
In Re: Rohtas Industries Ltd. (in liquidation)

Company Petition No. 3 of 1984

Court: Patna High Court

Date of Decision: Dec. 23, 1998

Acts Referred:

Companies Act, 1956 "Section 445(3)#Employees Provident Funds and Miscellaneous Provisions Act, 1952 "Section 1(3), 17, 2

Citation: (1999) 2 LLJ 222 : (1999) 1 PLJR 477

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

Bench: Single Bench

Advocate: R.S. Pradhan, Sheo Narain Singh, Umesh Prasad Singh, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

S.N. Jha, J.

An interesting question of law, which is said to be of first impression so far as this Court is concerned, has arisen for

consideration in this winding-up proceeding. The question is whether the Official Liquidator is liable to make deductions of the workers share from

their salary, contribute his share and deposit the same with the Regional Provident Fund Commissioner under the provisions of the Employees"

Provident Funds and Miscellaneous Provisions Act, 1952 (in short, "Provident Funds Act") and/or the Employees" State Insurance Corporation

under the provisions of the Employees" State Insurance Act, 1948 (in short, "Employees" Insurance Act"). The Official Liquidator has been

served with notices by the concerned authorities to appear and produce the records in the matter of enquiry for determination of the amount due

from him. The Official Liquidator has filed report (flag 324) and sought directions. Pursuant to notice the Provident Fund Commissioner, Bihar and

the Corporation have appeared through their respective Counsel. Mr. Umesh Prasad Singh, learned Counsel for the Official Liquidator and Mr.

R.S. Pradhan, learned Counsel for the Regional Provident Fund Commissioner made submissions at length. Mr. Sheo Narain Singh, learned

Counsel for the Employees' State Insurance Corporation adopted the argument of Mr. R.S. Pradhan. He submitted that since the provisions of the

Employees' Insurance Act are similar to those of the Provident Funds Act, similar order may be passed with respect to the Employees' State

Insurance Corporation. I, accordingly, proceed to deal with the matter in the context of the provisions of the Provident Funds Act.

2. It is an undisputed position that the establishment of Rohtas Industries Limited (hereinafter referred to as "the Company") was exempted from

the provisions of the Provident Funds Act in terms of Section 17 of the Act as the employees of the Company were governed by a scheme under

which a Trust had been created, which was being administered through the Trustees with the permission of the Regional Provident Funds

Commissioner. The Company closed its operations in the wake of troubles which had started in 1982- 83, with effect from September 9, 1984. In

the meantime the present Company Petition (C.P.No.3/84) was filed for winding up of the Company. On May 22, 1986 this Court appointed a

Provisional Liquidator. Earlier, the workmen of the Company had filed a writ petition being Writ Petition (Civil) No. 5222 of 1985 in the Supreme

Court making grievance that closure of the Company had resulted in denial of employment to them. With the object of reviving the industry and

rehabilitating the workmen, as their Lordships put it, the petition was entertained. The present company petition remained dormant during the

pendency of the said writ petition. Their Lordships finally concluded that the revival of the different units of the Company was not feasible and

accordingly while disposing of the writ petition on October 18, 1995 directed resumption of the winding up proceedings in this Court. A number of

directions were also issued in that connection. On receipt of the order of the Supreme Court winding-up of order was passed by this Court on

November 24, 1995. The Official Liquidator was appointed the Liquidator of the Company. He has since been performing his duties as Liquidator

under the general supervision and control of this Court. It may be mentioned here that during pendency of the writ petition in the Supreme Court,

the affairs of the Company were being managed by an Administrator appointed by the Court, who remained in control up to January 15, 1996 by

virtue of Court's order.

