

(1979) 02 RAJ CK 0009

In the Rajasthan High Court

Case No : Civil Writ Petition No. 803 of 1966

Bikaner Cold Storage Company

APPELLANT

Vs

Regional Provident Fund Commissioner, Employees Provident Fund

RESPONDENT

Date of Decision : 14-02-1979

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1, 16

Citation : (1979) WLN 156

Hon'ble Judges : S.K. Mal Lodha, J;M.C. Jain, J;D.P. Gupta, J

Bench : Full Bench

Final Decision : Allowed

Judgement

D.P. Gupta, J.—This writ petition was referred for decision to a large Bench, as the learned Single Judge who heard the same felt that there was divergence of judicial opinion regarding the interpretation of Section 19A of the Employees' Provident Funds Act, 1952 (hereinafter called the Act"), as two Division Benches of this Court have apparently expressed two divergent views on the question as to whether the provisions of Section 19-A could be invoked only by the authorities administering the provisions of the Act or even private parties could take renounce to the proceedings under the aforesaid provisions. In *Reshtriya Mill Mazdoor Sangh, Bijainagar* ILR (1966) 16 Raj a Division Bench of this Court held that the provisions of Section 19-A of the Act were designed to clothe the Central Government with the power of issuing directions, of a general nature and it was never intended to deal with any individual controversy between the parties. According to the aforesaid decision, the provisions of Section 19 A could be resorted to only for the removal of difficulties or doubts which the officers enforcing the provisions of the Act might entertain. On the other hand, another Division Bench of this Court, while deciding the case of *Mahaveer Metal Manufacturing Co v. Regional Provident Fund Commissioner and Ors.* ILR (1966) 19 Raj. appears to be of the view that the provisions of Section 19A could be invoked by any person, who felt any doubt as to whether his establishment was a

factory or not under Clauses (1) to (v) of Section 19A of the Act. It may be pointed out. however, that in the latter case, the court did not express its concluded opinion on this question, as after taking note of the controversy, it was observed by the Division Bench as under:

We need not enter into this controversy because in this case, the Regional Provident Fund Commissioner himself at one stage has of opinion that the petitioner's factory did not fall within the provisions of the Employees' Provident Fund Act, 1952 and the Scheme Framed thereunder, though he changed his opinion later on In such a situation, the petitioner had valid ground to get the doubt clarified from the Central Government u/s 19-A of the Act and it is very difficult for us to hold that even in such situation, Section 19A could not have been invoked by the petitioner.

2. In both the cases referred to above, the employer submitted an application before the Central Government u/s 19-A of the Act and the Central Government had decided the matter in controversy between the employer and the workmen. It was, therefore, necessary for this Court, in both the aforesaid cases, to decide as to whether only the authorities administering the provisions of the Act could invoke the provisions of Section 19-A or the said provisions could also be resorted to by the parties to the dispute, if any one of them entertained a doubt or difficulty in respect of the matters enumerated in Clauses (1) to (v) of Section 19A of the Act. Thus, in the aforesaid two cases, the directions issued by the Central Government u/s 19A of the Act were challenged before this Court on the ground that the same were issued without jurisdiction, having been issued at the instigation of one of the parties to the dispute namely the employer. But in the present case, it is not in dispute between the parties that the Central Government has not at all issued any directions u/s 19A of the Act nor any prayer has been made by the petitioner in this writ petition that the Central Government may be required to issue some directions u/s 19A of the Act. Moreover, the question as to whether it is competent for the Central Government to issue any directions u/s 19A of the Act at the instance of private parties, be it the employer or the employees or an association of employees cannot be considered and decided by this Court in the present case without affording an opportunity of hearing to the Central Government, whose competence to issue directions will have to be adjudicated upon, with reference to the provisions of Section 19A of the Act, if the aforesaid question has to be resolved in this case. However, the Central Government has not been made a party to the writ petition nor any order of the Central Government issued or purported to have been issued u/s 19A is subject matter of challenge in the present writ petition. Richer, as pointed out above it is a case of both the parties that the Central Government did not issue any direction u/s 19A of the Act in this case, although the petitioner had made a reference to the Central Government and addressed a communication to the Central Government in respect of the question in controversy between the parties. Thus, in the present case, we cannot proceed to resolve the conflict of decisions regarding the interpretation of Section 19A of

the Act on account of the Central Government, as the same could not be done without affording an opportunity of hearing to the Central Government.

