(1995) 02 KAR CK 0043

In the Karnataka High Court

Case No : Writ Petition No. 41286 of 1993

Canbank Financial Services Ltd. APPELLANT

Vs

Regional P.F. Commissioner RESPONDENT

Date of Decision : 01-02-1995

Acts Referred:

Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 16, 17, 7 A

Citation : (1995) 71 FLR 446 : (1995) ILR (Kar) 1064 : (1995) 2 KarLJ 395

Hon'ble Judges : Tirath S. Thakur, J

Bench : Single Bench

Judgement

1. In this petition the petitioner calls in question the correctness of an order dated September 16, 1993. Passed by the respondent u/s 7-A of the Employee''s Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act"). By the said order, the petitioner was held to be "trading and commercial establishment" within the meaning of the said term as appearing in the notification issued by the Central Government u/s 1(3)(b) of the Act. The facts are few and may, therefore, be stated first.

2. The petitioner company is a subsidiary of Canara Bank and has been incorporated with the object of carrying on business in equipment leasing and merchant banking. Besides other objects set out in its memorandum and articles of association. It claims to have employed nearly 120 persons in connections with its business for whose benefit it has framed a provident fund scheme, which is said to have been duly approved by the Commissioner of Income Tax, Bangalore.

3. It appears that the respondent issued a notice dated May 31, 1993, Annexure D, to writ petition, calling upon the petitioner to appear before him in connection with enquiry proposed to be held u/s 7-A of the Act. In response to the said notice, the petitioner appeared before the respondent and contended that it was not amenable to the provisions of the Act for the reason that the petitioner even

though a financial establishment was not engaged in the activity of borrowing. Lending and advancing of money or dealing with any other monetary transaction with a view to earn interest. The petitioner it was contended on its behalf was engaged only in equipment leasing and merchant banking and the income earned by it from these two activities could not be said to be interest so as to bring it within the four corners of the term "financial establishment" as envisaged by the notification afore-mentioned. Borrowing bending and advancing of money, it was urged "with a view to earn interest''s was a condition precedent for an establishment to fall within the said entry. Since, however, the petitioner was not engaged in any such activity, it did not fall in the said category and. therefore, could not be subjected to the rigours of the Act.

4. At the enquiry held by the respondent even though the argument advanced by the petitioner prevailed in so far as the petitioner not being a "financial establishment" in terms of entry 38 was concerned, yet the respondent came to the conclusion that the petitioner did answer the description of a "trading and commercial establishment" as appearing and described at Serial No. 11 the said notification. In coming to the said conclusion. The respondent relied upon the fact that the commission, fees or brokerage. Received by a trading and commercial establishment. As mentioned in entry 11, need not be received by the establishment concerned in connection with goods only but may even be received or receivable in respect of services rendered by It. The respondent held that in the instant case. Lease money was received by the petitioner against goods/equipment, purchased and leased by it whereas the income received from the merchant banking was in the nature of commission, brokerage and fees for the service rendered. Interest on investment made and debentures and other securities which fell under the schedule head "Trading and commercial establishment". The respondent accordingly directed that the provisions of the Act and the Schemes framed thereunder had been rightly made applicable to the petitioner-company and that the petitioner should comply with the provisions of the said Act and the Schemes with effect from June 4, 1990. Aggrieved by this order. The petitioner has come up to this court by way of the present writ petition, as already pointed out earlier.

5. I have heard Mr. E. R. Indra Kumar, learned counsel appearing for the petitioner and Mr. Shylendra Kumar, learned Senior Central Government Standing Counsel, appearing for the respondent.

Section 1 of the Act provides for the short title, extent and application of the Act and reads thus :-

"1. Short title, extent and application. - (1) this Act may be called Employees'' provident Funds and Miscellaneous Provisions Act, 1952.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(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 intentions 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."