3. Opening the arguments on behalf of the Official Liquidator, Mr. Umesh Prasad Singh submitted that the employees with respect to whom the

impugned notices have been issued by the concerned authorities are not employees of the Company; they have been retained in service merely to

assist the Official Liquidator in discharge of his duties. In this connection reliance was placed on the provisions of Section 445(3) of the Companies

Act, which lays down that making of a winding up order ""shall be deemed to be notice of discharge to the officers and employees of the Company,

except when the business of the Company is continued"". Mr. Singh submitted that in order to attract the provisions of the Provident Funds Act

there must be a factor or an establishment in which the employees work for wages. Since the establishment is not a going concern and is rather in

the process of winding-up, the Official Liquidator is not required to make any deductions of their share from their salary nor make his own

contributions and deposit the same with the Provident Fund Commissioner. In support of the contention Mr. Singh placed reliance on the case of

In Re: Mahalaxmi Cotton Mills Ltd. (in liquidation), . Mr. R.S. Pradhan on behalf of the Regional Provident Fund Commissioner submitted that the

term "Factory" occurring in the relevant provisions of the Provident Funds ""Act has been substituted by the term "Establishment" which is

indicative of the legislative intent to enlarge the scope of that Act and make it applicable to a larger body of employees. He pointed out that while

the term "factory" as defined in Section 2(g) of the Act, means ""any premises or precincts thereof, in any part of which a manufacturing process is

being carried on"", there is no such requirement for constituting an "establishment". In other words, even though no manufacturing process is carried

on, there may be an establishment. He referred to the preamble of the Act and submitted that the Act intends to provide certain benefits to the

employees in factories and other establishments. Mr. Singh, in reply, submitted that for being called "employees" there must be an "employer".

However, since the "Official Liquidator" does not come within the description of the term "employer" u/s 2(e) of the Act, he cannot be called an

"employer" nor the employees concerned can be called ""employees of the company"".

4. On first blush the submission of Mr. R.S. Pradhan appears to be attractive. Although in terms of the provisions of Section 445(3) of the

Companies Act, after winding-up order is made, the officers and employees of the Company stand discharged, the fact remains that certain

number of employees have been retained, or allowed to be retained by this Court, may be, to assist the Official Liquidator in discharge of his

duties, as put by Mr. Umesh Prasad Singh. Nevertheless they continued to receive their emoluments and, in the ordinary sense of the term, they

too are employees. However, in order to attract the provisions of the Provident Funds Act they have to qualify as "employees" within the meaning

of the Provident Funds Act and, similarly, the Official Liquidator also has to be held the "employer" within the meaning of that Act.

5. The term "employee" has been defined u/s 2(f) of the Provident Funds Act in the following manner:

(f) "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), under the Standing Orders of the

establishment;

The definition of "employer" u/s 2(e) runs as follows:

2(e) "'Employer'" means-

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal

representative of a deceased owner or occupier and, where a person has been named as manager of the factory under Clause (f) Sub-section (1) of

Section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(ii) in relation to any other establishment, the person who, or the authority, which has the ultimate control over the affairs of the establishment, and

where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

6, It is noteworthy that in the amended definition of "employee" the word "factory" has been substituted by "establishment". Although the term

"establishment" has not been defined in the Act it does appear that the object was to enlarge the ambit of the Act and bring within "its fold" - those

who work in an "establishment" as against the "factory". It is also significant that "employer" has been defined separately in relation to an

"establishment" which is a factory and in relation to any other establishment. In view of the two-fold definition of the terms, I do not think there is

any substance in the contention of Mr. Umesh Prasad Singh that in absence of any similar or corresponding amendment, the "employer" has to be

understood only in relation to a factory. It is to be kept in mind that in relation to any other establishment which is not a factory, u/s 2(e)(ii) of the

Act "employer" means the person or the authority which has the ultimate control over the affairs of the establishment, including the manager,

managing director etc., entrusted with the control over the affairs. A distinction nonetheless has to be drawn between a running concern i.e. a

concern in which the business is continued as against a concern which is in the process of being wound up.

