
(1968) 10 KAR CK 0012

In the Karnataka High Court

Case No : Writ Petns. No's. 326, 538, 539 and 540 of 1966

Chhotalal Morarji Dhami and Others

APPELLANT

Vs

Regional Provident Fund Commissioner and Others

RESPONDENT

Date of Decision : 21-10-1968

Acts Referred:

Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 1 (3) (a),
1 (3) (b)

Citation : AIR 1969 Kar 355 : (1969) 1 MysLJ 615

Hon'ble Judges : M. Santhosh, J;A. Narayana Pai, J

Bench : Division Bench

Judgement

Narayana Pai, J.—These petitions have been heard together because they raise a common question of law as to the applicability of the provisions of the Employees' Provident Funds Act, 1952, and the propriety of the action taken by the authorities functioning under the said Statute to apply the same, to the Establishments run by the petitioners in these four cases.

2. We shall deal in detail with the facts of and points of law raised in the first of the petitions W. P. No. 362/1966 because a decision thereon will govern the other three cases also.

3. The petitioner describes himself as the proprietor of a Cardamom Factory. According to his case, his establishment is only a factory within the definition of the term contained in clause (g) of Section 2 of the Act. But, because the industry in which it is engaged is not one of the industries enumerated in Schedule I of the Act, it is not possible to apply the provisions of the Act. The stand taken up by the 1st respondent, the Regional Provident Fund Commissioner, Bangalore, is that the petitioner's Establishment comes within the description of a trading and commercial establishment falling within the category to which the Statute has been made applicable by a Notification of the Government issued pursuant to clause (b) of sub-section (3) of Section 1 of the Act. The answer to this contention of the respondent on behalf of the petitioners

is that the Notification itself is ultra vires of the powers of the Government or is liable to be struck down as one made in excess of the power conferred by the Statute.

4. Although there is some dispute between the parties regarding such matters as the exact number of employees working in the establishment, there is not any dispute on or in respect of the following facts:--

5. The petitioners purchases cardamom, subjects it to a certain process coming within the meaning of manufacture as defined in clause (i-a) of Section 2 of the Act to make it marketable and then either sells locally or exports the processed cardamom. He engages manual labourers for the said manufacturing process. He also has a clerical staff attending to details of the working of his establishment other than manufacturing. He therefore purchases goods, stores them for some time and then sells them.

6. On the assumption for the purposes of this discussion that the total staff engaged by him numbers 20 or more, the establishment may be regarded as either a factory or an establishment engaged in buying, storing and selling goods.

7. If is to be regarded merely as a factory or to the extent it may be regarded as a factory, the processing of cardamom is admittedly not one of the industries enumerated in the I Schedule of the Statute. This position is also not disputed by the 1st respondent.

8. Before proceeding to formulate the exact controversy between the parties it is necessary to set out sub-section (3) of Section 1 of the Act. That reads as follows:

"1.(1) xx xx xx xx (2) xx xx xx xx

(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."

There is a proviso appended to this with which, however, we are not concerned in this case.

9. Under or pursuant to clause (b), the Central Government issued various Notifications from time to time. The Notification which is of relevance to the present case is No. GER 346 dated 7-3-1962, brought into effect from 30th April 1962. By the said Notification, the Act was applied or was made applicable to:

"Every trading and commercial establishment 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."

10. The contention on behalf of the 1st respondent is that whereas, as a cardamom factory, the establishment of the petitioner cannot be brought within the purview of clause (a) of sub-s. (3) of Section 1, it is an establishment which answers the description of trading and commercial establishment given in the said Notification, and is therefore within clause (b) of the said sub-section.

11. Once it is conceded that on the I Schedule as it now stands, cardamom industry is not enumerated therein and that, therefore, the establishment of the petitioner to the extent it may be regarded as a factory is not within the purview of clause (a), but it is, some respects, also an establishment which is not a factory, the question does arise as to how an establishment which is a factory as well as an establishment other than a factory, can be brought within the purview of either clause (a) or clause (b). In other words, the question does arise as to how an establishment which when viewed from one point of view answers the description contained in clause (a) and from another point of view answers the description of clause (b) can be clearly placed within one or the other clause and what the tests for the determination should be.