In exercise of the powers vested in the Central Government under sub-section (3)(b) of section 1, the Central Government has notified the other establishments employing 20 or more persons to which the provisions of the Act shall apply. For purposes of the present case, only two of the entries in the said notification issued by the Central Government assume importance. These are (i) "trading and commercial establishment" as appearing at item No. 11 and (ii) "financial establishments", as appearing at item No. 38 of the said notification. These read thus :

"11. Trading and commercial establishments engaged in the purchase, sale or storage of any goods including establishments of exporters, importers, advertisers, commission agents and brokers, and commodity and stock exchanges, but not including banks or warehouses established under any Central or State Act.

38. All financial establishments (other than banks) engaged in activities of borrowing, lending, advancing of money and dealing with other monetary transactions with a view to earn interest not being the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963), the Agricultural Refinance Corporation established under the Agricultural Refinance Corporation Act, 1963 (10 of 1963), the Industrial Development Bank of India established under the Industrial Development Bank of India Act, 1964 (18 of 1964), the Industrial Finance Corporation of India established under the Industrial Finance Corporation Act, 1948 (15 of 1948), and the State Financial Corporation established under the State Financial Corporations Act."

6. A plain reading of item No. 38 makes it fairly obvious that only such financial establishments fall within the purview of the said entry as are engaged in the activities of borrowing, lending and advancing of money or dealing with other monetary transactions with a view to earn "interest" on the same. In other words, financial establishments, which are engaged in any activity other than the one mentioned in the said entry, will remain outside the scope and ambit of entry 38. That being so, the petitioner was justified in contending and so was the respondent in accepting the proposition that the petitioner not being a "financial establishment'' engaged in borrowing, lending or advancing of money, etc., with a view to earn "interest" was not covered by entry 38 and could not, therefore,

be subjected to the provisions of the Act, by reason of the same.

7. The question, however, that has been debated at length by learned counsel appearing for the parties is : Whether the petitioner is a "trading and commercial establishment" engaged in the purchase, sale or storage of any goods or is an establishment of commission agent or a broker within the meaning of entry 11, reproduced earlier, Mr. Kumar, learned counsel appearing for the petitioner argued that the petitioner could not be said to be a "trading or commercial establishment" because it did not buy or sell goods which according to learned counsel was a sine qua non for the application of entry 11 to any establishment. He urged that the petitioner fell under the general head "financial establishment" referred to in entry 38, but since the petitioner was not engaged in any one of the activities which would attract the application of the Act or qualify for inclusion in entry 38, it was not amenable to the provisions of the Act.

8. Mr. Shylendra Kumar appearing for the respondent on the other hand contended that entry 11 pertaining to "trading and commercial establishments" was not being properly interpreted by the petitioner nor could it be said that the said entry would apply only to establishments engaged in sale or purchase of goods. He urged that entry 11 on a true and proper construction thereof was squarely applicable to the petitioner and the respondent was perfectly justified in holding so.

9. I have given my anxious consideration to the submissions made by learned counsel and am of the opinion that the view taken by the respondent is legally sound and indeed unexceptionable. Entry 11 is not exhaustive in character. It gives an inclusive description of the establishment to which the Act has been made applicable. A careful reading of the entry shows that while "establishments" engaged in purchase, sale or storage of goods from one category, the definition extends even to the establishment of exporters, importers, advertisers, commission agents, and brokers, where actual sale, purchase or storage of goods may or may not be involved. For instance, in the case of advertiser no sale or purchase of goods may be involved and what may be carried on by the establishment may be a simple service in the nature of an advertisement campaign on behalf of one of its customers. Similarly, commission agent and broker may or may not be actually dealing in purchase or sale of goods in the sense that no tangible goods may be purchased, sold or stored by them in the course of their activity and yet by reason of the extended meaning, given by the description of "establishments" under entry 11, an establishment, of a broker or an advertiser, or a commission agent is also deemed to be a trading and commercial establishment so as to attract the provisions of the Act. It is, therefore, incorrect to suggest that in order to be applicable, an establishment under entry 11 must necessarily be engaged in the sale, purchase or storage of goods. From the nature of the activities and the establishments covered by the extended meaning and description given under entry 11, it is apparent that even establishments where no purchase, sale or storage of goods is actually involved,

have been brought under the purview of the provisions of the Act.

