HIGH COURT OF ORISSA : CUTTACK.

<u>WPC(OAC) No. 1961 of 2016</u>
(in the matter of an application under
Articles 226 & 227 of the Constitution of India, 1950
being converted by virtue of transfer of Original Application
under Section 19 of the Administrative Tribunals Act, 1985)

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TRINATH CHHATRIA
KHIRA BISOI
BALARAM MAJHI
S. MUNNIAMMA
M. CHINA RAO
S. RAVANA
S. BALIAMMA
K. PAIDIRAJ
B. GURULU
M. RAMASWAMY
PREMANANDA HARIJAN … ***Petitioners***

Mr. Swapnil Roy, Advocate
for the petitioner

-versus-

STATE OF ODISHA & OTHERS … ***Opposite Parties***

Mr. Manoj Kumar Khuntia,
Additional Government Advocate
for the Opposite Party Nos. 1 to 4
Mr. Sishir Sundar Mohanty, Advocate
for the Opposite Party No.5

CORAM:

MR. JUSTICE MURAHARI SRI RAMAN

<u>ORDER</u>
08.08.2022

This matter is taken up by virtual/physical mode.

2. Assailing Office Order bearing No. 659, dated 7th April, 2016 of the Executive Engineer, Upper Indravati Irrigation Quality Control Division, Khatiguda in the district of Nabarangpur *vide* Annexure-1, seeking to recover the share of contribution towards Employees' Provident Fund (for short, "EPF") discharged by the Government pertaining to the period March, 1996 to February, 2012 from the petitioners-employees, the Petitioner has approached the learned Odisha Administrative Tribunal by way of an Original Application bearing No.1961(C) of 2016 under Section 19 of the Administrative Tribunal Act, 1985, praying therein for grant of following reliefs:

> *"(i) Let the impugned Office Order dated 07.04.2016 issued by the Respondent No.4 directing recovery of the amount from the applicants towards their share of the EPF dues vide Annexure-1 in the facts and circumstances of the case be declared as illegal and as such liable to be set aside; and*
>
> *(ii) Let any other relief/reliefs be passed to which the applicant entitled to."*

3. It is claimed that the petitioners, engaged as Nominal Muster Roll (NMR) employees in the Upper Indravati Irrigation Quality Control Division, Khatiguda in the district of Nabarangpur, being assigned with individual EPF Account No.OR/3242/***, are covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for brevity hereinafter referred to as "EPF Act"). It is averred that though the petitioners were covered under the said Act, individual EPF Account Number was never allotted to them, nonetheless, it is only when they were brought over to work charged establishment by virtue of an Order dated

20.07.2009 of the opposite party No.2, Engineer-in-Chief, Water Resources Department, Odisha, Bhubaneswar, said Account Numbers were assigned enabling them to make contributions towards EPF dues.

3.1. It is alleged that failure on the part of the employer to furnish statutory returns led to determination of an amount to the tune of Rs.61,22,188/- towards provident fund dues under Section 7A of the EPF Act pertaining to the period from March, 1996 to February, 2012 *vide* Order dated 02.07.2014 passed in 7A Case No. OR/3242/38 of 2013 by the Assessing Officer & Assistant Provident Fund Commissioner, SRO, Berhampur, Odisha.

3.2. In *Executive Engineer, Right Canal Division No.-II, Rengali Irrigation Project Vrs. Regional Provident Fund Commissioner and Others, 2016 (II) ILR-CUT 422,* this Court answering whether NMR/DLR employees working under the petitioner-establishment are coming within the purview of "EMPLOYEE" as defined under Section 2(f) and thereby, the Provident Fund Authority was within his jurisdiction to exercise power under Section 7A of the EPF Act has observed as follows:

> *"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. *** 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. *** 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. ***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.

**** 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.*

Learned Tribunal after taking into consideration the judgment rendered in case of Royal Talkies Vrs. 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.

