M/S. ORISSA CEMENT LTD.

v.

UNION OF INDIA

1962

March 14.

(B. P. SINHA, C.J., K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR and T. L. VENKATARAMA AIYAR, JJ.)

Provident Fund—Contract labour—Contribution to provident fund—If and when principal employer liable—Provident Fund Act, 1952 (XIX of 1952), ss. 5, 6, 7—Employees' Provident Fund Scheme, paras. 30, 31, 32, 73A—Notification No. S.R.O. 331 dated January 15, 1958—Notification No. G.S.R. 1467 dated December 2, 1960.

The Central Government under s.5 of the Provident Funds Act, 1952, published a Scheme under the Act for the establishments of the Provident Fund. Paragraph 2(f)(iii) of the Scheme defined "Excluded Employees" meaning employees employed by or through a contractor. Section 6 of the Act and paras. 30 to 32 of the scheme provided for the employer making contribution to the fund and the combined effect of s.6 and paras. 30 to 32 of the Scheme is that the contribution to the Provident Fund is to be 12-1/2% of the basic wages and dearness allowance, that is to be borne equally by the employer and the employee and that the employer is to pay the whole of it, half on his account, and the other half on account of the employee and he is to recoupe himself by deducting it from the wages of the employee. Paragraph 26 of the Scheme provided that every employee in a factory or establishment other than excluded employee shall be regarded to become a member of the fund if he has completed one years continuous service.

The Government by Notification No. S.R.O. 351 dated January 15, 1958, amended Para. 2(f)(iii) of the Scheme, whereby all employees employed by contractor who were directly connected with any manufacturing process carried out in a factory or establishment became entitled to the benefit by the Act. Another Notification No. G. R. E. 1457 dated December 2, 1960 repealed the said para. 2(f)(iii) added a new para. 73A. This amendment had the effect of abolishing the distinction between the workmen employed by the contractors who were directly connected with the manufacturing process in the factory or establishment, and those who were not so connected, all of whom became entitled to the

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benefit of the Scheme. The authorities issued notice on the petitioner to comply with the changes introduced by the amendments.

The petitioner filed petition under Art.32 of the Constitution challenging the validity of the two notifications as unreasonable restrictions and not falling within Art. 19(6) and that they should be struck down as infringing Art. 19(1)(g) of the Constitution.

Held, that the Notification dated January 15, 1958 and December 21, 1960 are unconstitutional and void.

Section 6(1) of the Act is to make the employer liable only for a moiety of the provident fund and while the scheme of 1952 is well designed to carry out this intentions in its application to workmen directly employed, by reasons of the combined operation of paras. 30 and 32, it breaks down in its extension to contract labour by reason of the inapplicability of para. 32. It operates unfairly and harashly on persons who employ contract labour and it further results in discrimination between those who employ contract labour and those who employ direct labour. The scheme therefore cannot be said to be reasonable and must be struck down as not falling within the protection afforded by Art. 19(6).

ORIGINAL JURISDICTION : Petition No. 17 of 1961.

Petition under Art. 32 of the Constitution of India for enforcement of Fundamental Rights.

A. V. Viswanatha Sastri, K. C. Jain and *B. P. Maheshwari*, for the petitioners.

Bishan Narain, Sukumar Ghose and *P. D. Menon*, for the respondent.

1962. March 14. The Judgment of the Court was delivered by

Aiyar J.

VENKATARAMA AIYAR, J.—The first petitioner is a company carrying on business in the manufacture of cement in the State of Orissa and petitioners Nos. 2 and 3 are two of its Directors. They have filed the present petition under Art. 32, challenging the validity of two notifications dated January 15, 1958, and December 2, 1960, issued

by the Central Government under s. 7(1) of the employees' Provident Funds Act. 1952 hereinafter referred to as "the Act". It will be convenient to first set out the relevant statutory provisions bearing on the question. The Act was passed for the purpose of providing for the institution of Provident Funds for the employees in factories and other establishments. Section 5 of the Act, which deals with this matter is as follows :—

> "5. Employees' Provident Fund Schemes.—(1) The Central Government may, by notification in the Official Gazette, frame a Scheme to be called the employees' Provident Fund Scheme for the establishnent of provident funds under this act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply and there shall be established, as soon as may be after the framing of the Scheme, a Fund in accordance with the provisions of this Act and the Scheme.
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> (2) A Scheme framed under sub-section (1) may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in the Scheme.

Section 6(1) which provides for the employer making contribution to the Fund runs as follows :—

> "6(1) The contribution which shall be paid by the employer to the Fund shall be six and a quarter per cent. of the basic wages dearness allowance and retaining allowance (if any) for the time being payable to each of the employees, and the employees contribution shall be equal to the contribution payable by the employer in respect of him

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and may, if any employee so desires and if the Scheme makes provision therefor, be an amount not exceeding eight and one-third per cent. of his basic wages, dearness allowance and retaining allowance (if any):

Provided that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee.

Under s.7 the Central Government may, by notification in the Official Gazette, add to, amend or vary any Scheme framed under this Act. Section 14 prescribes penalties for any contravention of the provisions of the Act or default in compliance with them.