10. There is yet another aspect to which I must at this stage turn, and this relates to the nature of the activity being actually carried on by the petitioner. The petitioner''s case, as set out in the writ petition, is that it purchases equipment and gives the same out on lease or hire purchase basis and receives in consideration of the same from its client rentals for the use of the said machinery and in certain cases it may even purchase new machinery according to the need and the requirement of a client and after purchase lease the same out to the client in consideration of a certain amount recovered by it as lease or hire purchase money. That the equipment purchased and leased to the customer belongs to the petitioner company has not been and cannot perhaps be disputed. In other words, while the petitioner does purchase the equipment, it does not sell the same on an outright sale basis. This, according to Mr. Kumar, took the petitioners out of the purview of entry 11, for, according to him, simple purchases of the machinery, was not enough unless the same was followed by the sale thereof. A careful reading of entry 11, however, does not support this interpretation of learned counsel. The entry does not require that the establishment must be engaged both in the purchase and sale of goods. The term "and" which Mr. Kumar reads into the entry, is actually absent and the absence of the same makes all the difference. The words "purchase, sale or storage" are disjunctively placed and, therefore, cannot be understood to mean that an establishment in order that it is covered by entry 11, must be engaged in all the three activities simultaneously, namely, purchase, sale and storage. It is enough for the application of entry 11 if the establishment is engaged in purchase only. It may even be sufficient if it is engaged only in sale or storage. As a matter of fact, an establishment engaged only in storage of goods does neither purchase nor sell the same but simply provides what can be called a warehousing facility. Yet such an establishment is a trading and commercial establishment in terms of entry 11, specifically excluding only such warehouses as are established under any Central or State Act. The intention, therefore, is clear that warehouses not established under any such Act, providing only a facility of storage of goods are covered by entry 11 even when no actual sale or purchase of goods in involved and what is provided is only a service.

11. In the present case, it is not as though the petitioner is simply purchasing and doing nothing thereafter with the goods in question. It is on its own showing selling the use of the goods, plant and machinery purchased by it and the said process of sale continues till such time the plant, machinery or equipment reaches its dead-end and is reduced to junk. In such a case, even though there is no sale, in the sense the said term is understood in the ordinary parlance, yet it cannot be disputed that the equipment is sold, spread over a period of time, may be, to one or more customers depending upon the life-span of the equipment and the nature of its use. Assuming, therefore, for the sake of argument that the purchase must be followed by a sale, as contended by Mr. Kumar, yet the said requirement is also satisfied in the present case for plant,

machinery and equipment purchased by the petitioner which are goods within the meaning of the entry are sold spread over a period of time for a valuable consideration.

12. The other activity which the petitioner is engaged in is "merchant banking". The petitioner''s case is that merchant banking is an activity by which an organisation underwrites corporate securities and advises clients on issues like corporate mergers, etc., involved in the ownership of commercial ventures. Merchant banking, it was submitted, primarily involves the management of public issues and loan syndication though slowly and gradually the activities have extended to other areas like project counselling, portfolio management, investment counselling. mergers and amalgamations, etc. The nature of the service rendered by a merchant banker it was contended, is multifarious in character with a view to provide solutions to complex and interrelated, problems which a client may be confronted with. For these services rendered by a merchant banker it receives fee and not commission as was suggested by the respondent. It was argued that commission was essentially payable to an agent for handling or selling merchandise and, therefore, it was wrong to suggest that the petitioner was a commission agent.

13. The term "commission" has not been defined under the Act nor has the term "commission agent" as appearing in entry 11, been defined. As to what will amount to commission and who shall be deemed to be a "commission agent" will. Therefore, have to be examined with the assistance of external aids. The term "commission" has been defined thus in the Black''s Law Dictionary :

"The authority or instructions under which one person transacts business or negotiates for another. In a derivative sense, a body of persons to whom a commission is directed."

The same term is defined in New Webster''s Dictionary this :

"The act of committing or giving in charge; authoritative charge or direction; authority committed; as for particular actions or functions; an instrument or warranting granting authority to act in a given capacity or conferring a particular rank; a body of persons authoritatively charged with particular functions, to give a commission to; authorise, delegate, send on a mission; to put in commission a warship."

