
(1968) 10 KAR CK 0005

In the Karnataka High Court

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

Chhotalal Morarji Dhami

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 : (1970) 1 LLJ 541

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. Write Petition No. 326 of 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 (q) of S. 2 of the Act. But, because the industry in which it is engaged is not one of the industries enumerated in Sch. I of the Act, it is not possible to apply the provisions of the Act. The stand taken up by respondent 1, 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 S. 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 petitioner purchases cardamom, subjects it to a certain process coming within the meaning of manufacture as defined in Clause (i.a.) of S. 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 twenty or more, the establishment may be regarded as either a factory or an establishment engaged in buying, storing and selling goods.

7. If it 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 Sch. I of the statute. This position is also not disputed by respondent 1.

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

"1. (1) * * * (2) * * *"

(3) Subject to the provisions contained in S. 16, it applies -

(a) to every establishment which is a factory engaged in any industry specified in Sch. 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 notification from time to time. The notification which is of relevance to the present case is No. G.S.R. 346, dated 7 March, 1962, brought into effect from 30 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 respondent 1 is that whereas, as a cardamom factory, the establishment of the petitioner cannot be brought within the purview of Clause (a) of Sub-section (3) of S. 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 Sch. I 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, in 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 (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 Sri B. S. Keshava Ayyangar, learned counsel for respondent 1, is contained in the principles stated by the Supreme Court of India in two rulings 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 Sch. I 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 :

"(i) 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 S. 2A by the amending Act 46 of 1960 making it clear that an establishment may consist of different departments or may have 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 Sch. I 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 Sch. I and some not, comes within the

purview of Clause (a) of Sub-section (3) of S. 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 Sch. I, 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 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 the statute should be the staff working in respect of the industry, enumerated in Sch. I, or staff working in respect of the entire establishment. The answer was the 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 Sch. I, 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 twenty 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 Sch. I 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 S. 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 S. 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 statutes cannot be validly applied.

16. The contention of respondent 1, as already stated, is that the establishment of the petitioner in this case is an 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 Sri Jagannatha Shetti, 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-section (3) of S. 1 of the Act was an unguided, uncanalized 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 the judgment at p. 539 of the report :

"... It cannot be asserted that the powers entrusted to the Central Government to bring within the purview of the Act Such establishments or class of establishment as the Government may by notification in the official gazette specify is uncontrolled and uncanalized. The whole Act is directed to institute provident funds for the benefit of employees in factories and other establishments, as the 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 establishments which do not come within the description 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 twenty 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 ..."

19. Sri Jagannatha Shetti'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 establishments 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 a 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 by respondent 1, which we have already copied, operates to apply the statute to every trading commercial establishment engaged in purchase, sale or storage of any goods. The characteristic of the establishment or class of establishments selected which distinguishes 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 Sri Shetti, 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. 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 establishment of exporters, importers, advertisers, commission agents, brokers, commodity exchanged and stock exchanges all or any 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 circumstances. Obviously, with a view to make the position clear, the notification expressly excludes banks and warehouse 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 within its scope, apparently because, the activities of exporters, importers, 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 Sri Shetti 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 establishment not sought to be covered by it. The addition of other enumerated categories of establishment 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 the 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 the 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 the 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 an Inspector of Provident Funds working under respondent 1 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 respondent 1 and replies on behalf of 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 petitioners nor respondent 1 nor any officer working under respondent 1 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, then respondent 1 can sustain his case that the petitioner's establishment comes within the scope of the notification mentioned.

25. As the facts and circumstances of the case have not been examined from the point of view of, and in the light of the principle 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 respondent 1 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 quashing the demands impugned and declare that the said quashing will not preclude respondent 1 from examining the facts and circumstances, either himself or through his authorized subordinates, 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.