
(2005) 07 BOM CK 0012

In the Bombay High Court

Case No : Writ Petition No. 3087 of 2005

Forest Development Corporation of Maharashtra Ltd.

APPELLANT

Vs

Regional Provident Fund Commissioner and Others

RESPONDENT

Date of Decision : 27-07-2005

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1, 1(2), 1(3), 1(4), 14

Citation : (2006) 2 BomCR 189 : (2006) 109 FLR 368 : (2006) 2 LLJ 1109

Hon'ble Judges : Rebello F.I., J; Britto N.A., J

Bench : Division Bench

Advocate : M.P. Badar, for the Appellant; R.S. Somdaram and U.R. Tanna, for the Respondent

Judgement

Rebello F.I., J.—The matter was on board for confirmation of interim relief as rule was issued on 24-6-2005. However, considering the affidavit filed on behalf of the respondents, the matter was taken up for final hearing itself.

2. A few facts may now be set out. The petitioner is a Corporation set up by the State of Maharashtra and its main activity is to raise plantation in the forest areas earmarked for the company by Government of Maharashtra after clearing existing degraded forest and to undertake maintenance, preservation, protection and development of the existing forest. The issue involved in this petition is whether the petitioner is governed under the provisions of the Employees Provident and Miscellaneous Provisions Act, 1952. The main submission of the petitioner is based on the fact that no notification has been issued u/s 1(4) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "Act"). It is the case of the petitioners that considering that there is no notification the order dated 25-10-2004 is without authority of law and consequently reliefs are prayed for to quash the order dated 25-10-2004 passed by respondent No. 1 in the matter of levy of damages u/s 14(6) of the Employees Provident Fund and Miscellaneous Provisions Act as also the

Certificate No. 9 dated 8-4-2005 issued by the Assistant Provident Fund Commissioner, SRO Nagpur.

3. In answer, on behalf of the respondents, reply has been filed. In the said reply, it is set out that the establishment of the petitioners which is non scheduled establishment has been governed under the provisions of the Act with effect from the year 1974. At the request of the petitioner's Head Office for administrative convenience, different branch offices have been given different code numbers which were communicated to the petitioner by letter dated 7-10-1977. The petitioner, it is pointed out, has been complying with the provisions of the Act and has been paying contribution regularly and has also paid damages in case of delay in remittance. As on date, the petitioner's establishment has enrolled as many as 1014 employees of the corporation and are regularly paying the provident fund contribution. As on date, 669 employees have already settled their dues on account of provident fund and deriving pension from the respondent department. It is therefore, submitted that the present challenge is only an afterthought and the petitioners are estopped from now contending that the Act is not applicable to them. When the petitioners themselves resolved that the provisions of the Act should be made applicable to them, the requirement of issuance of notification u/s 1(4) is not mandatory. At the highest, it is required for knowing the date from which the provisions became applicable. The petitioners, it is contended, had filed Writ Petition No. 1498 of 1987 challenging the damages levied. That was disposed of by order dated 24-4-1987 reducing the quantum of damages but however, upholding the order of the respondent department. Another writ petition was filed being Writ Petition No. 350 of 1987 which came to be disposed of on 18-4-1991, Writ Petition No. 441 of 1997 has been disposed of on 8-10-1997. The petition was partly allowed. Writ Petition No. 279 of 1999, it is however, pointed out, is pending before this Court. That petition, however, challenges the order passed by the Appellate Tribunal, In that petition, the petitioners herein have sought a stay to the effect and operation of the order dated 11-9-1998 remanding the matter back to the respondent department. It is therefore, pointed out that as similar grievance as now raised have been raised earlier and rejected, rule should be discharged.