The term "commission agent" is synonymous to a "commission merchant" which is defined thus in the Black''s Law Dictionary :

"A term which is synonymous with ''factor''. It means one who receives goods, chattels, or merchandise for sale, exchange, or other disposition, and who is to receive a compensation for his services, to be paid by the owner, or derived from the sale, etc., of the goods. One whose business is to receive and sell goods for a commission, being entrusted with possession of the goods to be sold, and usually selling in his own name."

Since the petitioner is a member of the stock exchange and is a registered broker, also it is necessary to notice the difference between "commission agent" and a "broker" as given in the above dictionary.

"A ''factor'' or ''commission merchant'' is one who has the actual or technical possession of goods or wares of another for sale, while a ''merchandise broker, is one who negotiates the sale of merchandise without having it in his possession or control being simply an agent with very limited powers."

14. From the annual report for the year 1987-88, Annexure B to the writ petition, reference whereto was made by the respondent in his order impugned in these proceedings, it is apparent that the petitioner company''s earnings have resulted from lease income, investment income, merchant banking income, issue management fees and credit syndication fees although the major portion of its earning has been from merchant banking and leasing of equipment. Under merchant banking, the petitioner''s income primarily has been from consultancy, advisory fees, funds management, commission and underwriting and commission/ brokerage. Relying upon the sources of income derived by the petitioner, the respondent came to the conclusion that the petitioner''s activities satisfied the requirements of the Schedule head "trading and commercial establishment". In my opinion, the views taken by the respondent cannot be said to be either irrational or otherwise far-fetched. The very fact that the petitioner is not actually engaged in the sale of goods on behalf of the client whom it serves as a merchant banker does not in my opinion mean that the petitioner is not receiving commission or cannot be treated as a "commission agent" as understood in the context of entry 11 of the notification in question. The term "commission agent", appearing in entry 11, cannot be given a restricted meaning as argued by the petitioner, nor should the same be limited to cases where a person sells goods on behalf of another and receives an amount out of the sale proceeds thereof as compensation of the service rendered. The social welfare purpose behind the legislation, and the ever increasing horizons and the myriad types of activities which are taking shape in the field of modern commerce, demand a liberal and more purposeful interpretation of the term "commission agent". Any activity which is undertaken on behalf of another, with an element of a compensatory payment for the work so done by the agent and relatable or proportionate to the magnitude of the assignment, should fall within the meaning of the term "commission agent". When seen in that context the petitioner''s merchant banking activity would certainly fall in place and would, therefore, qualify for being classified as a a trading or commercial activity within the meaning of entry 11 of the notification in question.

15. There is yet another reason which would bring the petitioner within the purview of entry 11 and that is the petitioner''s activity as a broker. The fact that the petitioner is a member of the stock exchange and is registered as a broker is not in dispute. That it has been working in that capacity is also not denied. What is contended by the petitioner is that the business which the petitioner is doing

as a broker is a very small percentage of what it is doing in equipment leasing and merchant banking. It was argued by Mr. Kumar, that the dominant purpose behind the incorporation of the company is to carry on business in equipment leasing and merchant banking and its amenability to the provisions of the Employees'' Provident Funds Act, ought to be determined only in the context of those two activities; and not as a broker, although business from brokerage has also been done by the petitioner in a small measure. I do not find any substance even in this submission of Mr. Kumar. The applicability of the provisions of the Act, cannot be made to depend upon the magnitude of business, an establishment does in a particular field of activity. Once an establishment answers the description given in any of the items, mentioned in the notification it attracts the application of the provisions of the Act, regardless of whether it has actually done any business and if so, the magnitude thereof. The test of dominant purpose has no application to the nature of the activities being carried on by the petitioner which can be reasonably treated as trading and commercial activities.

