

(2016) 04 OHC CK 0028

In the Orissa High Court

Case No : Writ Petition (Civil) No. 29523 of 2011

The Exe. Engineer, Right Canal Divn. No. II

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 05-04-2016

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(f), 7A

Citation : (2016) 2 ILRCuttack 422

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

Bench : Single Bench

Advocate : Miss Sanjeebani Mishra, Addl. Standing Counsel, for the Petitioner; M/s. Prasanna Ku. Parhi and S.S. Mishra, Advocates, Mr. Samarendra Mohanty, Intervener, for the Opposite Parties

Final Decision : Dismissed

Judgement

S.N. Prasad, J.—This writ petition is against the order passed by the EPF Appellate Tribunal, New Delhi dated 27.07.2010 in A.T.A. No. 827(10) of 2005 by which the appeal preferred by the petitioner has been dismissed.

2. Facts of the case as has been pleaded by the petitioner in the writ petition is that the Rengali Right Canal Division No.II comes under the control of the Chief Engineer and Basin Manager, which is a division under the Water Resources Department, Government of Orissa and look after the work of Right Canal System of Rengali Irrigation Project under its territorial jurisdiction. This Division has permanent regular employees, temporary regular employees as well as work charged employees besides NMR/Casual employees. NMR employees are employed by the petitioner establishment according to the workload of the Division.

In order to regulate the service condition of the work charged employees rules have been framed but no rule has been framed governing service condition of NMR employees. A notice under section 7A of the Employees Provident Fund and

Miscellaneous Provisions Act, 1952 has been issued by the Regional Fund Commissioner, Bhubaneswar (hereinafter referred to as "the Act, 1952") directing the petitioner-establishment to show cause as to why legal action should not be initiated against the petitioner-establishment for contravening the provisions of the Act for not depositing the EPF dues for the NMR employees of the division for the period from 11/1980 to 2/1996.

The petitioner in terms of the show cause notice had appeared before the Regional Provident Fund Commissioner and submitted reply stating therein that the provisions of the Act, 1952 is not applicable to the NMR/casual employees of the petitioner-establishment because there was no notification to bring the establishment/Division of the Executive Engineer within the ambit of the Act as required under section 1(3) of the Act, 1952.

It has been contended that their daily wages workers are getting fixed amount as contemplated under the act, but the opposite party no. 1 without considering the point raised, has adjudicated applicability of the Act bringing the petitioner-establishment within the purview of the act with a direction to pay contribution amount on different heads vide order dated 6.8.1996, accordingly notice of demand was issued on 7.8.1996 demanding amount of Rs. 17,21,327/-.

3. The State Government being aggrieved filed writ petition before this Court being O.J.C. No. 9764 of 1997 and this Court vide order dated 06.08.1996 permitted the petitioner to withdraw the writ petition to prefer an appeal under section 7A of the Act, 1952, petitioner had preferred appeal bearing No. ATA/193(10) of 2000 before the EPF Appellate Tribunal, New Delhi and the Appellate Tribunal decided the case vide order dated 14.12.2000 and the Appellate Tribunal remitted the matter before the original authority to determine the dues as per the guideline. In view thereof the Regional Provident Fund Commissioner initiated a fresh proceeding on the premises that the Act is applicable and amount to be paid was only to be calculated and thereafter final order was passed calculating the dues. Petitioner again approached this Court vide W.P.(C) No. 12940 of 2003 challenging the order dated 14.12.2000 and the notice dated 15.4.2002 but again this Court has given liberty to the petitioner-establishment to file appeal before the Appellate Forum as provided under section 7(1) of the Act and accordingly appeal was preferred which was dismissed vide order dated 27.07.2010 which is challenged in this writ petition.

4. Ground taken by the petitioner assailing the order passed by the Appellate Authority is that the Act, 1952 is not applicable and the establishment is not coming under the purview of the EPF Act, there is no notification as required under section 1(3) of the Act, 1952, as such it was contended before the Appellate Authority that when applicability of the Act itself was disputed petitioner-establishment is not liable to deposit statutory amount, hence not committed any offence contrary to the Act, 1952.

