party no.1 under Section 7-A of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "EPF & MP Act, 1952") directing the petitioner to pay a sum of Rs.3,83,951/- as provident fund dues towards (i) the provident fund contribution, (ii) the family pension contribution/EPS'' 95 contribution, (iii) the administrative charges, (iv) the employees deposit linked insurance contribution, (v) the employees deposit linked insurance administrative charges for the period from 11/97 to 9/2001, and a sum of Rs.83,198/- towards interest for the period up to 17.10.2001 @ 12% per annum under Section 7-Q of the Act.

2. The factual matrix of the case is that Tata Refractories Employees Co-operative Society Limited is a society registered under the Orissa Co-operative Societies Act, 1962. The petitioner society is engaged in sale and purchase of groceries, stationery, clothes, Liquefied Petroleum Gas (LPG), etc. The employees

of M/s. Tata Refractories are the customers of the petitioner society. The petitioner society is registered under the Orissa Sales Tax Act, 1947, as well as the Central Sales Tax Act, 1960, and has engaged 21 persons to look after its day to day business. On 24.07.2001, the Assistant Provident Fund Commissioner-opposite party no.1 wrote a letter to the petitioner society stating that the petitioner society is covered under the purview of the EPF & MP Act, 1952 and is directed to deposit the provident fund dues. In response thereto, the petitioner society replied on 18.08.2001 stating inter alia that in view of the provisions contained under Section 16(1) of the EPF & MP Act, 1952, a co-operative society is not covered under the said Act, if it is employing less than fifty persons and is running without the aid of power. It was further stated that the petitioner society, having registered under the Orissa Co-operative Societies Act, 1962 and engaged 21 persons (which is less than 50 persons) and not operated any power driven equipment, is exempted from the provisions of the EPF & MP Act, 1952. On receipt of the same, opposite party no.1 issued summons on 31.08.2001 to the Secretary of the petitioner society under Section 7-A of the EPF & MP Act, 1952 requiring to appear in person or through an authorized representative on 24.09.2001 to adduce evidence and to produce the documents for conducting enquiry and determining the amount due from 11/97 onwards. In compliance of the same, the Secretary of the petitioner society appeared before opposite party no.1 on 24.09.2001, but could not be examined and the matter was adjourned to 04.10.2001. On that date, the matter was again adjourned to 17.10.2001, when the Secretary appeared before opposite party no.1 and reiterated the stands, as were taken in the reply. But opposite party no.1, without appreciating the stands taken by the petitioner and examining the fact in proper perspective, passed the impugned order dated 30.10.2001, hence this application.

3. Mr. V. Mohapatra, learned counsel appearing on behalf of Mr. S.P. Sarangi, learned counsel for the petitioner contended that in view of the provisions contained under Section 16(1)(a) of the EPF & MP Act, 1952, the petitioner society does not come within of purview of the said Act and, as such, opposite party no.1 has no jurisdiction to pass the order impugned, consequentially seeks for quashing of the same. In support of his contention he has relied upon the judgment in Cuttack Development Authority v. Regional Provident Fund Commissioner, 2009 (Supp.II) OLR-447 and Orissa State Cooperative Union Ltd. v. Regional Provident Fund Commissioner, 2012 (135) FLR 686.

4. Mr. P.K. Parhi, learned counsel for opposite party no.1, while justifying the impugned order, contended that the petitioner establishment is squarely covered under the provisions of the EPF & MP Act, 1952 and, as such, is liable to pay the demand raised. It is further contended that the petitioner society has installed refrigerators in canteen and in its retail outlets, such as medicine store and cold-drink shops, besides other electrical appliances/gadgets that are required to run such business establishment including fans and lights. As such, it can be safely construed that the establishment is running with the aid of power and, therefore, liable to pay the provident fund as per the provisions contained under EPF & MP

Act, 1952. It is further contended that the order passed under Sections 7-A and 7-Q is appealable and, instead of doing so, the petitioner society should not have approached this Court invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. Therefore, the writ petition is liable to be dismissed in view of availability of alternative remedy. To substantiate his contention, he has relied upon the judgment in Mansa Nagrik Sahakari Bank Ltd. v. Regional Provident Fund, (2005) 2 GLR 1592.

5. Having heard Mr. V. Mohapatra, learned counsel for the petitioner and Mr. P.K. Parhi, learned counsel for opposite party no.1 and pleadings between the parties having been exchanged, with the consent of the learned counsel for the parties, this petition is being disposed of finally at the stage of admission.

6. In view of the pleaded facts and rival submissions made by learned counsel for the parties, the piquant question that arises for consideration is whether the petitioner society comes within the purview of the provisions of EPF & MP Act, 1952 and if so whether it is entitled to pay the EPF dues for the employees engaged in the petitioner society.