12. The answer, according to Mr. B. S. Keshava Iyengar, learned counsel for the 1st respondent, is contained in the principles stated by the Supreme Court of India in two rulings reported in *The Regional Provident Fund Commissioner, Bombay Vs. Shree Krishna Metal Manufacturing Co., Bhandara*, and *The Associated Industries (P) Ltd. Vs. The Regional Provident Fund Commissioner, Kerala Trivandrum*, . Both the cases dealt with establishments which were clearly factories but which were engaged in more industries than one. Some of which were among the industries enumerated in the I Schedule and some not. The question was whether and in what manner the factories may be classified so as to determine whether the Statute could or could not be applied. The more detailed discussion of Principles is contained in the first of the cases. Among other propositions, the most important propositions laid down were:--

"the Statute, in terms, applies to establishments of two categories, viz., establishments which are factories and establishments which are not factories;

(ii) an establishment for the purpose of the Statute need not necessarily be engaged in a single activity or located in a single place, especially after the introduction of Section 3-A by the Amending Act 46 of 1960 making it clear that an establishment may consist of different branches whether situate in the same place or in different places;

(iii) It is not the intention of the Statute that factories should be exclusively engaged in any one of the industries specified in the I Schedule before they can be brought within the purview of the Statute; and

(iv) in determining whether a particular factory engaged in several industries,

some of which are those enumerated in the I Schedule and some not, comes within the purview of clause (a) of sub-section (3) of Section 1, the test to apply is which is the primary or dominant activity of the establishment; if the dominant activity is an industry enumerated in the I Schedule, then the factory will come within the purview of clause (a) notwithstanding the fact that it engages itself in other industries or activities as well."

13. The same principles were reiterated in the subsequent decision reported in *The Associated Industries (P) Ltd. Vs. The Regional Provident Fund Commissioner, Kerala Trivandrum*, .

14. In both the cases, the further question was also discussed, viz., whether the necessary minimum strength of staff to attract the provisions of necessary minimum strength of the Statute should be staff working in respect of the industry enumerated in the I Schedule, or staff working in respect of the entire establishment. The answer was latter.

15. From the principles so laid down by the Supreme Court, it follows that just as the Statute does not require that for a factory to come within the purview of clause (a) it should engage itself exclusively in one or more of the industries enumerated in the I Schedule, so also there is nothing in the Statute to indicate that before an establishment can be brought within its purview, it should be either exclusively an establishment which is a factory or exclusively an establishment which is not a factory. In actual practical working also, it may not be possible to have such clearly distinguishable establishment engaged purely or exclusively in one activity alone. Modern economic and commercial life necessarily involves the combination of more activities than one for the purpose of profitable working of any establishment or venture. When therefore, one is met with an establishment which for the stated reasons may be regarded as a composite establishment, that is, an establishment engaged in more activities than one, some of which are manufacturing activities and some merely commercial or other activities, but employs on the whole 20 or more persons, the question whether such an establishment can be brought within the scope of the Statute must be answered by applying the test laid down by their Lordships of the Supreme Court in the above cases. That is to say, one has to examine which among the activities of the establishment is the dominant or primary activity and which the secondary or ancillary activity. If the dominant activity is manufacturing activity, the establishment will necessarily have to be classified or identified as a factory. If in such a situation, the factory is engaged in more industries than one, some of which are enumerated in I Schedule of the Act and some not, the further question will have to be examined as to whether the dominant or principal activity is an industry mentioned in the Schedule or not. If the answer is the former, the factory will come within the purview of clause (a) of sub-section (3) of Section 1. If the answer is latter, it will not come within the purview of the said clause. If upon applying the test it is found that the dominant activity is a non-manufacturing activity or an activity other than manufacturing

activity, the establishment will go out of the purview of clause (a) of sub-section (3) of Section 1. The next question in that situation would be, is it an activity which would bring the establishment within the description of an establishment given in any one of the Notifications made by the Central Government pursuant to Clause (b). If it answers any one of those descriptions, the Statute can be validly applied; if it does not, the Statute cannot be validly applied.