Learned counsel for the petitioner has submitted that he has not been provided

with adequate opportunity of being heard and to demonstrate this argument Annexure-2 has been referred to.

5. Although notice has been issued to the parties but no counter affidavit has been filed. But however, it has been submitted on behalf of learned counsel represent the opposite parties that the NMR/DLR employees are coming under the purview of the definition of as provided under section 2(f) of the Act, 1952. It has been stated that since the Act, 1952 is Social Welfare Legislation which has been made to protect interest of poor workers and provide them the Employees Pension/Provident Fund and of the miscellaneous benefits to the employees who are working in the unorganized sectors, hence Welfare Legislation is to be liberally constituted.

Petitioner has preferred an appeal before the Appellate Tribunal and the matter has been remitted before the original authority to decide the dues and accordingly the original authority has adjudicated the dispute and quantified the dues which the petitioner-establishment is liable to pay against the statutory deposit as required for the period in question.

It has been contended that the NMR/DLR workers are engaged by this establishment to perform duties and such establishment is under coming under the purview of the Act, 1952.

6. Heard learned counsel for the parties and perused the documents on record.

7. Specific case of the petitioner is that the petitioner-establishment is not amenable to the jurisdiction of the Act, 1952 and as such petitioner-establishment is not liable to make any statutory contribution or deposit in terms of the Act, 1952.

8. In order to substantiate this argument it has been contended by learned counsel for the petitioner that NMR/DLR employees working under the petitioner-establishment is not coming under the purview of the Act, 1952, hence the proceeding initiated under section 7A of the Act, 1952 is without any jurisdiction.

It has further been contended that there is no notification as required under section 1(3) of the Act, 1952. In order to substantiate the argument it is necessary to see the provisions as contained in Section 1(3) which is being reproduced herein below.

"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-I 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:

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."

From perusal of the statutory provisions it is apparent that subject to the provisions contained in section 16, the Act will be applicable 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 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.

9. Provisions of Section 16 of the Act, 1952 is also needs to be referred which provides non-applicability of the Act to certain establishment is being reproduced herein below.

"Act not to apply to certain establishments- (1) This act shall not apply-

(a) to any establishment registered under the Cooperative Societies Act, 1912 (2 of 1992), or under any other law for the time being in force in any State relating to cooperative societies, employing less than fifty persons and working without the aid of power; or

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees 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; or

(c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits.

(2) If the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt whether prospectively or retrospectively, that class establishment from the operation of this Act for such period as may be specified in the notification."

From perusal of the provisions of section 16 it is apparent that the petitioner-establishment is not coming under the parameter of the provisions of section 16 of the Act, 1952 as because it is admitted case of the petitioner that the petitioner-establishment being Water Resources Department of the State Government is meant for construction work, implied meaning would be that the department has been established by the State Government for construction purposes.

10. Provision of Section 2(f) of the Act,1952 which defines "employee" which needs to be referred to which is being reproduced herein below.

"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."

From perusal of the definition "employee" it is evident that employee has been defined that a 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 get his wages directly or indirectly from the employer in connection with the work of the establishment. At this juncture, it needs to be referred to the definition of "exempted employee" as provided under Section 2(ff) which implies that an employee to whom a Scheme or the Insurance Scheme, as the case may be, would, but for the exemption granted under section 17, have applied, but it is specific case of the petitioner-establishment that NMR/DLR who are being engaged in the department for construction work being not a regular employee or the work charge employee, hence NMR/DLR employees will not come under the definition of section 2(ff) of the Act,1952.

The Act also provides giving therein the list as contained in Section 1(3)(b) bringing the factory/establishment under the purview of the Act, to that effect the Central Government has also issued notification on 31.10.1980 being the building and construction work under the purview of the Schedule-I.