3. However, tan this old writ petition has been referred to us for decision we now proceed decide the same on merit. The facts which have given me to this writ petition may be briefly recounted It is he admitted case of the parties that, he petitioner runs a cold storage at Bikaner for the purpose of refrigerating fruits, vegetables etc, and, thus, the petitioner is undoubtedly carrying on an industry. The case of the petitioner a that there were only 10 employee, on its muster rolls and that the number regular employees on the muster roll of the petitioner company did not exceed 13 in the year 1964, 12 in the year 1965 and 11 in the year 1966. It is further alleged by the petitioner that on February 27, 1965, the Provident Fund Inspector visited the premises of the petitioner and he inspected the attendance register of the employees and found that the petitioner had 13 regular employees on its muster rolls on March 18, 1964 and besides that there were 8 casual labourers on that day. According to the petitioner, the aforesaid casual labour, consisting of 8 coblies, was engaged merely for carrying on building repair work and they had nothing to do with the running of the business of the petitioner Company. Again, the Provident Fund Inspector visited the premises of the petitioner on June 26, 1965 and found that May 1965 there were 8 regular employees on the muster rolls of the petitioner company, while he engaged 11 casual labourers, in addition to the allowed regular employees. The provident Fund Inspector visited the premises of the petitioner for the third time on May 13, 1966, when he again found 8 regular employees on the muster rolls in March 1966 and in addition thereto 6 casual labourers were also engaged at that time by the petitioner company. The Regional Provident Fund Commissioner called upon the petitioner, by his notice dated June 4, 1966, to furnish a return for the period from April, 1964 to April 1966 probably because he considered that the petitioner's establishment has a factory engaged in an industry specified in Schedule 1 and twenty or more persons were employed therein.

4. It is not disputed by the petitioner that his establishment is a "factor" engaged in an "industry" specified in Schedule I annexed to the Act but, while according to the petitioner, twenty or more persons were not regularly employed in his establishment, yet according to the Regional Provident Fund Commissioner, the petitioner's, factory employed more than twenty person. Thus, the bone of contention between the parties is as to whether all types of employees including casual labourers, could be counted for the purposes of Section 1(3)(a) of the Act or only persons employed on a permanent basis or the regular employees working in an establishment alone could be considered for the purposes of Section 1(3)(a) of the Act and casual or temporary workmen, engaged occasionally or intermittently, for temporary or seasonal work like loading, unloading etc or for purpose unconnected with the business of the factory, could not be counted for the purpose of bringing an establishment within the purview of Section 1(3)(a) of the Act. If the casual and temporary workmen can be lawfully included, then the strength of the employees in the establishment of the

petitioner on March 18, 1964 was certainly 21 and as such the establishment did fall under the provisions of Section 1(3)(a) of the Act. But, if the casual or temporary employees can not be counted for the purpose of determining the number of employees of the establishment of the petitioner, and if only regular or permanent employees whose names appeared on the muster rolls were to be considered, then the establishment of the petitioner did not fall within the provision of Section 1(3)(a) of the Act.

5. Section 1(3)(a) of the Act, which is relevant for the present purposes, runs as under:

1(3) Subject to the provisions contained in Section 165 it applies:

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

6. Thus it is clear that the provisions of the Act would be applicable to every establishment, which is a factory engaged in any industry specified in Schedule I, subject to the condition that twenty or more persons are employed therein. According to the petitioner, twenty or more persons were never the regular employment of the establishment of the petitioner and the casual and temporary workers could not be taken into consideration for the purpose of determining as to whether the provisions of the Act would be applicable to an establishment or not. On the other hand, the point of view propounded by the respondent is, that even a casual or temporary labourer should be counted for the purpose of determining the number of employees of an establishment and according to him on March 18 1964, the employment strength of the petitioner's establishment, including casual labourers, was twenty one and as such that establishment was governed by the provisions of the Act. The short question, which requires determination in this case, is as to whether the casual or temporary workmen employed by the petitioner company are to be considered in the employment strength of the establishment for the purpose of determining as to whether the provisions of the Act would be applicable to such an establishment, because of the provisions of Clause (a) of Sub-section (3) of Section 1 of the Act. What is to be found out is as to whether all persons, employed for any purpose whatsoever and for howsoever short duration could be counted for the purposes of Clause (a) of Sub-section (3) of Section 1 of the Act, when it speaks of an establishment in which twenty or more employees are employed or in the alternative only regular employees, whose names are borne on the muster rolls of the establishments could alone be considered for the aforesaid purpose.

7. It appears to us that an establishment to which the provisions of the Act may be made applicable should have at least twenty workmen employed in its usual or normal work. A financial burden is imposed upon the establishment once it is held to be governed by the provisions of the Act. We may refer to the provisions of Section 16 of the Act in this context which, provide that the Act does not apply to an establishment belonging to the Government or local authority and to

