

(1974) 05 DEL CK 0035

In the Delhi High Court

Glamour

APPELLANT

Vs

Regional Provident Fund Commissioner and Others

RESPONDENT

Date of Decision : 17-05-1974

Acts Referred:

Citation : (1975) 1 LLJ 514

Hon'ble Judges : B.C. Misra, J

Bench : Single Bench

Judgement

B.C. Misra, J.—This writ petition is directed against the order of the Central Government dated 26th August, 1966, by which it has rejected the reference of the petitioner u/s 19A of the Employees' Provident Fund Act as well as the order of the Regional Provident Fund Commissioner dated 2nd March, 1966, calling upon the petitioner to enroll the employees in dispute and to pay all arrears of provident fund dues in their respect.

2. The Materials facts of the case are that the "petitioner (which is owned by a private limited company), deals in sales of sarees under its name and style "Glamour" at Connaught Place New Delhi. There is scarcely any dispute with regard to its being covered under the scheme of Employees' Provident Fund, and Family Pension Fund Act, 1952, and its own employees appear to have been enrolled under the scheme. The main dispute between the parties briefly stated, however, is that there is one V.S. Kartar Chand, respondent No. 3, who, at the material time, was employing about six persons and had been carrying on the tailoring business at the premises of the petitioner. The contention of the department is that they are employees of the petitioner and so must be subjected to enrolment under the Act for purposes of the Provident Funds Scheme. The petitioner disputes the said position and contends that respondent No. 3 has an independent business and his employees cannot be enrolled along with the employees of the petitioner.

3. This controversy has arisen under the circumstances that on 30th December, 1963, respondent No. 1, Regional Provident Fund Commissioner," wrote a letter

to a number of factories/establishments, including the petitioner, in which be stated that an amendment had been made in the Act, as a result employees employed by or through a contractor in any factory/establishment had been brought at par With the employees employed directly for the benefit of the Employees" Provident Fund with effect from 30th November, 1963. He, therefore; requested that the procedure for enrolment according to law indicated by him be adopted. On 18th January, 1964, the petitioner gave a reply to the said circular letter stating that its tailoring order was being executed by respondent No. 3 and that he gave commission to the petitioner for the orders booked but the workers were exclusively his employees on monthly wages and a regular attendance register was maintained by him under the Shops and Establishments Act and it was contended that the amendment was not applicable to the petitioner, Subsequently, there was further correspondence exchanged on 13th February and 18th February, 1964. Thereafter, on 16th February, 1965, respondent No. 1 again wrote to the petitioner to the effect that inspection of the accounts of the petitioner-firm made on 7th January, 1965, had disclosed that it was employing workers in its establishment through a contractor, namely, respondent No. 3 and that they must be enrolled as eligible employees for purposes of the provident fund and their contributions and administrative charges thereon should be deposited. To this, a reply was sent on 3rd April, 1965, on behalf of the petitioner by which the petitioner maintained its stand that respondent No. 3 had an independent business and he was not a contractor of the employees of the petitioner, nor did he work under the petitioner's supervision and control and he was a separate entity and that his workers were exclusively (sic). On 2nd March, 1966, a reply was sent by respondent No. 1 to the aforesaid letter of the petitioner. It was observed that the establishment of the petitioner had been inspected on 24th May, 1965, by the officer himself and he had found that six persons were being employed in the establishment of the petitioner through the contractor, respondent No. 3 who were working in connection with work of the establishment and they were getting their wages indirectly from the petitioner through the contractor. It was stated that these six persons would be considered as employees of the petitioner employed through contractor and the petitioner was called upon to enroll all the eligible employees as members of the fund from the due date and deposit their contributions and administrative charges thereon. The petitioner feeling dissatisfied with the said communication, filed a reference u/s 19A of the Act before the Central Government in which it set out its case as stated above. This was disposed of by the impugned order of the Central Government dated 26th August, 1966. The order is to the effect that "the point of reference to the Government in the said letter is not attracted by Section 19A of the Act. Further, under paragraph 26B of the Employees' Provident Fund Scheme, 1952, the decision of the Regional Commissioner as regards any question whether an employee is entitled or required to become a member of the Employees' Provident Fund is final. In the circumstances, Government regrets its inability to issue a direction u/s 19A of the Act." In other words, the reference of the petitioner was turned down without