7. In terms of Section 1(3) of the Provident Funds Act, the Act is applicable-

(a) to every establishment which is a factory engaged in any industry specified in Schedule-1 and in which twenty or more persons are employed;

(b) to any other establishment employing twenty or more persons or a class of such establishments which the Central Government may, by

notification, in the Official Gazette, specify in this behalf.

The establishment of Rohtas Industries Limited was admittedly covered under the Act. But that was because its factories were engaged in

industries specified in Schedule-I of the Act. It is another matter that it was exempted from its operations since its employees were governed by a

Provident Fund Scheme, as indicated at the outset. Whether even after the factories closed the operations and particularly after the winding up

order, the Act can still be said to be applicable?

8. The Calcutta High Court in the case of Mahalaxmi Cotton Mills Limited (supra), which is said to be only decided case on the point, held that the

Official Liquidator possesses the ultimate control over the affairs of the Company and as such is an employer within the meaning of the Act and

rejected the contention of the Official Liquidator. It, however, made distinction between a "going" concern in which business is carried on and a

concern which is to be wound up and closed down. The Court held that where the Liquidator has been asked to carry on the factory engaged in

the industry and sell it as a going concern, he is liable as an "employer" and occupier within the meaning of the Provident Funds Act, but where the

Liquidator is asked to wind-up a factory and not to carry on the business of the Company, he will not be liable for contribution under the Provident

Funds Act. The following observation may usefully be noticed:

The word "employer" in the Act only shows the machinery or the personality made responsible for the contribution, and should not be given a

meaning which defeats the very basis of the operation or impact of the Act, which remains a "factory engaged in any industry" specified. No

doubt, ordinarily in liquidation, the Official Liquidator will be asked to wind-up a company running a mill or a factory and, therefore, to discharge

the employees. In such an event it will no longer be a factory "engaged" in any industry within the meaning used u/s 1(3) of the Act and, therefore,

such an Official Liquidator will not be required to pay contributions under this Statute.

The Mysore High Court in the case of G.V. Joshi v. State of Mysore AIR 1969 Mys 300, held that the word "employ" in Section 2(f) as well as

Section 1 means "employ in work", that is to say, employed and actually working.

9. The words "except when the business of the company is continued" occurring in Sub-section (3) of Section 445 of the Companies Act also lead

to the same conclusion. The Section makes an apparent distinction between the employees of a company whose business is continued even after

passing of the winding-up order from those of a company whose business is not to continue. While in the case of the latter, winding-up order

results in discharge of the officers and the employees, it is not so in the case of the former.

10. From the judgment of the Supreme Court dated October 18, 1995 (supra), since reported in Workmen of M/s. Rohtas Industries Vs. Rohtas

Industries and others, it is evident that despite ardent endeavours of the Court to revive the industry, as a result of which some of the units come

into operation but only for some time, the efforts had to be abandoned. The Court held that revival of the Company was not feasible and in that

view of the matter directed this Court to resume the winding-up proceeding. In the light of certain observations made in the judgment this Court

also made endeavours for revival of the company but gave up making further efforts. This Court is now merely concerned with the sale of the

assets of the company and their distribution as per the provisions of the Companies Act in, order to complete the winding-up process and finally

dissolve the company. It is an admitted position that except for part of the period when the case was pending in the Supreme Court, different units

of the company have been out of operation and remained closed since 1984. Neither they are running at present nor is there any change of their

revival in future. The establishment being in the process of winding up, pure and simple, not engaged in any industrial activity specified in Schedule

not specially notified u/s 1(3)(b) of the Act, I am inclined to hold that the Provident Funds Act is not applicable and the Official Liquidator is not

liable for contribution under that Act.

11. As stated at the out-set, no separate argurnent was advanced by the Counsel for the Employees" State Insurance Corporation. The above

noted finding on the question of liability of the Official Liquidator under the Provident Funds Act will apply to and govern the question of similar

liability under the Employees Insurance Act as well.

12. The report of the Official Liquidator (flag-324) and the connected affidavits by the parties stand disposed of .