In exercise of the powers conferred by s. 5 of the Act, the Central Government published on September 2, 1952, what is called the Employees' Provident Funds Scheme, 1952. Para 2(f)(iii) of the Scheme defines "Excluded Employees" as meaning the employees employed by or through a contractor. Under Para 3 the provident fund standing to the credit of an employee vests in the authorities constituted thereunder. Para 26 provides that every employee employed in a factory or establishment other than an excluded employee shall be required to become a member of the fund if he has completed one year's continuous service, in the factory or establishment, and there is a proviso that if the employee has actually worked in the factory or establishment for not less than 240 days, he shall deemed to have completed one years continuous service. Paras 30 to 32 deal with contributions to be made by the employer and they are as follows :—

"30. 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, the contribution payable by the member (in this Scheme referred to as the member's contribution)."

"31. 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. (1) The amount of a member's contribution paid by the employer 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 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 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.

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

(3) Any sum deducted by an employer from the wage 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."

The combined effect of s. 6 and Paras 30 to 32 of the Scheme is that the contribution to the Provident Fund is to be 12-1/2 per cent. of the basic wages, and dearness allowance, that it is to be borne equally by the employer and the employee, and that the employer is to pay the whole of it, half on his account, and the other half on account of the employee, and he is to recoup himself by deducting it from the wages of the employee. Such deduction would be possible only when the employer is the person who has to pay wages to the employee and that is why employees employed by or through a contractor were included in the definition of "excluded persons" to whom under Para 26 the Scheme had no application. These employees would be paid by the contractor and the question of deduction of wages by the principal employer, i.e, the person who is in charge of the factory or establishment, will not arise.

It is said that with a view to avoid their contribution under the Act, the employers resorted increasingly to the device of employing workmen through contractors, and the Government accordingly deemed it expedient to amend the provisions of the Scheme so as to secure the benefits thereof to employees who were employed through contractors. To carry out this purpose, a notification was

issued on January 15, 1958 No. S.R.O. 331 substituting for Para 2(f)(iii) of the Scheme as it stood in 1952 the following :—

> "(iii) an employee employed by a contractor in any operation not directly connected with any manufacturing process carried on in the factory or other establishment, or
>
> *Explanation*—In respect of an employee employed by a contractor who is not an excluded employee under this paragraph, the principal employer shall be responsible for complying with the provisions of the Act and the Scheme;"

The result of this amendment was that all employees employed by contractors who were directly connected with any manufacturing process carried on in the factory or the establishment became entitled to the benefits under the Act. On May 11, 1959, Para 26 was suitably amended so as to conform to the notification dated January 15, 1958. Even this notification was felt to be inadequate for achieving the objects of the legislation and therefore in exercise of the powers conferred by s. 7(1) of the Act Government issued a fresh notification No. G.S.R. 1467 on December 2, 1960, whereby it repealed Para 2(f)(iii) as it then stood and added a new Para 73A as follows :—

> "73A. Where an employee is employed by, or through, a contractor in, or in connection with, the work of an establishment, the principal employer shall be responsible for complying with the provisions of the Act and this Scheme in relation to such employee."

This amendment had the effect of abolishing the distinction made by the amendment of 1958 between

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workmen employed by contractors who were directly connected with the manufacturing process in the factory or establishment, and those who were not so connected, all of whom became entitled to the benefits of the Scheme.

The authorities constituted under the Act issued notices to the first Petitioner drawing its attention to the changes introduced by the notifications and asking it to comply with their provisions, to which the management replied pointing out the practical difficulties in the way of implementing them as regards workmen brought in by contractors. A long correspondence followed culminating in a threat by the respondents to take penal proceedings under s. 14 of the Act. Thereupon the petitioners have filed the present petition, raising the question of the constitutionality of the two notifications dated January 15, 1958 and December 2, 1960. They contend that they throw a heavy burden on their business and cannot, in consequence, be upheld as reasonable restriction within Art. 19(6) and must be struck down as infringing Art. 19(1)(g) of the Constitution. The respondents on the other hand maintain that they are beneficient legislation enacted in the interests of the public and are within the protection of Art. 19(6).

Now there can be no question that the impugned notifications are conceived in the interests of the public. The Scheme framed under the Act in 1952 conferred benefits of provident fund on workmen directly employed in factories or establishments but large sections of them working there under similar conditions but employed by contractors were excluded from its purview. This was obviously a discrimination for which there was no justification and it was this that was sought to be removed by the notifications in question. It is not contended by the petitioners that the object behind these notifications is not such as would fall within

Art. 19(6). What is urged is that the means and modus adopted for achieving it are unreasonable and that therefore the Scheme must be held to violate Art. 19(1)(g). It is argued that when the Government decided to confer the benefits of provident fund on workmen who were employed through contractors, instead of framing provisions appropriate to their character as employees of contractors, it simply extended to them the provisions which had been framed in 1952 with reference to workmen directly employed without regard to the difference in the situations in which the two classes of workmen were placed. This, it is contended, has led to results as unjust as unforeseen, and the Scheme must therefore be held not to be within the saving of Art. 19(6).