any decision. Thereafter, respondent No. 1 issued the demand for payment of arrears of provident fund dues by letter dated 2nd November, 1966. Aggrieved by these sections and orders, the petitioner has filed the present writ petition on 7th November, 1966, on the grounds mentioned in the writ petition. A counter-affidavit to the writ petition has been filed by the Regional Provident Fund Commissioner. After adverting to the correspondence mentioned above, he has in paragraph 11 given detailed reasons as to why he considers that these workmen in dispute were really employees of the petitioner for purposes of the provident fund. In the counter-affidavit, it has been mentioned that the petitioner had been given ample time and all opportunities to lead evidence in the matter and its written representation had been duly considered. Along with the counter-affidavit, a copy of the report of the Provident Fund Inspector has also been filed. The comments of respondent No. 1 made on the query of the Central Government has also been filed. A rejoinder to the counter-affidavit has been filed on behalf of the petitioner in which the assertion made in paragraph II of the counter-affidavit has been controverted. It has also been denied that the petitioner had been given any opportunity to establish its contentions by production of relevant evidence.

4. Dr. Anand Parkash appearing in support of the writ petition has contended that the questions involved raise disputes about the status of respondent No. 3 and of his employees and the same should have been decided by the appropriate authority after affording the petitioner an opportunity to produce evidence and that the petitioner was entitled to a hearing and a decision on the points raised by it and so the order of respondent No. 1 is legally bad. The second contention of the learned Counsel is that the Central Government has refused to exercise the jurisdiction vested in it u/s 19A of the Act and its order is liable to be quashed. The Scheme of the Employees' Provident Fund and Family Pension Fund Act, 1952 (herein referred to as the Act,) is that the Act applies to every establishment which is a factory engaged in any industry specified in Schedule I and in which 20 or more persons are employed. It also applies to other establishments which may be specified by the Central Government and inter alias to others specified in the sub-sections of Section 1 of the Act. Section 4 confers powers on the Central Government to add to the Schedule and the other establishments to which the Scheme may apply are mentioned in the other sub-sections of Section 1 of the Act, while Section 6 has carved out the exceptions. Section 2 A, inserted by Act 46 of 1960, has extended the coverage of the Act to different departments and branches of the same establishment. In an establishment governed by the Act to which the Employees' Provident Fund Scheme framed under the Act applies, the employer has got certain obligations and duties and rights, in particular to enroll his employees as members of the fund to recover their contribution and to add his own contribution to the fund in accordance with the provisions of the Scheme. Until the insertion of Section 7A in the Act, there was no machinery provided for determining the amount due from the employer, although there was a machinery for recovery of the amount from

the employer to penalties by use of various coercive measures. Section 7A of the Act was inserted by the amending Act 28 of 1963. Its material portion reads as follows:

The Central Provident Fund Commissioner, and Deputy Provident Fund Commissioner or any Regional Provident Commissioner, may, by or del determine the amount due from any employer under any provision of this Act, the Scheme or the Family Pension Scheme, as the case may be and for this purpose may conduct such inquiry as he may deem necessary.

Sub-section (2) gives powers of a civil Court to enforce attendance of witnesses and production of documents, etc, for the purpose of the enquiry. Sub-section (3) reads that no order determining the amount "due from any employer shall be made under Sub-section (1), unless the employer is given a reasonable opportunity of representing his case". Sub-section (4) has accorded a finality to this order and has made it unquestionable in any Court of law. It is not disputed that the Regional Provident Fund Commissioner is enjoined by this section to hold an enquiry and deter, mine the amount due from the employer. After the amount has been determined, various modes are prescribed for enforcing its recovery. The question now arises whether Under this section, the function of the Commissioner is only to determine the amount due or its scope extends to determination of all jurisdictional facts leading up to the determination of the amount.