4. We may firstly note that the petitioners herein had filed Writ Petition No. 350 of 1987 which was also disposed of alongwith other writ petitions by the learned Judge of this Court on 18-4-1991. On the consideration of the said judgment, the issue before the learned Single Judge was whether the Commissioner was right in assessing the damages based on a circular issued prior to the year 1982. There was no challenge by the petitioner herein that the Act itself was not applicable. The issue therefore which the Court was considering was whether the damages as levied u/s 14(b) could have been levied. The learned Judge ordered deposit of damages at the rate of 25%. The Provident Fund Commissioner was thereafter directed to assess the damages. Subsequent petition being Writ Petition No. 1498 of 1993 filed by the petitioners was disposed of by order dated 24-4-1991 in view of the order passed in Writ Petition No. 350 of 1987 which was

heard alongwith Writ Petition No. 1650 of 1984.

The petitioner thereafter filed one more petition being Writ Petition No. 441 of 1997. That was to clarify the order made for remand in W.P. No. 350/87 on 18-4-1991. The judgment to which one of us was partly (Rebello, J.) noted that the Board of Directors of the petitioners had passed a resolution communicating to the Regional Provident Fund Commissioner to extend the provisions of the Act to the petitioner establishment. The stand of the petitioner was that the formal coverage to the establishment under the Act can only be after the publication of the notification in the Official Gazette by the Central Government and not otherwise. The issue was also in the matter of levy of damages. On behalf of the petitioner, reliance was placed in the judgment of *Harish Sakharam Savardekar Vs. Union of India (UOI) and Others*, . After considering various contentions it was held that the date of applicability at the highest can be 4-8-1977 and for the purpose of computation and convenience, it was considered to be 1-9-1977. Reference was also made to the order passed in Writ Petition No. 350 of 1987. It was noted that the order impugned in Writ Petition No. 441 of 1997 was the order passed on remand subsequent in the order disposing of Writ Petition No. 350 of 1987. The principal grievance which was argued was in the matter of damages. It was noted, considering the provisions of Sub-section (4) of Section (1) that there was nothing on record to show that the employees participated in the decision namely resolution passed by the petitioners to apply the provisions of the Act. It was noted that on the contrary the employees had made representation that the contribution should not be recovered during the period from 1-11-1974 to 31-8-1977. It is in that context that this Court held that the date of applicability should be 1-9-1977. The deduction ought to be from 1-9-1977. It is therefore, clear that the provisions of the Act were deemed to be applicable with effect from 1-9-1977. The petitioners have not challenged the said judgment.

5. With the above, the first question that will arise is whether the issue is open for consideration considering judgment dated 8-10-1997 in Writ Petition No. 441 of 1997 and the earlier judgment in Writ Petition No. 350 of 1987. In both the petitions, the petitioners herein had raised a contention that the provisions of the Act are not applicable considering that there was no notification issued u/s 1(4) of the Act. The issue seems not to have been answered in so far as Writ Petition No. 350 of 1997 is concerned. However, in Writ Petition No. 441 of 1997 considering the contentions it was held that the provisions of the Act would be applicable from 1-9-1977. The contention that a notification was required was not accepted. The petitioner herein have chosen not to challenge the said order which was passed on 8-10-1977. In other words, the issue of applicability of the Act stands concluded. Even otherwise, from the reply filed by the respondents, it would be clear that the petitioners themselves had passed a resolution calling on the respondents to make applicable the provisions of the Act to the petitioners. Pursuant to that the petitioners started deducting and depositing amounts. It is only when the demand for damages was made that the order was challenged.

The respondents have pointed out that a large number of employees have been covered under the scheme. The employees have been receiving benefits from the respondents and at the request of the petitioners the various branches have been given distinct code numbers. Even assuming Section 1(4) requires a notification, the notification is only for the purpose to make known that the act is applicable from a particular date. In the instant case the petitioners requested respondents to make applicable the provisions of the Act. The employer did not oppose the same de facto from 1-9-1977 contributions are being paid. Non publication of notification is therefore of no consequence. Even otherwise considering the fact that the matter was in issue in Writ Petition No. 441 of 1997 and the matter has been decided after being in issue, it will not be open to the petitioners herein once again to contend that the provisions of the Act is not applicable. The principles of res judicata or principles akin thereto would be applicable and it will not be open to the petitioners to once again contend that the Act is not applicable and that it is open to them to file a fresh petition in respect of the same issue. We are therefore, clearly of the opinion that the matter having been in issue and having been answered by this Court and the fact that contributions have been collected and paid from 1-9-1977, it will not be open to this Court to once again permit the petitioners to raise the issue. The petition therefore, on that count is liable to be rejected. In Harish Savardekar (supra), the issue before the learned Judge WHS whether the application by the employer and majority employees for voluntary coverage is sufficient. On the consideration, the learned Judge held that it is only on the notification being promulgated in Gazette would the Act be made applicable. Considering the above we are of the clear opinion that the first contention must be rejected.