In order to decide how far this objection is well founded we must examine the distinction between contract labour and direct labour to the extent that it bears on the provisions of the Scheme. When the principal employer engages contract labour there is no privity of contract between him and the workmen who actually do the work. It is the contractor who engages them, and pays wages to them. The principal employer has as such no direct relationship with them. Now the argument of the petitioners is that the obligation of the employer to contribute every month to the provident fund an amount equal to six and a quarter per cent. of the wages and dearness allowance of the employee is incapable of performance as the principal employer is not in a position to know what wages had been agreed between the contractor and his employees and that further as the factory or establishment maintains no muster rolls as regards workmen employed through contractors, it is not possible for the principal employer to know whether a workmen is a casual labourer, or whether he is entitled to the benefits of the Scheme under Para 26, by reason of his

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having put in continuous work for the requisite period.

The difficulties suggested by the petitioners are not without substance but they are not, in our view, of sufficient weight to overthrow the Scheme. It is true that they could have been eliminated if the Scheme had enacted a provision imposing on the contractors an obligation to give a statement in writing to the principal employer containing the necessary particulars about the workmen and their wages. But even apart from such a provision there should be no difficulty in the principal employer requiring the contractor at the time of the agreement to give those particulars, so as to protect himself. Nor is there any point in the contention that the workmen may be casual labourers and the principal employer would not be in a position to ascertain whether a particular workmen is entitled to the benefits of the Scheme under Para 26 because under that para the workman can claim the benefits of the Scheme only if he works continuously for a period of not less then 240 days in that very factory or establishment, and that is a matter which is capable of being ascertained by the principal employer.

A more serious objection to the extension of the Scheme of 1952 to workmen employed through contractors is that the right given to the principal employer under Para 32 is incapable of exercise as against them. Under Para 30 the whole of the provident fund, being 12-1/2 per cent. of the wages and dearness allowance has to be paid in the first instance by the employer and under Para 32 he is to deduct half of it, being the employee's share of the contribution from his wages. As already pointed out, this contemplates that the hand which has to pay the provident fund under Para 30 is also the hand that has to pay wages to the workmen under Para 32. But that is not the position in the case of contract labour. It is the contractor who pays

the wages of workmen employed through him, but the obligation to pay the provident fund is cast on the principal employer. Now the complaint of the petitioners is that the Scheme works "with an evil eye and an unequal hand" with reference to an employer who engages contract labour, in that while an obligation to pay the entire provident fund, including the share of his employee, is laid on him, he is not given the correlative right of recouping himself to the extent of that share, by deducting it out of his wages.

The answer of the respondents to this is that the principal employer might by an arrangement with the contractor deduct from out of the amounts payable to him the sums contributed by him to the provident fund on account of the employees and that further he might sue to recover those sums from the contractor in a suit based on s. 69 of the Contract Act. But then, it is to be observed, that Para 32 provides that the employer has to deduct the amount paid towards the provident fund on account of the employee from his wages "and not otherwise". Moreover the Scheme does not impose any obligation on the contractor to pay to the principal employer the amounts paid by him on account of the employee. The intention of the Legislature as expressed in s. 6(1) of the Act is to make the employer liable only for a moiety of the provident fund and while the Scheme of 1952 is well designed to carry out this intention, in its application to workmen directly employed, by reason of the combined operation of Paras 30 and 32, it breaks down, in its extension to contract labour by reason of the inapplicability of Para 32. It operates unfairly and harshly on persons who employ contract labour and it further results in discrimination between those who employ contract labour and those who employ direct labour. The Scheme therefore cannot

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be said to be reasonable and must be struck down as not falling within the protection afforded by Art. 19(6).

In the result we hold that the notifications dated January 15, 1958, and December 2, 1960, are unconstitutional and void. The petitioners are entitled to their costs.

Petition allowed.

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MOHAN SINGH

v.

STATE OF PUNJAB

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR and T. L. VENKATARAMA AIYAR, JJ.)

Criminal Liability—Members of unlawful assembly—Maintainability of conviction—Common object and common intention—Distinction—Alteration of conviction—Indian Penal Code 1860 (Act 45 of 1860). ss. 302, 149, 34.

The two appellants, who were tried with three others, were convicted under s. 302 read with s. 149 and s. 147 of the Indian Penal Code. Two of these five persons tried together were acquitted. In the charge these five accused persons and none others were mentioned as forming the unlawful assembly and the evidence led in the case was confined to them alone. The facts proved in the case unmistakably showed that the two appellants and the other convicted person, who inflicted the fatal blow, were actuated by the common intention of fatally assulting the deceased. It was contended in this Court that the conviction of the appellants under s. 302 read with s. 149 of the Indian Penal Code was not sustainable in law in view of the acquittal of two of the five accused persons who were alleged to have formed the unlawful assembly.

Held, that the contention must prevail and the conviction altered to one under s. 302 read with s. 34 of the Indian Penal Code.

Section 149 of Indian Penal Code prescribes vicarious or constructive criminal liability for members of an unlawful