

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

**OWP no. 959/2003
CMP nos. 1193/2003 & 802/2006
OWP no. 37/2007
CMP no. 41/2007**

Date of Decision:02.06.2009

**State Forest Corporation & Ors Vs.Commissioner Provident Fund & Ors
Divisional Manager and anr Vs.State and Ors.**

Coram:

Mr. Justice J.P.Singh, Judge.

Appearing counsel:

For The Petitioner(s) : Mr. Vipin Gandotra, Advocate.
(In OWP no. 959/2003)
Mr. B. M. Bhardwaj, Advocate.
(In OWP no. 37/2007)

For Respondent(s) : Mr. Abhinav Sharma, Advocate.

i) Whether to be reported
in Press/Journal/Media : Yes

ii) Whether to be reported
in Digest/Journal : Optional.

Provident Fund Commissioner (Enforcement) Jammu, issued various notices to the functionaries of the State Forest Corporation, calling upon it to deposit the contribution, it was required to pay for the workers engaged by the Contractor(s)/Mate(s), of the Corporation, for its work of extraction of timber, under the Jammu and

Kashmir Employees Provident Funds (And Miscellaneous Provisions) Act, 1961. Failure of the Corporation to deposit the contribution, ultimately resulted in initiation of recovery proceedings against it, by the Special Tehsildar (Recovery) Assistant Collector 1st Class, Jammu.

The State Forest Corporation, hereinafter to be referred as the “Corporation”, filed OWP no. 959/2003 seeking quashing of the notices issued by the Special Tehsildar, on a short ground, that despite Corporation’s approaching the Commissioner Provident Fund’s Office, it had not informed it about the names of the workers for whom the contribution was payable, And that the recovery proceedings initiated at the behest of the Commissioner, were bad in law, being in violation of the provisions of Section 8-A of the Jammu and Kashmir Employees Provident Funds (And Miscellaneous Provisions) Act, 1961, hereinafter to be referred as the “Act”.

During the pendency of this writ petition, the Corporation filed another writ petition, OWP no. 37/2007, seeking direction against the Provident Fund Commissioner, not to proceed against it under the provisions of the Act, besides seeking quashing of the recovery notices which the Deputy Provident Fund

Commissioner had issued to it, from time to time, including the final notice of November 10, 2006, directing recovery of an amount of Rs. 6,09,525/- from the Corporation, being the contribution payable by it under the Act.

The case set up by the Corporation, in this writ petition, *inter alia*, is that, in terms of the provisions of the Act, the Corporation was not under any obligation to deposit the contribution for those workers, who had been engaged for corporation's work, by its contractor or mate, and that, its liability to deposit contribution in terms of the Act, extended only to those workers who were its Permanent employees, for whom it had been regularly depositing its contribution with the Provident Fund Commissioner.

The plea which the Corporation has raised in its OWP no. 959/2003, that the Provident Fund Commissioner had erred in omitting to follow the procedure prescribed under Section 8-A of the Act before issuing recovery notice to the Corporation, has been reiterated in this writ petition as well.

The Jammu and Kashmir State Forest Corporation Labour Union and its Chairman/Legal Advisor and

General Secretary, have contested the Corporation's writ petitions saying that the Corporation's plea regarding non-application of the provisions of the Act to the employees, engaged by the Contractor/Mate of the Corporation, was untenable, in that, the Corporation, in terms of the provisions of the Act, was under a statutory obligation to deposit the contribution which was payable to the workers engaged by the Contractor/Mate, for Corporation work, And that the recovery proceedings initiated against the Corporation did not suffer from any error of law.

As common question of law as to the legality or otherwise of the recovery notices of the Commissioner Provident Fund had arisen in these two writ petitions, so both these petitions were heard together and are being disposed of by this common judgment, dealing with the common question of law aforementioned and the question as to the liability or otherwise of the Corporation to pay the contribution under the Act, for the workers engaged by its contractor/mate, which would govern the aforementioned two writ petitions.

The Corporation's learned counsel, in OWP no. 37/2007, Mr. B. M. Bhardwaj, referring to the definition of "basic wages", appearing in Section 2(a) of the Act,

submitted that as the Corporation had not entered into any contract of employment with the workers engaged by its Contractor/Mate, so the Corporation was not obliged to deposit the employers' contribution for the workers.

Appearing for the workers Union, Mr. Abhinav Sharma, on the other hand, referred to the definition of "employee" appearing in Section 2(d) of the Act, to urge that the Corporation was under statutory obligation to deposit the employers' contribution in terms of the provisions of the Act, for the labour which had been engaged by the Contractor/Mate for the Corporation's work.

