

(2001) 08 MAD CK 0104

In the Madras High Court

Case No : Writ Petition No. 16040 of 1995 and W.M.P. No's. 25502 of 1995 and 1446 of 1998

J. Engineering Company

APPELLANT

Vs

Assistant Provident Fund Commissioner, Employees'
Provident Fund

RESPONDENT

Date of Decision : 17-08-2001

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(4), 19, 5

Citation : (2002) 1 LLJ 653

Hon'ble Judges : E. Padmanabhan, J

Bench : Single Bench

Advocate : Vijay Narayan, for the Appellant; Radha Srinivasan, for the Respondent

Final Decision : Allowed

Judgement

E. Padmanabhan, J.—The petitioner prays for the issue of a writ of certiorari to call for and quash the proceedings of the respondent in No.

8.3 (TN)/MD/2391/ENF-Mdu/95 dated September 14, 1995.

2. The petitioner, a partnership firm is carrying on business of trading in domestic appliances. At all material times it is stated that the petitioner has

employed less than 15 employees and at present there are only 13 employees employed by the petitioner firm. The Employees Provident Funds

and Miscellaneous Provisions Act, 1952, applies to an establishment employing 20 or more persons. The said enactment has no application to the

petitioner firm as the petitioner has employed less than 20 employees.

3. In terms of Sub-section (4) of Section 1 if an application is made to Central Provident Fund Commissioner that the employer and a majority of

employees with respect to an establishment agree that the provisions of the Act shall be made applicable to such establishment, the Central

Provident Commissioner may by a notification apply the provisions of the Act to such establishment on and from the date of such agreement or

from any subsequent date in such agreement.

4. One of the Enforcement Officers made one of the partners of the partnership firm to believe that an application could be made under Sub-

section (4) of Section 1 of the Act and believing the same the partner had signed an application form on April 13, 1993, so also 8 workmen

agreed for the Act being applied. The said joint application has since been withdrawn by the petitioner.

5. After passage of one year on March 23, 1994, a code number was allotted to the petitioner-establishment though no notification had been

issued under Sub-section (4) of Section 1. The respondent is not the authority to notify and issue a notification under Sub-section (4) of Section 1.

The applicability of the Act even in terms of Sub-section (4) of Section 1 is required to be notified in the Gazette which is a mandatory one. It is

the case of the petitioner that six out of eight workmen have already left and others have been employed in the place of the said 8 workmen, who

have signed in the joint application. The petitioner had not withheld the employees contribution at any point of time.

6. During April 1994, the petitioner was summoned for an enquiry u/s 7A of the Act on various dates. But the enquiry was adjourned on account

of lack of time. By communication, dated July 27, 1995, the petitioner was asked to appear once again for an enquiry on August 16, 1995. As the

partner could not appear on that day, an adjournment was sought for assigning valid reasons. On September 21, 1995, the petitioner received an

exparte proceedings dated September 14, 1995 directing the petitioner to pay a sum of Rs. 67,424.45 towards contribution and administrative

charges for the period commencing from April 1993 and ending with February 1995. Following the same, a recovery order has also been served

on the petitioner. Being aggrieved and having no other alternative remedy the petitioner has come before this Court.

7. It is contended by Sri Vijay Narayan, learned counsel appearing for the petitioner that the impugned action is without jurisdiction and till a valid

notification is gazetted under subsection (4) of Section 1, the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act,

1952 has no application to the petitioner's establishment. Such notification having not been made so far by the Central Provident Fund

Commissioner, the respondent has neither the authority, nor jurisdiction to proceed further or assess the petitioner's liability or call upon the

petitioner to pay the sum. It is also contended that the respondent's action is illegal, arbitrary and in excess of jurisdiction in issuing the impugned

proceedings and also in threatening the petitioner with coercive action. The ex parte order served on the petitioner also is illegal and without

jurisdiction. The petitioner further states that it has already written to the Central Provident Fund Commissioner withdrawing the consent and

therefore there could be no action against the petitioner as employer under the provisions of the Employees' Provident Funds and Miscellaneous

Provisions Act.