infant industries and further the Central Government has been empowered to exempt such class of establishments from the operation of the Act, for such period as may be specified by it, after considering the financial position of the establishment of bear the burden. Moreover, Sub-section (5) of Section 1 of the Act provides that 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, unless for a continuous period of not less than one year the number of persons employed therein is not less than fifteen. Thus, it is clear that the Act is intended to apply only to an establishment which has attained sufficient financial stability and is prosperous enough to be able so afford regular contribution in the Fund created by the Act. The financial capacity of the establishment to bear the burden must continue for a reasonably longer periods because once the establishment comes to be governed by the provisions of the Act, than by virtue of the provisions of Sub-section (5) of Section 1 of the Act, the same shall continue to be applicable even if the number of employees at any one time fell below twenty, unless a continuous period of not less than one year the number of employees is less than fifteen. Thus, in our view, more casual or temporary persons employed in an establishment, not connected with the normal or regular work of such establishment, cannot be counted for the purpose of determining as to whether the establishment was governed by the provisions of Clause (a) of Sub-section (3) of Section 1 of the Act. But it is also not necessary that only the workmen who are permanent employed & whose names are borne on the muster rolls of the factory should alone be considered for the aforesaid purpose. The number of persons, who are ordinarily regularly engaged for some abnormal or emergent purpose other than the normal work of such establishment. It shall naturally depend upon the facts of each case to find out as to whether the so called temporary workmen were regularly employed in connection with the normal & usual course of business of that establishment or they were engaged in the performance of some work which had no relation with the normal and regular course of business of the establishment.

8. Their Lordships of the Supreme Court, while considering the question of the applicability of Clause (b) of Sub-section (3) of Section 1 of the Act in the case of the The Regional Provident Fund Commissioner, Andhra Pradesh Vs. Sri. T.S. Hariharan, observed as under:

It, therefore, follows from this that the number of persons to be considered to have been employed by an establishment for the purpose of this Act has to be determined by taking into account the general requirements of the establishment for its regular work which should also have a commercial nexus with its general financial capacity and stability. This seems to us to be the correct approach under the statutory scheme.

Their Lordships further observed as under in the aforesaid case:

Employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature

of the business of the establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can reasonably be concluded that the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by this definition. The word "employment" must, therefore, be construed as employment in the regular course of business of the establishment such employment obviously would not include employment of a few persons for a short period on account of some pasting necessity or some temporary emergency beyond the control of the company.

9. Again in *Shri V.K. Bhatt, Inspector Employees' Provident Fund, Ahmedabad Vs. Allwin Concrete Blocks and Tiles Mfg. Co. and Others*, their Lordship of the Supreme Court proceeded on the basis that Section 1(3)(a) of the Act can have no application unless twenty or more persons are ordinarily employed in a factory. It may be pointed out that there has been a conflict of decisions on the subject, as the Madras High Court in *East India Industries (Madras) Private Limited Vs. Regional Provident Fund Commissioner*, held that the provisions of Section 1(3)(a) postulated continuity of employment while the Andhra Pradesh High Court in *Nazeena Traders (P) Ltd. Regional Provident Fund Commr. Hyderabad AIR 164 AP 200* took the view that the said provisions contemplated that the requester number of people should work continuously in the factory in a given year. But the aforesaid observation of a Andhra Pradesh High Court was not held to reflect the correct legal position by their Lordships of the Supreme Court in *T.S. Hariharan's* case, while the decision of the Madras High Court was also not approved by their Lordships of the Supreme Court in the aforesaid case. However, the view taken by their Lordships was that the persons, employed in the normal regular course of the business of the establishment, should be considered as the persons in employment for the purpose of the provisions of Section 1(3)(a) of the Act and persons employed for a short duration or on account of some urgent necessity or abnormal contingency or temporary emergency, which was not a regular feature of the business of the establishment, cannot be considered as employees of the concern for the purpose of determining employment strength of the establishment in relation to the applicability of Clause (a) Sub-section (3) of Section 1 of the Act.

10. Applying the aforesaid principles to the facts of the present case, we find that out of 21 persons, who were said to have been employed on March 18, 1964 in the factory of the petitioner, 8 persons were merely temporary labourers employed for the purpose of carrying on the repairs of the factory building & it cannot be held that they were employed for the normal business of the establishment. The employment of the aforesaid 8 persons, as is clear from the perusal of Annexure 10, was only a temporary employment for a purpose not connected with the normal business of cold, storage. Even if casual or temporary workers are engaged occasionally or intermittently to meet some temporary expediency or unusual or emergent situation, such temporary or casual workmen cannot be considered to be employees of the concern for the purposes of Section

1(3)(a) of the Act. Moreover, the building repair work cannot be held to be a part of the regular business of the factory and labourers employed for carrying on building repair work cannot by any stretch of imagination be considered as persons engaged in carrying out the regular or normal work of the establishment. We are, therefore, of the view that merely the fact that 8 casual labourers were employed by the petitioner on March 18, 1964, could not have the effect of making the provisions of the Act applicable to the establishment of the petitioner. We, therefore, hold that the establishment of the petitioner is not an industry in which twenty or more than twenty persons were employed during the relevant period and the Regional Provident Fund Commissioner was not justified in holding that the establishment of the petitioner was governed by the provisions of the Act.

11. In the result, the writ petition is allowed and the proceedings taken by the Regional Provident Fund Commissioner the petitioner and the notices and order issued by him under the Employees' Provident Funds Act, 1962 are quashed, so far as they relate to the period from April 1964 to April 1966. However, in the circumstances of the case, the parties are left to bear their own costs.