Mr. Vipin Gandotra, appearing for the Corporation, in OWP no. 959/2003, submitted that the Commissioner had erred in issuing the impugned final notice, without holding inquiry, as required under Section 8-A of the Act, and the proceedings initiated against the Corporation, were thus liable to be set aside and quashed.

Learned counsel for the parties were, however, not at variance that the workers whose employers' contribution is sought to be recovered, in terms of the impugned recovery notices, in the writ petitions, though engaged by the Contractor/Mate, have been doing the

Corporation work, which it had entrusted to its contractors/mates.

I have considered the submissions of learned counsel for the parties and gone through the provisions of the Act.

In order to deal with the questions raised at the Bar, the status of the workers engaged by the Contractors/Mates of the Corporation needs to be examined, and for that purpose regard needs to be had to the provisions of Section 2(d) of the Act which defines the employee covered by the provisions of the Act, in the following terms:-

2-(d) "Employee" means any persons whose services are non-pensionable and 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 establishment."

A bare perusal of the definition of "employee" reproduced hereinabove, reveals that it includes in it even those persons who are employed by, or through a contractor, in connection with the work of an establishment.

The labour engaged by the contractor/mate, who were admitted by the Corporation to be doing its work, thus fall within the definition of the employee in terms of the provisions of the Act. Wages drawn by a worker, may not thus have any relevance in determining his/her status for the purpose of considering the applicability of the provisions of the Act to an employee, seeking deposit of contributions under the Act with the Provident Fund Commissioner.

Mr. Bhardwaj's submission that as the wages payable to the workers would not fall within the definition of basic wages, so the provisions of the Act would not apply to the employers, is thus found to be irrelevant besides being untenable, to determine the status of the employees engaged by the Corporation's Contractors/Mates, for the application of the provisions of the Act.

In terms of the provisions of Section 9-A of the Act, the amount of employer's and employee's contribution payable under the Act, by the contractor, is recoverable by the principal employer/establishment, for whose work the workers are employed, meaning thereby that the Act in the first instance ensures deposit of employer's contribution, as also the employee's contribution, in terms

of the provisions of the Act and the Scheme framed thereunder, and thereafter provides for the recovery of contribution payable by the employer/contractor, by the Principal Employer/establishment.

The Corporation, therefore, appears to be under a misconception that it was not obliged to pay the employer's and employee's contribution of the workers engaged by the contractors/Mates for the Corporation work.

The Corporation cannot thus avoid its liability to deposit employer's contribution and that of the employee's contribution under the Act and the Scheme framed thereunder, in case the contribution of the employee, is not so paid.

Petitioner's learned counsel's submission that the Corporation is not obliged to deposit the employer's and employee's contribution for the workers engaged by the Contractors/Mates, is thus found to be unsustainable, hence rejected.

The next plea of the Corporation that the Commissioner had not complied with the provisions of Section 8-A of the Act before directing the Corporation to deposit the contribution payable by it under the Act, with

him, is, however, found sustainable, in that, before issuing the final recovery notice, the respondents had not complied with the provisions of Section 8-A of the Act, in terms whereof an inquiry needs to be conducted by the Officer empowered to recover the contributions payable under the Act.

Section 8-A(3) of the Act requires the authorized Officer under the Act to give a reasonable opportunity to the employer to represent its case, before determining the money which the employer is liable to pay under the Act. This, however, does not appear to have been done in this case and it was because of this reason that the learned counsel appearing for the Jammu and Kashmir State Forest Corporation Employees Union too had fairly conceded, that the employees would have no objection in case the respondents were directed to hold inquiry, in terms of Section 8-A of the Act and hear the Corporation, before passing final orders for depositing the contributions payable by it, in terms of the provisions of the Act.

Perusal of the notices placed on records indicates that neither any inquiry as contemplated under Section 8-A (1) of the Act had been conducted nor had the

Corporation been heard in terms of Section 8-A (3) of the Act before issuance of the final recovery notices.

The impugned recovery notices in both the writ petitions are, thus, liable to be quashed.

These petitions are, therefore, allowed and the recovery notices impugned in the writ petitions are quashed.

The Provident Fund Commissioner/Deputy Provident Fund Commissioner, is directed to determine the amount payable by the Corporation as employer's/employee's contribution under the Act and the Scheme in force, after holding inquiry and hearing the Corporation in this behalf, in terms of the provisions of Section 8-A of the Act.

The Corporation and the Jammu and Kashmir State Forest Corporation Employees Union are directed to appear before the Deputy Provident Fund Commissioner, Jammu, on June 29, 2009.

(J. P. Singh)
Judge

Jammu
02.06.2009
Anil Raina, Secy.