5. In Newspaper Publishers Private Limited v. Regional Provident Fund Commissioner, Bangalore (1972) 41 F.J.R. 328, a Division Bench of the High Court of Mysore observed that the objection of the employer that the apprentices or trainees under it did not come within the definition of employees under the scheme and that they had not put in service for the requisite number of days constitute objections to the condition precedent to action under the Act and that the said objections had to be determined u/s 7A of the Act. In the absence of such determination. the High Court quashed the order. A learned single Judge of the High Court of Madras in Chokkan Palani Vilas v. Regional Provident Fund Commissioner, Madras (1971)41 F.J.R. 243, had to deal with a case where the employer contended that he had 14 employees working in his factory and six employees were working at his shop and the factory and the shop did not have any connection with each other and the establishment, Therefore, did not employ 20 or more persons to attract the provisions of the Act. No opportunity had been given to the employer to establish his contention. It was contended before the learned single Judge that Section 7A only contemplated an enquiry into the determination of the amount due, but it did not envisage the determination of the liability and that the controversy could only be decided u/s 19A of the Act. The learned single Judge repelled the contention and held that though it was not explicitly stated in Section 7A that it was open to the authorizes specified therein to determine the liability of the employer, still it would be seen that the prerequisite for determining the amount of contribution was the liability of the

employer and, Therefore, in deciding the amount of contribution payable, it was necessary to decide the question of the applicability of the Act and in a case where the controversy had been raised by the employer to the effect that his establishment did not come within the scope of the Act and the Scheme, he need not necessarily be directed to approach the Central Government u/s 19A and that the Legislature had conferred power upon the authorities u/s 7A to determine the amount and it was, Therefore, competent for the authorities to decide the question or liability by giving an opportunity to the employer. The learned Judge also found that the fact that the authorities had proceeded on the basis of the information given by the employer himself, was not of any consequence and the opportunity was necessary to be given to the employer by holding an enquiry u/s 7A. In this decision, the Court followed three other decisions, namely, Radha Krishna Narayandas v. Regional Provident Fund Commissioner (1967) 32 F. J. R. 358, Gunyantra v. Regional Provident Fund Commissioner (1970) 40 F.J.R. 599 and Balasore Motor Association v. Regional Provident Fund Commissioner (1970) 40 F.J.R. 595.

6. My conclusion is that u/s 7 of the Act, the appropriate officers specified therein have the power and jurisdiction to not only determine the amount due but also to decide all jurisdictional and relevant facts necessary for the final decision about the amount due and this they have to do after giving the employer a reasonable opportunity of representing his case.

7. In the instant case the contention of the employer was that the workman employed by the contractor were not part of the petitioner's establishment and they carried on independent business and so were not covered by the Act or the Scheme. Therefore, the question arose whether part of the alleged establishment was or was not covered by the Scheme and the Act, This is certainly a jurisdictional fact which required determination by the appropriate authorities. The petitioner has not had any opportunity to meet it since no enquiry was admittedly held by the Regional Provident Fund Commissioner u/s 7A of the Act which could be accorded a finality. The investigation made by the inspector or the report submitted by him was no substitute for a quasi-judicial enquiry envisaged by Section 7A. The petitioner is entitled to show to the appropriate officer that the report of the inspector is not correct and the establishment in dispute is not a part of the petitioner's establishment or, for any other reason, is not covered by the Act or the Scheme. The impugned order is, Therefore not sustainable.

8. Mr. Saharya for the respondents has contended that the dispute raised in the case was in respect of the number of workmen employed and so it would be governed by paragraph 26B of the Scheme which reads as follows:

Resolution of doubts? If any question arises whether an employee is entitled or required to become or continue as member, or, as regards the date from which he is so entitled Or required to become a member, the decision thereon of the Regional Commissioner shall be final:

Provided that no decision shall be given unless both the employer and the employee have been heard.