16. The contention of the 1st respondent, as already stated, is that the establishment which comes within the description of trading and commercial establishment engaged in purchase, sale or storage of goods.

17. Whether that contention is right or wrong or supportable on the material placed before Court will not arise if Mr. Jagannatha Shetty, the learned counsel for the petitioner is right in saying that the Notification itself is ultra vires of the powers of the State Government.

18. He relies strongly on the observations of the Supreme Court in the case of Mohmedalli and Others Vs. Union of India (UOI) and Another, . In that case it was argued that the power given to the Central Government under clause (b) of sub-s. (3) of Section 1 of the Act was an unguided uncanalised power and that therefore the Statute itself was bad as amounting to excessive delegation of legislative powers beyond constitutional limits. In repelling that contention and upholding the validity of the Statute, their Lordships made the following observations in paragraph 6 of the judgment at page 983 of the report:

"It cannot be asserted that the power entrusted to the Central Government to bring within the purview of the Act such establishments or class of establishments as the Government may by notification in the Official Gazette specify is uncontrolled and uncanalised. The whole Act is directed to institute provident funds for the benefit of employees in factories and other establishments, as the preamble indicates. The institution of provident fund for employees is too well established to admit of any doubt about its utility as a measure of social justice. The underlying idea behind the provisions of the Act is to bring all kinds of employees within its fold as and when the Central Government might think fit, after reviewing the circumstances of each class of establishments.....

So far as establishment which do not come within the descriptions of factories engaged in industries, the Central Government has been vested with the power of specifying such establishments or class of establishments, as it might determine, to be brought within the purview of the Act. The Act has given sufficient indication of the policy underlying its provisions, namely, that it shall apply to all factories engaged in any kind of industry and to all other establishments employing 20 or more persons. This Court has repeatedly laid it down that where the discretion to apply the provisions of a particular statute is left with Government, it will be presumed that the discretion so vested in such a high authority will not be abused. The Government is in a position to have all the

relevant and necessary information in relation to each kind of establishment enabling it to determine which of such establishments can bear the additional burden of making contribution by way of provident fund for the benefit of its employees. x x x x."

19. Mr. Jagannatha Shetty's argument is that in upholding the constitutionality of the Statute, the Supreme Court has proceeded upon the footing that the control or guidance given to the Government by the Statute in the matter of exercising the delegated power consists in this, viz., that it should examine the position and the desirability of applying the Statute with reference to each kind of establishment or each category of establishments. If, therefore, the Government goes beyond these directions or principles of guidance and purports to bring within the fold of the Statute an heterogeneous body of establishments, the obvious inference could be that the Government have not applied their mind to the desirability or otherwise of applying the Statute to the different kinds of establishments and that therefore the exercise of the power itself must be struck down as either in excess of the power or in contravention or opposition of the policy of the Statute.

20. Now the Notification depended upon the 1st respondent, which we have already copied operates to apply the Statute to every trading and Commercial establishment engaged in purchase, sale or storage of any goods. The characteristic of the establishment or class or establishments selected which distinguished it from the class of establishments kept outside the scope of the classification is said to be its trading and commercial activity. This description, according to Mr. Shetty, is too wide, and the subsequent portions make it clear that it is too wide. The subsequent portions include certain specially described establishments within the scope of the description "trading and commercial establishments" and exclude certain others therefrom.