8. The respondent contended that the petitioner and its employees signed an agreement on their own and the allegation to the contrary are untrue.

The applicability of the Act has to be decided by the Regional Provident Fund Commissioner and any recommendation will be made to the Central

Provident Fund Commissioner for notification only subsequently as per Sub-section (4) of Section 1 of the Act.

9. It is further pointed out that subsequent reduction in the strength of the employees will not absolve the petitioner from its liability to contribute

to the provident fund. The petitioner-establishment has been duly covered and therefore any reduction in strength of employees is of little

consequence.

10. The employer had entered into an agreement with the employees to come under the purview of the Act from April 1997 and hence the

employer is expected to collect the employees' contribution and to arrange for the remittance of both contributions and the submissions of

statutory returns and challans as per the statutory provisions. The respondent had passed an ex parte order as the petitioner, failed to appear and

seek for an adjournment. The primary activity of the Employees' Provident Fund Officer is to extend the benefits to the employees of the factories/

establishments and on the common request steps have been taken to cover u/s

1(4) of the Act and hence the petitioner is liable to pay the contribution and the provisions of Sub-section (4) of Section 1 has been followed strictly.

11. It is further contended that the Regional Provident Fund Commissioner has the authority to decide the applicability of the Act and hence the action taken by the Employees' Provident Fund Commissioner is within his jurisdiction and the Act will apply to the petitioner-establishment with effect from April 1, 1993. From the date of coverage the petitioner establishment is expected to implement the provisions of the Act and it would stand covered from the date of agreement between the employer and the employees or any subsequent date agreed to between them. As the petitioner had secured orders of stay, further proceedings were not taken. The petitioner is adopting delaying tactics in not applying the provisions of the Act. The primary activities of the Employees' Provident Fund Officer is to extend the benefits to the employees of factories and establishments and hence on a common request made by the employer as well as employees the coverage u/s 1(4) was made as the petitioner had failed to pay the contributions, action has been taken and no interference is called for.

12. It is stated that the mandatory requirement of Section 1(4) of the Act have been strictly followed. It is further contended that the Regional Provident Fund Commissioner is the competent authority under Sub-section (4) of Section 1 of the Act and therefore the petitioner cannot avoid the liability to pay the subscriptions.

13. Heard Sri Vijay Narayan, learned counsel appearing for the petitioner and Ms. Radha Srinivasan, learned counsel appearing for the respondent.

14. The only and substantial point that arises for consideration in this writ petition is:

Whether the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, have been extended to the petitioner establishment by a notification? and whether the petitioner establishment is bound to subscribe to the fund by remitting the employer as well as the employees' contribution ? If so, from which date?

15. Admittedly the petitioner-establishment had employed less than 20 persons

at all material point of time and therefore the provisions of the Act have no application. In terms of Sub-section (4) of Section 1, it is pointed out by the respondent that the petitioner and the majority of the workers employed in the petitioner's establishment have agreed at the provisions of the Act should be made : applicable to the establishments and therefore the petitioner is liable to contribute towards provident fund on and from the date of such agreement or from any subsequent date specified in such agreement. In the present case 1 during April 1993, it is true an agreement had been signed jointly by the petitioner/employer and eight workmen seeking for the provisions of the Act being extended under Sub-section (4) of Section 1 of the Act.

16. However, it is admitted that on the date of the impugned proceedings and even as on date also no notification had been issued by the Central

Provident Fund Commissioner in the Official Gazette applying the provisions of the Act to the petitioner's establishment. This is factually admitted.

The provisions of the Act should be extended with the consent of employer and majority of the employees employed by such employer in terms of

Sub-section (4) of Section 1 of the Act. For the extension of the provisions of the Act, the Central Provident Fund Commissioner has to issue a

notification in the Official Gazette to apply the provisions of the Act to the petitioner's establishment either from the date of such agreement or from

any subsequent date specified in such agreement.

17. The Act has no application to the petitioner's establishment since admittedly it has not employed 20 or more persons at any point of time and

therefore the Act if at all could be extended only in terms of Sub-section (4) of Section 1 by agreement between the employer and employees and

on the Central Provident Fund Commissioner making a public notification in the Official Gazette in that behalf. Till a notification is issued the Act

will have no application and consequently no action at all could be taken by the respondent.