16. In Andhra University Vs. Regional Provident Fund Commissioner of Andhra Pradesh and Others, the provisions of the Employees'' Provident Funds and Miscellaneous Provisions Act were sought to be applied to the printing presses being run by the Universities of Andhra Pradesh and Osmania. Notices issued by the concerned authorities were called in question before the High Court on the ground that the universities were purely educational institutions having a number of departments, the main object whereof was to impart education, to the youth and that the departments of publications and press maintained by the universities were meant only to cater to the needs and requirements of the students and, therefore, could not be regarded as factories or industries so as to attract the provisions of the Employees'' Provident Funds Act. A Division Bench of the High Court of Andhra Pradesh held that the department of publication and press maintained by each of the two universities was an establishment engaged in an industry specified in Schedule I and was, therefore, amendable to the provisions of the Act and the schemes framed thereunder. The matter was then taken to the Supreme Court who upheld the view taken by the High Court and observed thus (in para 7 at page 157) :

"In construing the provisions of the Act, we have to bear in mind that it is a beneficent piece of social welfare legislation aimed at promoting and securing the well-being of the employees and the court will not adopt a narrow interpretation which will have the effect of defeating the very object and purpose of the Act. Once it is found that there is an establishment which is a ''factory'' engaged in an ''industry'', specified in Schedule I and employing 20 or more persons, the provisions of the Act will get attracted to the case and it makes no difference to this legal position that the establishment is run by a large organisation which may be carrying on other additional activities falling outside the Act."

17. In Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, there

lordships observed that the Provident Funds Act was a beneficent statute which should be so construed as to advance the object with which it is passed and any construction which would facilitate evasion of the provisions of the Act should as far as possible be avoided and also that section 16 of the Act, being a provision granting exemption to the employers from the liability to make contributions, should receive a strict construction.

18. Mr. Kumar, learned counsel appearing for the petitioner, however, relied upon the judgment of a Division Bench of the High Court of Madhya Pradesh in Central India Excise Traders Vs. Regional P.F. Commissioner and Another, in support of his contention that the entries is in the notification issued by the Government of India, should receive a narrow and strict constriction. For the reasons given by me earlier and keeping in view the observations of the Supreme Court in the two cases noticed above, I regret my inability to follow the line of reasoning advanced in the judgment relied upon by Mr. Kumar. In my opinion, there is no room of a different view or approach in matters of interpretation of the provisions of the Act or statutory notifications issued thereunder other than the one set out by their Lordships of the Supreme Court; nor can the beneficent effect of the provisions of the Act be negated by giving a narrow interpretation to the same, only because the provisions of the Act or the notifications issued by the Central Government has the effect of creating some obligations or financial liability for the employer.

19. Mr. Kumar lastly contended that since the employees of the petitioner-company had the benefit of a scheme of its own, there was no justification for imposing the provisions of the Act upon the company and that it was a case where the company ought to have been exempted u/s 17 of the Act. I do not find any substance even in this submission of Mr. Kumar. The power to exempt u/s 17 of the Act, vests in the appropriate Government. A plain reading of Section 17 shows that the appropriate Government can exempt any establishment from the provisions of the Act if it is of the opinion that the provisions of any such scheme with respect to the rates of contribution are not less favourable than those specified in section 6 and that the employees are in receipt of other provident fund benefits which are not less favorable to them than the benefits provided under the Act or any scheme in relation to the employees in any other establishment of a similar character. The question, whether the scheme which the petitioner company has framed for the benefit of its employees qualifies for the grant of an exemption to the petitioner-company u/s 17 of the Act is, therefore, a matter which shall have to be considered by the appropriate Government as and when an application in that regard is made to it. As at present, no such application has been admittedly made with the result that it is premature for this court to examine whether the petitioner is or is not entitled for the grant of an exemption. Mr. Kumar''s apprehension that even if such an application is made by the petitioner, the same is not likely to get the attention it deserves, appears to me to be unfounded. It is presumptuous on the part of the petitioner to think that the application it may make for grant of exemption, shall

not be considered by the appropriate Government. In any case remedies are admittedly, open to the petitioner if it finds that its application for the grant of of exemption is not being looked into by the authorities concerned. As at present, there is no justification for this court nor is there any prayer contained in the writ petition for the issue of a mandamus to the appropriate Government to consider the petitioner''s application for grant of exemption.

20. In the result, this petition fails and is accordingly dismissed, but in the circumstances of the case without any orders as to costs.