21. Even in regard to the class selected, it appears to us that it may not be quite right to say that it applies to all types of trading and commercial establishments. It is limited in its application to trading and commercial establishments engaged in the purchase, sale or storage of any goods. There may be several activities which may be brought within the scope of either trade or commerce. Indeed, the latter word is wider in its connotation than the former. By restricting the category to establishments engaged in purchase, sale or storage of any goods, the commercial activity of such establishments is sought to be brought nearer an activity which can be clearly described as trade, because, primarily trade consists in buying and selling of goods, whereas the commercial activity is wider than mere buying and selling of goods. If it is on account of this clear intention to limit the class in the manner indicated, that it becomes necessary to include within the definition certain categories of establishments which would not otherwise have fallen within the limited category so described. These are the establishments of Exporters, Importers, Advertisers, Commission Agents, Brokers, Commodity Exchanges and Stock Exchanges, all or any of whom may or

may not, under all circumstances, purchase goods or store goods or sell goods. But, they do engage themselves in commerce under all circumstances. This slight widening of the definition apparently would bring within its scope banks and warehouses in certain circumstance. Obviously, with a view to make the position banks and warehouses from its scope. In the last analysis, therefore, establishments to which the notification primarily applies the Statute are trading and commercial establishments engaged in the purchase, sale or storage of any goods. Other establishments like Exporters. Importers, etc., which will not come within the strict limitation of the said description are specially brought which in its scope, apparently because, the activities of Exporters, Importer, etc., are so closely connected with the activity of the establishments first mentioned that it was considered desirable to name them along with the first mentioned category of establishments.

22. So understood, we find it difficult to accept the criticism of Mr. Shetty that the Notification purports to deal with different varieties of establishments as belonging to one class. There is a clear statement of the principal characteristic which distinguishes the class selected for action and keeps out of it establishments not sought to be covered by it. The addition of other enumerated categories of establishments is also clearly understandable on the footing of intimate relationship that exists between them and the first named establishments.

23. In that view, we are unable to agree that the position is such that if examined in the light of the principles stated by their Lordships of the Supreme Court in case of Mohmedalli and Others Vs. Union of India (UOI) and Another, it could be regarded as one in which the Government have exceeded the scope of the power delegated to them under the Statute.

24. What remains now is that application of the principles to the facts of this case. As already discussed, the one or the primary question of fact for investigation is which of the two activities of the petitioner is a dominant activity of his establishment. Is it manufacturing activity or is it the commercial activity? Although an assertion has been made in the affidavit of as Inspector of Provident Funds working under the 1st respondent that the dominant activity is clearly commercial activity, it does not appear that the position was clearly examined from the point of view of principles now discussed. The correspondence or the contents of the notices issued on behalf of the 1st respondent and replies on behalf of the petitioner disclose that the parties were at issue on various other matters which may or may not be of relevance to the main issue. Neither the petitioner nor the 1st respondent or any officer working under the 1st respondent had clearly applied his mind to the main question about the relative importance of the different activities engaged in by the petitioner's establishment. As we have already pointed out, if the dominant activity can be regarded as the manufacturing activity, then the petitioner's establishment is clearly outside the scope of the Statute. It is only if, upon fact, it can be held that the dominant

activity is the commercial activity, 1st respondent can sustain his case that the petitioner's establishment comes within the scope of the Notification mentioned.

25. As facts and circumstances of the case have not been examined from the point of view of, and in the light of the principles stated above there is no alternative but to quash the demands for deposits impugned in these various petitions. At the same time, the liberty should be reserved to the 1st respondent to examine the position in the light of the principles stated above, and then decide whether the Statute can or cannot be validly applied to the establishment of the petitioner.

26. In each of these writ petitions, therefore, we make an order quenching the demands impugned and declare that the said quashing will not preclude the 1st respondent from examining the facts and circumstances, either himself or through his authorised subordinate, in the light of the principles stated in this order and then take a decision as to whether or not the Statute can be validly made to apply to the establishment of the petitioner.

27. In each of these cases, the parties will bear their own costs.

28. BNP/D.V.C

29. Order accordingly.