9. I have taken the view that the contention of the petitioner raises a controversy which constitutes a jurisdictional fact for determining the amount due from the employer and so it falls within the ambit of Section 7 A of the Act. In this view of the matter, it is not necessary to determine the scope of paragraph 26B of the Scheme finally. As at present advised, it appears to me that the controversy envisaged by this paragraph relates to a dispute between the employer and employee and in respect of particular employees to an establishment, which is admittedly governed by the Scheme or the Act.. This paragraph has no reference to dispute arising between the Provident Fund Commissioner and the employer with (regard to the direction of the Commissioner to the employer to pay the amount due under the Act. This view also finds support from the fact that u/s 7 A., there is no express provision for hearing an employee, (although there is no bar to the authorities hearing employees) still an express provision is only for affording an opportunity to the employer. On the other hand in paragraph 26B, the dispute is to be resolved after hearing both the employer and the employees, The Act further accords a finality to the decision u/s 7A of the Act, but no such express provision is found in paragraph 26B. The contention of Mr. Saharya is, Therefore, without force

10. In the counter-affidavit, a number of reasons have been advanced as to why the employees of the contractor respondent are included in the petitioner's establishment and so governed by the Scheme. This has a reference to the merits of the case. Whether or not the said reasons are sufficient to support a finding is outside the scope of the writ jurisdiction of this Court. But the finding must be arrived at and the question be determined by the Regional Provident Fund Commissioner or other appropriate authority by holding an enquiry u/s 7A of the Act after affording the petitioner a reasonable opportunity of representing its case and then the merits of the controversy and the grounds in favor of or against the petitioner would be considered,

11. In the instant case, the Central Government was moved u/s 19A of the Act, but by a short order dated 26th August, 1966, it has rejected the reference as not attracted by Section 19A of the Act and that the case was covered by paragraph 26B of the Scheme and the decision of the Regional Commissioner was final and so the Government could issue a direction u/s 19A of the Act. This order is without jurisdiction. Section 19A of the Act provides that if any difficulty arises in giving effect to the provisions of the Act and in particular if any doubt arises as to whether an establishment was a factory and whether any particular establishment was an establishment and the number of persons employed in any establishment and the number of years which had elapsed from the date on which an establishment had been set up and whether the total quantum of benefit to which an employee was entitled, had been reduced by the employer, then the Central Government has the power to make provisions or give directions

not inconsistent with the Act as may appear to the Government to be necessary and expedient. A learned single Judge to this Court (V. S. Deshpande, J.) in *Wire Netting Stores v. Regional Provident Fund Commissioner* (1970) 31 F. J. R. 277, in determining the constitutional validity of Section 19A of the Act, has held that the nature of the power conferred on the Central Government by Section 19A is two-fold, namely, (1) in some cases it is administrative power analogous to rule-making or the power to make subordinate legislation and the directions and the provisions made in exercise of this power are, Therefore, sometimes called administrative legislation and (2) the other power is to make a quasi-judicial adjudication by an order passed on the existing facts of a particular case which would also serve as a precedent for the future and this power is quasi-judicial to decide an existing controversy or dispute.

12. In my opinion, the controversy raised in the matter is not exactly with regard to the number of particular workmen in an establishment determinate under paragraph 26B. The controversy is whether the tailoring establishment under the contractor forms part of the establishment of the petitioner or is independent and whether or not the same is covered by the Act and the scheme. This controversy is, according to my view covered by Section 7A of the Act. Consequently it follows that it falls within the ambit of exercise of powers by the Central Government u/s 19A of the Act.

13. As a result I allow the writ petition and quash the order of the Central Government contained in its letter dated 26th August, 1966, and issue a writ of mandamus against the respondents directing them to forebear from enforcing the demand in dispute lastly conveyed by letter dated 2nd November, 1966, unless and until the matter has been determined by the competent authorities by an appropriate legal order passed after affording the petitioner a reasonable opportunity of being heard, In the circumstances of the case, the parties are left to bear their respective costs.