

(1975) 07 DEL CK 0003

In the Delhi High Court

Case No : Civil Writ Petition Appeal No. 1216 of 1971

Amar Nath and Others

APPELLANT

Vs

Regional Provident Fund Commissioner, Delhi

RESPONDENT

Date of Decision : 17-07-1975

Acts Referred:

Citation : (1975) ILR Delhi 684 : (1975) LabIC 1720

Hon'ble Judges : H.L. Anand, J

Bench : Single Bench

Advocate : N.B. Sinha, Urmila Kapoor and Rekha Sharma, for the Appellant;

Judgement

H.L. Anand, J.

(1) The principal question that this petition under Article 226 of the Constitution of India involves is as to the true construction and correct interpretation of sub-section (5) of Section 1 of the Employees' Provident Funds Act, 1952, hereinafter to be referred as the "Act", and the proviso to it.

(2) The facts and circumstances leading to the petition are not in dispute and may be briefly stated. The establishment of the petitioners was at one time covered by the provisions of the Act and was treated as such, by virtue of the fact that during the said period 20 or more persons were employed in the establishment so as to attract the provisions of sub-section (3) of Section 1 of the Act. It is a common case of the parties that from June, 1964 to December, 1966, the establishment employed less than 15 persons. By their letter of July 26, 1965, Annexure "A" to the petition, the petitioners informed the Regional Provident Fund Commissioner, an authority under the Act, that the establishment was employing less than 15 employees since the month of May, 1964 and that the Act would, Therefore, not apply to the establishment. The petitioners requested the Commissioner to inform them of "the formalities to be done in this connection". There was no reply to this communication but it appears from the report of Shri M. K. Bhatnagar of September 10, 1965, Annexure "B" to the

petition, that on the said date, Mr. Bhatnagar, an official of the authority under the Act, visited the establishment and, on an examination of its records, was satisfied that the employment strength of the establishment remained "less than 15 from 8/64 to 7/65". The report adds that the establishment had deposited provident fund contribution up to the period ending July, 1965. The report further adds that the said officer had "asked the proprietor to continue implementation of Epf Scheme even though the employment strength is less than 15". By his letter of October-12/13, 1965, Annexure "C" to the petition, the aforesaid Commissioner drew the attention of the petitioners to certain previous arrears and stated in the last para that further action on the petitioners' letter of July 26, 1965 "requesting exemption u/s 1(5) will be taken on receipt of the above compliance from you". By their letter of February 16, 1966, Annexure "D" to the petition, the petitioners informed the Commissioner that they had deposited the amount required of them by the letter of October 12/13, 1965 and requested the Commissioner "to please take immediate action on our letter dated 26-7-65 request ing for exemption u/s 1(5)". As no steps were taken by the Commissioner, the petitioners sent another letter on December 13, 1967, Annexure "F" to the petition, reiterating the contents of their earlier letters of July 26, 1965, January 18, 1966 and February 16, 1966 and asserted that the establishment "does not come under this Act". It was further pointed out that one of the Inspectors had examined the records and, after having been satisfied, confirmed that the establishment was not covered under the Act. It was further pointed out that the Inspector had told the petitioners that the petitioners were free to stop compliance with Act and that the petitioners had, Therefore, not filed formal return pursuant to it. It appears that quite some time no action was taken on the petitioners' request for "exemption" with the result that the petitioners sent another letter, Annexure "L" to the Commissioner on April 27, 1970 inviting attention to the earlier communications and reiterating their contention that the establishment". did not fall within the provisions of the Act by virtue of the fact that fo ra period of more than one year, the establishment employed less than 15 persons. This was followed by a counsel's notice of September 5, 1970, Annexure "M" to the petition. It appears that as a result of the counsel's notice, the authority took up the matter because according to Annexure "H" to the petition, an office note was recorded on November 27, 1970 by which the author of the note expressed the view that a registered A. D. notice was served u/s 1(5) of the Act on December 13, 1967 and as such the management be allowed to opt out of the Act with effect from December, 1967 only. The orders of the Commissioner were sought if the establishment may be .allowed to opt out of the Act with effect from December, 1967 only, and the management be directed to pay the dues from January, 1967 to November, 1967. Apparently, the petitioners were given a hearing by the Commissioner and the plea for opting out of the Act was turned down and the liability of the petitioners with regard to the provident fund contribution and administrative charges was computed by an order made by the Commissioner on April 21, 1971, Annexure "P" to the petition. In the course of the said order, the Commissioner held that the first notice of July 26, 1965

seeking to opt out of the Act u/s 1(5) of it had become infructuous because subsequent to the said notice, the petitioners continued to comply with the requirement of the Act up to December, 1966. It was further held that the second notice of December 13, 1967 seeking to opt out of the Act was not valid because it was not sent within one month of the date of cessation, the employer having ceased to give effect to the Act from January, 1967. It was, Therefore, held that the establishment was not entitled to opt out of the Act as the requirements of Section 1(5) of the Act were not complied with. On merits, the Commissioner computed the liability of the petitioners on account of provident fund contribution at Rs. 7,650 for the period January 1967 to March 1971 on the basis of Rs. 150 per month and administrative charges for the said period at Rs. 229. It was further directed that 7 days' notice be given to the petitioners to pay the amount. As the petitioners failed to make payment, they were required by the Commissioner's notice of August 9, 1971, Annexure "S" to the petition, to show cause why prosecution should not be launched against them for contravention of para 38 (2) of the Provident Funds Scheme. 1952.