6. Though the petition can be disposed of on this point only, for the sake of argument, let us consider the provisions of Sub-section 1(4) of the Act and other provisions of the Act. By virtue of Section 1(2), the provisions of the Act have been made applicable to the whole of India, except the State of Jammu and Kashmir. Section 1(3) sets out the establishment in which the Act is applicable. Then we have Section 1(4) which reads as under :

Notwithstanding anything contained in Sub-section (3) of this section or Sub-section (I) of Section 16, where it appears to the Central Provident Fund Commissioner whether on an application made to him 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, he may, by notification in the Official Gazette, apply the provisions of this Act to that establishment on and from the date of such agreement or from any subsequent date specified in such agreement.

Reading of this section would therefore, show that even if otherwise, the Act is not applicable, if it appears to the Central Provident Fund Commissioner where on application made to him or otherwise that the employer and the employees are desirous, that the provisions of the Act be made applicable to the

establishment, that can be so done by notification published in Official Gazette, On such notification the provisions of the Act on or from the date of such order specified in such agreement the act becomes applicable. The purpose therefore, of the notification and its publication is to make known to the employer and all employees working in the establishment that the Act will be made applicable to them from the date set out in the notification. The question is whether the publication of the notification is mandatory to make applicable the provisions of the Act. We have noted earlier that by virtue of Sub-section (4) of Section (1), even if the establishment is not covered it is open to both the employer and employee to apply for registering the establishment under the provisions of the Act. The date of applicability is to inform everyone the date when the Act becomes applicable to the establishment. In the instant case, admittedly there is no notification has been issued notifying the date from which the provisions of the Act would become applicable. There is also nothing on record and as noted in Writ Petition No. 441 of 1997 that there was no agreement between the petitioners and employees and on the contrary the contention of the employees was that no deduction should be made for the period of 1-11-1974 to 31-8-1977. After that period, the employees themselves have not objected to the petitioner forwarding the contribution under the Act to the respondent. This practice is going on from the year 1977. Even if date was not notified, the date of applicability was held to be as 1-9-1977 as can be seen from the judgment in Writ Petition No. 441 of 1997. The publication of notification therefore is only for making known that the provisions of the Act apply in order to enable the parties to make their contributions. Considering the object of publication of the notification, we are unable to agree with the view taken by the learned Single Judge in Harish Saktharam Savardekar (supra) that in the absence of notification, provisions of the Act would not be applicable. At the highest, in the absence of notification it will not be open to the respondents to claim damages until a date for application is agreed upon. The purpose of object of the notification is only to make known the date. If the parties therefrom agree to a date and start directing the contribution from the employer and the employer do not opposes the same but acquiesce, there is no need of a notification to make the act applicable. The conduct of the parties is sufficient. That requirement is therefore directory. We are clearly therefore, of the opinion that mere non- publication of the Gazette cannot result in holding that the provisions of the Act are not applicable. If the parties themselves directly or indirectly acquiesce that the provisions of the Act be made applicable and start making contribution the Act would be applicable from the date of contributions notwithstanding the non-publication in the Official Gazette, There is therefore, no merit in this petition. As the petition was admitted amongst others on the ground that the Writ Petition No. 441 of 1997 is pending which in fact has been disposed of and the issue in Writ Petition No. 279 of 1999 is not directly in issue. Rule discharges. There shall be no order as to costs.