In this connection, judgment referred by the Hon"ble Apex Court in the case of M/s P.M. Patel & sons and others, v. Union of India and others reported in AIR 1987 S.C. 447 needs to be referred to wherein their Lordships of the Hon"ble Apex Court while interpreting definition of "employee" has been pleased to hold at paragraph-8, relevant part is being quoted.

"The real question is whether the home workers are entitled to that benefit. Clause (f) of Section 2 of that Act defines an "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, employed by or through a contractor in or in connection with the work of the establishment." It will be noticed that the terms of the definition are wide. They include not only persons employed directly by the employer but also persons employed through a contractor. Moreover, they include not only persons employed in the factory but

also persons employed in connection with the work of the factory. It seems to us that a home worker, by virtue of the fact that he rolls beedis, is involved in an activity connected with the work of the factory. We are unable to accept the narrow construction sought by the petitioners that the words "in connection with" in the definition of "employee" must be confined to work performed in the factory itself as a part of the total process of the manufacture."

Thus there may be dispute about the fact by taking into consideration the definition of employee under Schedule-1 containing construction work by virtue of notification issued by the Central Government under section 1(3)(b) of the Act,1952 that NMR/DLR employee is employee within the meaning of the Act,1952.

11. So far as the contention of the petitioner that there is no enquiry having been conducted under section 1(3)(a) of the Act,1952 is concerned, there is no force in this argument for the reason that the Central Government has issued notification bringing the establishment under the purview of Schedule-I as per the notification dated 31.10.1980 by which building construction has been brought under the purview of Schedule-I as per Section 1(3)(a) of the Act,1952 and since the petitioner-establishment being a Government department established for construction work for irrigation and other things hence it will be covered under this notification, hence there is no need to take any further enquiry in view of the statutory provision contained in Section 1(3)(a) which stipulates that every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed and as per the provision of Section 16 of the Act,1952 the petitioner-establishment is not coming under Section 16 of the Act, 1952.

12. In view of the specific definition of "employee" given U/s. 2(f) of the Act, 1952 it is evident that any worker working directly or indirectly for the establishment is said to be an employee. The learned Tribunal after taking into consideration this aspect of the matter and also considering the nature of the work performed by the NMR employees and comparing it with the definition of the "employee" given under the statute has come to a definite finding that if the work is being discharged by a worker in connection to the work of the establishment which means that there must be nexus between the establishment and the work of the employee which should be relevant for the purpose of establishment though it may be loose connection.

13. Learned Tribunal after taking into consideration the judgment rendered in case of Royal Talkies v. ESIC reported in AIR 1978 SC 1478 wherein it has not been disputed that the NMR were working in connection with the work of the establishment so they are the employees of the establishment.

14. Learned Tribunal has also taken into consideration regarding the statutory provision as contained in Section 1 Clause 4 which required issuance of notification to cover an establishment relates to voluntary coverage. But this is

not a case of voluntary coverage and as such Section 1(4) is not applicable.

15. So far as the contention raised by learned counsel for the petitioner that she has not been heard, but the submission is contrary to the material available on record as because the petitioner being appellant before the authority has all along been represented by her counsel and on 27.7.2010 when the case was fixed for order, an application was filed and the same has rightly not been taken into consideration. But from the order it appears that petition for adjournment has been filed on 27.7.2010, the date when the order was passed by the learned Tribunal which suggests that the case was ripe for passing order and as such the learned Tribunal has rightly not given adjournment considering the fact that the matter pertains to the beneficial legislation and also considering the fact that the petitioners are adopting lingering attitude to deprive the benefit of the Act to its beneficiaries.

16. Learned Tribunal keeping in view of all these aspects of the matter has come to a definite finding that no illegality has been committed by the authority in deciding the application U/s.7-A of the Act, 1952.

17. In view of the foregoing discussions there is no force in the argument of learned counsel represent the petitioner. Accordingly, the case is dismissed being devoid of merit.