(3) By this petition, the petitioners challenge the order of the Commissioner of April 21, 1971, Annexure "P" declining to permit the petitioners to opt out of the Act and holding that the petitioners were liable to pay provident fund contribution and the administrative charges as also the notice, Annexure "S", threatening the petitioners with prosecution. The petitioners also seek a direction for the refund of the amount already paid by them in respect of the period July. 1965 to December, 1966 during which the petitioners admittedly did employ in the establishment less than 15 persons.

(4) At the hearing of the petition, learned counsel for the petitioners raised a number of questions as to the obligation of the Authority under the Act to advise the petitioners as to the manner in which the petitioners could opt out of the Act, as to the validity or otherwise of the two notices of July 26, 1965 and December 13, 1967, as to the possible effect of the continuance of the petitioners to comply with the requirements of the Act even after the establishment employed for more than one year less than 15 persons but the principal question that really emerged at the hearing was as to the true construction and correct interpretation of the provisions of sub-section (5) of Section 1 of the Act and the proviso to it.

(5) Section 1 of the Act, inter alia, deals with the application of the Act to an establishment and sub-sections (3) to (5), which are material for our purpose, as they stood at the relevant time. are in the following terms:

(3) 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. (4) Notwithstanding anything contained in sub-section (3) of this section or sub-section (1) of section 16, where it appears to the Central Government, whether on an application made to it in this behalf or otherwise, that the employer and the majority of employees in relation to any (establishment) have agreed that the provisions of this Act should be made applicable to the (establishment), it may, by notification in the Official Gazette, apply the provisions of this Act to that (establishment). (5) An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty: Provided that where for a continuous period of not less than one year the number of persons employed therein has been less than fifteen, the employer in relation to such establishment may cease to give effect to the provisions of this Act and any Scheme framed there under, with effect from the beginning of the month following the expiry of the said period of one year, but he shall, within one month of the date of such cessation, intimate, by registered post, the fact thereof to such authority as may be specified by the appropriate Government in this behalf.

(6) The basic question that requires consideration is as to the manner in which an establishment, which was once covered under the Act, may opt out of it if, for a period of not less than one year immediately preceding such option, it employed less than 15 persons.

(7) To my mind, the Scheme of Section 1 of the Act is quite clear and does not admit of any controversy as to the manner in which an establishment may cease to be covered by the Act and may opt out of it. Clause (a) of sub-section (3) provides that the Act would apply to every establishment which is a factory engaged in any industry specified in Schedule I and in which 20 or more persons are employed. Clause (b) of sub-section (3) extends the provisions of the Act to any other establishment employing 20 or more persons if a notification is issued by the Central Government in that behalf. The proviso to the sub-section enables the Central Government to extend the provisions of the Act to any establishment which employed less than 20 persons as may be prescribed. Sub-section (4) provides for the application of the provisions of the Act to an establishment to which it would otherwise not apply if the employer and the majority of the employees concurred in the extension of the Act to the establishment. Sub-section (5) then provides that an establishment to which the Act applies shall continue to be governed by the said Act "notwithstanding that the number of persons employed at any time falls below twenty". The proviso to this sub-section contains an exception and envisages that where the number of persons employed in an establishment has been less than 15 for a continuous period of not less than one year, the employer would have the option to cease to give effect to the provisions of the Act with effect from the beginning of the month following the said period provided that the employer gives notice within one

month of the date of cessation to the authority specified by the appropriate Government in that behalf.

(8) Learned counsel for the respondent however, contends that the only mode by which an establishment may opt out of the Act on the first condition of the proviso being satisfied is by cessation of compliance with the provisions of it in accordance with the provisions of the proviso followed by a notice within one month of the date of cessation and that, Therefore, unless the employer ceased to comply with the requirement of the Act, as envisaged by the proviso, and gave the notice as contemplated by it, there would be no opting out of the Act. Learned counsel for the respondent further contends that neither of the two notices in the present case were valid because so far as the first notice is concerned, it was issued without the cessation of compliance with the requirement of the Act inasmuch as even after the notice, the petitioners continued to comply with the provisions of the Act. So far as the second notice is concerned, she contends that the cessation having taken place in December, 1966, the second notice was given almost a year after the cessation and did not, Therefore, conform to the requirement of the proviso.