Learned Tribunal has also taken into consideration regarding the statutory provision as contained in Sec.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 Sec.1(4) is not applicable."

3.3. Be that be, after determination of the provident fund dues from the establishment under Section 7A of the aforesaid Act, the Government has deposited the money which fact is apparent from the following statement contained in Annexure-J enclosed to the counter verified by Executive Engineer, Upper Indravati Irrigation Quality Control Division, Khatiguda-opposite party No.4 *vide* Letter No. 565/EE, dated, Khatiguda the 27th March, 2015 issued to the Regional Provident Fund Commissioner-opposite party No.5, which reads thus:

"In inviting kind reference to the letter cited above I am submitting herewith the Demand Draft bearing No.528103 dated 27.03.2015 for an amount of Rs.61,22,188/- (Rupees Sixty One Lakh Twenty Two Thousand One Hundred Eighty Eight) only for taking further necessary action.

The receipt of the Demand Draft may kindly be acknowledged."

3.4. From the contents of the petition it is gathered that the Office Order dated 7th April, 2016 of the Executive Engineer, Upper Indravati Irrigation Quality Control Division, Khatiguda at Annexure-1 was issued directing recovery of the petitioners-employees' share of the EPF dues. Director, Personnel in the Office of the Engineer-in-Chief, Water Resources, Odisha, Bhubaneswar issued Letter No. ME-EPF-10/09—11044, dated 20.11.2012 (Annexure-3) addressed to All Chief Engineers/Chief Engineers & Basin Managers/All Superintending Engineers/Directors, whereby it has been directed as follows:

"Office of the Engineer-in-Chief,
Water Resources, Odisha, Bhubaneswar.
No. ME-EPF-10/09—11044 Dated, the 20-11-12

From:
Er. B. Mohanty,
Director Personnel.

To
All Chief Engineer/Chief Engineers & Basin Managers/
All Superintending Engineers/Directors

Sub: Recovery of "Employees Share" of EPF contribution from the employees concerned.

Sir,

I am directed to state that it has been the stand of Govt. so far that NMR/DLR employees are not covered under EPF Act. But for enforcing such Act in respect of NMR/DLR employees, Enforcement Officers of EPF Organization are inspecting different divisions and after receipt of report from them, the Assistant Provident Fund Commissioners are assessing dues retrospectively under Sec.7A of the Act & sending "Notice of demand" to the employer to pay the dues. In case of delay, the APFC are issuing "Certificates" to the "Recovery Officers" who are instituting "Certificate Cases" against the employees for liquidation of the assessed amount. Even they forcibly recover this amount by way of attachment of Bank Account of the employer. In order to get rid of such situation, approval of Govt. is being accorded & the amount is deposited.

> ***In this context, it is to state that the assessed dues so deposited consist of both employees' share and employers' share. Thus it would be appropriate to recover 'employees share' from the concerned employees.***
>
> *It is therefore requested that immediate steps may please be taken to recover employees share from the employees concerned, if not recovered in the meanwhile. Since such employees are low paid employees, they may be given liberty to choose mode of recovery like number of installments or any other suitable mode in which it will be recovered from them.*
>
> *Yours faithfully,*
> *Sd/-*
> *Director Personnel."*
>
> *[Emphasis supplied]*

3.5. Therefore, at paragraph 6.11 of the Writ Petition/Original Application, it has been submitted by the petitioner as follows:

> *"That the applicants beg to state that they have no objection to deposit their share of the EPF dues, if the respondents will provide individual EPF Account Number to the applicants for the said period and make further deposit from the date of engagement as NMRs till 31.07.1992. ***"*

4. *Vide* Order dated 18.05.2016, the learned Odisha Administrative Tribunal while issuing notice in the matter, passed the following interim order:

> *"*** So far as prayer for interim order is concerned, no action pursuant to order dated 07.04.2016 (be taken), so far as it relates to the applicant, till filing of counter."*