7. For just and proper adjudication of the case, it is necessary to refer to the provisions of Section 16(1)(a) of the EPF & MP Act, 1952, which read thus: "16. Act to apply to certain establishments - (1) This Act shall not apply- (a) to any establishment registered under the Co-operative Societies Act, 1912 (2 of 1912), under any other law for the time being in force in any State relating to co-operative societies, employing less than fifty persons and working without the aid of power"

In order to appreciate the aforementioned provisions, it is also necessary to refer to clauses (b) and (c) of the said sub-section which exempt establishments set up by Central/State Government or under Acts of Parliament or State Legislature, provided the employees of such Government/statutory establishment are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits. While Section 17 confers power on the appropriate Government to grant exemption to an establishment with or without conditions if the Rules for such contributions to the Provident Fund and the benefits in the nature of Provident Fund, Pension or Gratuity are not less favourable to employees of such establishments than the rates of provident fund/ benefits provided under the Act, the only other establishment which is entitled to exemption as a matter of right under the provisions of the Act is an establishment which is a co-operative society employing less than 50 persons and working without the aid of power as provided in clause (a) of Section 16(1).

8. The analysis of the above provision clearly indicates (1) an establishment must be registered under the Co-operative Societies Act; (2) have employed less than 50 persons; and (3) working without the aid of power. If all these three conditions are satisfied on the materials available on record, then it is to be

construed that the EPF & MP Act, 1952 will not be applicable and, consequentially, the authority will have no jurisdiction to pass an order for payment of any provident fund amount as demanded by the impugned order in Annexure-5.

9. The fact, that the petitioner society has been registered under the Orissa Co-operative Societies Act, 1962 and that it has engaged less than 50 persons, is not disputed. But it is only to be seen whether the petitioner society works with or without the aid of power. As per the materials available on record, the petitioner society is engaged in the sale and purchase of groceries, stationery, clothes, LPG and the employees of M/s. Tata Refractories are its customers. The said society is also registered under the Orissa Sales Tax Act, 1947 and the Central Sales Tax Act, 1960. Merely because some refrigerators have been installed to chill the cold drinks, it cannot be construed that the petitioner society has been running with the aid of power.

10. In dictionary the word "aid" has been defined as to support, help or assist. So installation of refrigerator at a place, where sale and purchase of articles like grocery, stationery, clothes, LPG etc, are undertaken, cannot be said to be running with the aid of power. Opposite party no.1, in its impugned order, has come to a finding that use of electricity for light, fan and refrigerator comes within the meaning of expression "aid of power" and, therefore, the provisions of the EPF & MP Act, 1952 are applicable, for which the petitioner society is not exempted in view of the provisions under Section 16(1) (a) of the EPF & MP Act, 1952. Such finding of opposite party no.1 is erroneous and thoroughly misconceived, in view of the fact that mere consumption of electricity for the purpose of light, fan and refrigerator cannot be construed that the establishment runs with the aid of power. The further contention raised that the establishment in question has engaged more than 20 employees and thus does not come under the purview of Section 16(1)(a) of the Act, is also cannot sustain in the eye of law in view of the fact that the Commissioner has lost sight of the fact that the establishment is a society registered under Orissa Co-operative Societies Act, 1962 and if it has engaged less than 50 persons then it is exempted under Section 16(1)(a) of the EPF & MP Act, 1952. In view of such position, the order so passed by opposite party no.1 is without jurisdiction. Therefore, this Court is of the view that the petitioner should not be relegated to alternate forum when the authority has no jurisdiction to pass the order impugned.

11. In Orissa State Co-operative Union Ltd. (supra), this Court taking into consideration the ratio decided in Cuttack Development Authority (supra) held that the petitioner-Orissa State Co-operative Union Ltd. is exempted from the application of the provisions of clause (b) of sub-section (1) of Section 16 of the EPF & MP Act, 1952.

12. So far as applicability of the Division Bench judgment in Mansa Nagrik Sahakari Bank Ltd. (supra) is concerned, it has been decided on its own facts and circumstances which are not akin to the case at hand and, as such, the same

is not applicable to the present context.

13. In view of legal and factual discussions made above, this Court is of the considered view that the impugned order dated 30.10.2001 in Annexure-5 passed by the Asst. Provident Fund Commissioner under Section 7-A of the EPF & MP Act, 1952 cannot sustain in the eye of law being without jurisdiction. Furthermore, the provisions contained under Section 16(1)(a) of the EPF & MP Act, 1952 being squarely applicable to the petitioner society, it is exempted from payment of any provident fund dues. As a result therefore, the order so passed in Annexure-5 dated 30.10.2001 is liable to be quashed and is accordingly quashed.

14. The writ application is accordingly allowed. No order as to cost.