(9) After hearing learned counsel for the respondent at some length, it appears to me that the contention raised on behalf of the respondent on this aspect of the matter, as indeed the reasoning of the order made by the Commissioner, is based on a misconception as to the true meaning and import of sub-section (5) and the proviso to it.

(10) As has been pointed out above, the Act could apply to an establishment only if the establishment answered the description contained either in clause (a) of sub-section (3) or in clause (b) of it, or in the proviso to it or as provided in sub-section (4) of Section 1. It follows, Therefore, that, having regard to the scheme of Section 1, an establishment which does not answer to the description contained in either of the aforesaid four categories would be beyond the scope of the Act and there would be no authority to extend or apply the provisions of it to such an establishment. Sub-section (5), however, provides that once the Act applied to an establishment, the establishment would continue to be governed by that Act even though "at any time" the number of persons employed in such an establishment falls below 20. "The proviso to the sub-section, however, clearly lays down that where an establishment had employed less than 15 persons for a continuous period of not less than one year, that would constitute an exception to the provisions contained in sub-section (5). The combined reading, thereof, of sub-section (5) and the first part of proviso to it appears to indicate that if the Act applied to an establishment, it will continue to be subject to the Act even though the number of persons employed in it may fall the requisite number of 20 at any particular point of time. But where the number is reduced to less than 15 and such reduction continues for a period of not less than one year, the Act would not continue to apply to such an establishment because such an establishment would then be beyond the scope of the main provisions of sub-

section (5) with the result that on the condition laid down in the first part of the proviso to it being satisfied, the establishment would cease to be governed by the Act." Normally, Therefore, when the Act ceased to apply to an establishment, the two possible modes would be open to the establishment-(1) to inform the authorities under the Act of its claim that the Act no more regulated the establishment and seek a confirmation before making any unilateral change with regard to the compliance of the various requirements of the Act, and (2) to resort to an unilateral cessation of compliance with the various requirements of the Act. The latter part of the proviso deals with the second mode and enjoins that in case the employer opted to adopt the second mode, the unilateral cessation by it would not be unfettered and in that event the employer would be under an obligation to give to the authority under the Act a notice within one month of the date of such cessation. I am, however, unable to agree with the learned counsel for the respondent that even where the employer did not cease to comply with the requirements of the Act, even though it was entitled to it in terms of the proviso, but instead chose the first of the two alternatives and repeatedly requested the authority, as in the present case, to treat the establishment as being beyond the scope of the Act, it was still necessary for the employer to give any notice whatever muchless a notice conforming to the requirements of the second part of the proviso. To my mind, the notice that the proviso envisages is only necessary where the employer chooses to cease to give effect to the provisions of the Act on its own and not otherwise. The question, Therefore, whether the two notices in the present case were valid, were not given after the cessation or within certain period of the expiry of one year of cessation or as to the effect of the continued compliance even after the notice on the validity of it, are wholly irrelevant to determine the question if the Act applied to the establishment or not. Learned counsel for the respondent however, urged that there was no express provision in the Act which may enable the employer to adopt any other mode to opt out of the Act. To my mind. such a provision is clearly implied in the proviso when it says that where for a continuous period of not less than one year the number of persons employed has been less than 15, the employer may cease to give effect to the provision of this Act. To my mind implicit in this provision is the right of the employer to seek a direction from the authority that by virtue of the employment position for a period of not less than one year, the establishment would no more be covered or should no more be treated as covered under the Act. The various communications addressed by the petitioners to the authority clearly indicate that the petitioners exercised the option to take the establishment out of the Act by virtue of the change in the employment position for the requisite period envisaged by the proviso. In this view of the matter, it was not open to the authorities to refuse to treat the establishment as being outside the Act merely because of what appeared to them to be non-compliance with the requirements of the proviso as regards the notice. The employment position, during the relevant period entitled the petitioners to take the establishment out of the Act and they validly exercised the option when, even while continuing to comply with

the requirements of the Act, they informed the authority repeatedly that the Act did not any more apply to the establishment. The continued compliance with the Act even after the condition of employment justified ouster was clearly subject to the notice and without prejudice to it.

(11) In the view that I have taken of the principal question, the various other contentions raised on behalf of the petitioners referred to above do not survive.

(12) In the result, the petition succeeds and the impugned order of the Commissioner of April 21, 1971, Annexure "P", notice of August 9, 1971, Annexure "S", threatening the petitioners with prosecution and the demand for the payment of the amount computed in the order of April 21, 1971 are quashed.

(13) It appears that the petitioners have since paid the employers as well as employees' contribution in respect of the period from July 1965 to December 1966 even though the establishment could not be deemed to have been covered under the Act in respect of the said period and the employers had exercised their right to opt out of the Act. The petitioners would be entitled to the refund of the employers' contribution. The employees' contribution may be refunded to the employees concerned. The bank guarantee furnished by the petitioners during the pendency of the petition in respect of the outstanding liability shall stand discharged.

(14) The petitioners would also have their costs. Counsel's fee is assessed at Rs. 350.