5. Counter has been filed by the Assistant Provident Fund Commissioner, Legal, Employees' Provident Fund Organisation on behalf of the opposite party No.5-Regional Provident Fund Commissioner wherein it has been asserted as follows:

"4. That the employer (Respondent No.4) issued a Letter dated 07.04.2016 as per Annexure-1 directing for recovery of employees share paid towards Provident Fund contribution from the employees. In this regard it is humbly submitted that the employer M/s. Executive Engineer, Upper Indravati Irrigation Quality Control Division, At/PO Khatiguda, has already been intimated that as per Para 32 of the Scheme the employer cannot direct the employees to deposit the employees share of contribution for the past period.

5. That in view of the above submissions the applicants' grievances have already been mitigated and he has no further claim, hence the Original Application is not maintainable in the eye of law and liable to be dismissed as infructuous."

5.1. Paragraphs 29, 30, 31 and 32 of Chapter-V of the Employees' Provident Funds Scheme, 1952 run as follows:

"29. Contributions.—

(1) The contributions payable by the employer under the Scheme shall be at the rate of ten per cent of the basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any) payable to each employee to whom the Scheme applies:

Provided that the above rate of contribution shall be twelve per cent in respect of any establishment or class of establishments which the Central Government may specify in the Official Gazette from time to time under the first proviso to sub-section (1) of Section 6 of the Act.

(2) The contribution payable by the employee under the Scheme, shall be equal to the contribution payable by the employer in respect of such employee:

Provided that in respect of any employee to whom the Scheme applies, the contribution payable by him may, if he so desires, be an amount exceeding ten per cent or twelve per cent, as the case may be, of his basic wages, dearness allowance and retaining allowance (if any) subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Act;

(3) The contributions shall be calculated on the basis of basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any) actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis.

(4) Each contribution shall be calculated to the nearest rupee, 50 paise or more to be counted as the next higher rupee and fraction of a rupee less than 50 paise to be ignored.

30. Payment of contributions.—

(1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

(2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges.

(3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.

EXPLANATION.—

For the purposes of this paragraph the expression "ADMINISTRATIVE CHARGES" means such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, and in respect of which Provident Fund Contribution are payable as the Central Government may, in consultation with the Central Board and having regard to the resources of the Fund for meeting its normal administrative expenses, fix.

31. Employer's share not to be deducted from the members.—

Notwithstanding any contract to the contrary the employer shall not be entitled to deduct the employer's contribution from the wage of a member or otherwise to recover it from him.

32. Recovery of a Member's share of contribution.—

(1) The amount of a member's contribution paid by the employer or a contractor shall, notwithstanding the provisions in this Scheme or any law for the time being in force or any contract to the contrary, be recoverable by means of deduction from the wages of the member and not otherwise:

Provided that no such deduction may be made from any wage other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable:

Provided further that the employer or a contractor shall be entitled to recover the employee's share from a wage other than that which is paid in respect of the period for which the contribution has been paid or is payable where the employee has in writing given a false declaration at the time of joining service with the said employer or a contractor that he was not already a member of the Fund:

Provided further that where no such deduction has been made on account of an accidental mistake or a clerical error, such deduction may, with the consent in writing of the Inspector, be made from the subsequent wages.

(2) Deduction made from the wages of a member paid on daily, weekly or fortnightly basis should be totaled up to indicate the monthly deductions.

(3) Any sum deducted by an employer or a contractor from the wages of an employee under this Scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted."

5.2. The opposite party Nos.1 to 4 filed counter through the Executive Engineer, Upper Indravati Irrigation Quality Control Division, Khatiguda in the district of Nabarangpur stating therein that:

"5. That, as regards the averments made by the applicants in paras 6.6. to 6.13 of Original Application, it is submitted that the EPF contribution of employee's and employer's share have been collected as per Section 29 of Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The Act clearly stipulates under Section 30(1) that the employer shall, in the first instance pay both the contribution payable by himself, i.e., employees' share and employers' share to the EPF Authority and Section 30(2) stipulates that in respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employees and shall pay to the principal employer. Section 32(1) also stipulate that the amount of a Member's contribution paid by the employer (or contractor) shall be recoverable by means of deduction from wages of the member and not otherwise. As the Executive Engineer has deposited the employees' share from Government Exchequer and there is instruction of the Engineer-in-Chief, Water Resources, Odisha, Bhubaneswar vide his Letter No. 11044 dated 20.11.2012, communicated to this establishment vide Memo No.10107-114 dated 30.11.2012 of Chief Engineer, Upper Indravati Irrigation

> *Project, Khatiguda to recover the employees' share in easy instalments from the concerned employees. So the Executive Engineer acted as per instruction of higher authority. ****
>
> *As regards deduction of un-deducted employees' share were taken hastily without giving sufficient time, in this connection it is submitted that, the applicants are fully aware about the rules of the EPF Act on the day when they lodged complaint before the EPF Authority to initiate proceedings under Section 7A to determine the EPF dues. The employees' share are to be borne by the employees themselves as per instruction of Engineer-in-Chief, Water Resources, Odisha, Bhubaneswar vide his Letter No.11044 dated 20.11.2012. ***"*

5.3. Referring to the principle enunciated by the Hon'ble Supreme Court of India in the case of *Chandi Prasad Uniyal & Ors. Vrs. State of Uttarakhand & Ors., (2012) 8 SCC 417*, it is submitted by the learned Additional Government Advocate that "any amount which is due to be recovered is taxpayers' money" can be recovered at any point of time since that amount has not been collected from the employees-petitioners at the time of depositing the EPF amount and ultimately the petitioners-applicants will get the benefits out of the amount deposited by the Government on their behalf from the taxpayers' money. As the amount has already been paid by the State Government towards employees' share, the employees shall have to pay the said amount to the State.

6. Though Sri Swapnil Roy, learned counsel for the petitioner as also Sri Sishir Sundar Mohanty, learned Advocate for the opposite party No.5-Regional Provident Fund Commissioner argued refuting the contention of the State that the Government is competent to recover the share of the employees' contribution towards discharge of liability on account of EPF for the past periods stemming on the provisions contained in Paragraph 32 of the Employees' Provident Funds Scheme, 1952, in view of clear admission on the part of the petitioner at paragraph 6.11 of the Writ Petition/Original Application (extracted *supra*) and that the opposite parties have received/recovered the amount as determined under Section 7A of the EPF Act, without entering into any controversy, interest of justice would be best served by vacating the interim order dated 18.05.2016 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack.

6.1. Without expressing any view on the question whether the Government is entitled to recover the share of the employees discharged towards EPF as determined under Section 7A of the EPF Act for the past periods, it is open to the petitioner to pay the amount as mentioned in the Office Order dated 07.04.2016 issued by the opposite party No.4 *vide* Annexure-1 in view of concession made at Paragraph 6.11 of the Writ Petition/Original Application.

6.2. The petitioner may, if so advised, approach the competent authority for ventilating its grievance with regard to contributions towards EPF in respect of the periods from the date of engagement as NMRs till 31st July, 1992. The said competent authority may take immediate step in this regard keeping in view the decision rendered by this Court in the case of *Executive Engineer, Right Canal Division No.-II, Rengali Irrigation Project Vrs. Regional Provident Fund Commissioner and Others, 2016 (II) ILR-CUT 422,* and take a decision at the earliest preferably within a period of three months from the date of receipt of certified copy of this order. For this purpose, the petitioner shall submit a representation before the competent authority along with the certified copy of this order within a period of four weeks.

7. With the aforesaid observation and direction the writ petition stands disposed of.

Urgent certified copy be issued as per rules.

(M.S. RAMAN)
JUDGE

AKS High Court of Orissa, Cuttack
August 08, 2022