18. The respondent has neither the authority nor jurisdiction to enforce the provisions of the Act merely because an agreement has been arrived at

between the employer and employees. Till a notification is issued extending the Act to the petitioner-establishment, the respondent has no authority

or jurisdiction to call upon the petitioner to file the returns or remit employer or

employees" contribution as required under the provisions of the Act.

19. The respondent will get jurisdiction to enforce the provisions of the Act provided the Central Provident Fund Commissioner issues a notification in the Official Gazette applying the provisions of the Act to the petitioner-establishment on and from the date of such agreement or from any future date agreed to. Admittedly no notification has been issued so far even after a lapse of eight years.

20. It is pointed out by Sri Vijay Narayan, learned counsel for the petitioner that the petitioner has withdrawn his consent and the workers who have signed the agreement have also left the establishment. It is not the case of the respondent that at any point of time the petitioner has employed

20 or more persons which alone will give jurisdiction or authority to the respondent to assess the liability to subscribe and not otherwise. Till the

Act and the provisions are made applicable by issuance of a notification under Sub-section (4) of Section 1, it has to be held that the respondent

has no jurisdiction or authority to proceed against the petitioner establishment or call upon them to pay the contributions. It may be that on a

notification being issued, the liability to contribute may be retrospective or prospective depending upon the terms of the notification, yet, the

respondent in the absence of any notification under Sub-section (4) of Section 1 cannot enforce the provisions of the Act so far as the petitioner

establishment is concerned.

21. It is true and it is well settled that the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, is a beneficial

piece of legislation and it can be described as a social security statute. The object is to ensure the employees better future on their retirement and of

their dependents on the death. However that does not mean that without a notification being issued under Sub-section (4) of Section 1, the

respondent gets jurisdiction.

In the present case already the petitioner had made a representation going back from its earlier representation on certain reasons or grounds.

22. Further, neither the respondent herein nor the Regional Provident Fund Commissioner is the authority to extend the provisions of the Act in

terms of Sub-section (4) of Section 1 of the Act. Though Ms. Radha, Srinivasan,

learned counsel for the respondent contended that the publication of notification could be made by the Regional Provident Fund Commissioner and it is being a mere formality therefore the respondent is well founded in calling upon the petitioner to pay the subscription in terms of the agreement.

23. It has to be pointed out that but for the agreement, the provisions of the Act have no application. Mere agreement will not be sufficient, but it should be followed by a notification issued by the Central Provident Fund Commissioner and not by any other authority. Such notification should be gazetted. Before issuing such notification, the Central Provident Commissioner has to apply its mind and issue a notification extending the provisions of the Act to the petitioner-establishment in terms of Sub-section (4) of Section 1 of the Act.

24. Till such a notification is issued, it is clear from the provisions of the Act that mere agreement will not confer jurisdiction. It is not the case of the respondent that subsequently or pending the writ petition a notification has been issued in terms of Sub-section (4) of Section 1 of the Act. Hence, it is clear that the respondent has acted without the authority since the provisions of the Act had not been extended.

25. Incidentally, it was contended that the Regional Provident Fund Commissioner is the authority to extend the provisions of the Act. Such a contention *ex facie* cannot be sustained. Sub-section (4) of Section 1 mandatorily provides that such notification should be made by the Central Provident Fund Commissioner in the Official Gazette. The Regional Provident Fund Commissioner is not the Central Provident Fund Commissioner.

26. Section 5.0 provides for appointment of officers. The said Section provides that the Central Government shall appoint a Central Provident Fund Commissioner who shall be the Chief Executive of the Central Board and shall subject to the general control and superintendence of the Board. Sub-section (3) of Section 5.0 provides for appointment of Additional Central Provident Fund Commissioners, Deputy Provident Fund Commissioners, Regional Provident Fund Commissioners, Assistant Provident Fund Commissioners by the Central Board for the efficient administration of the scheme. Therefore the Regional Provident Fund

Commissioner is not the Central Provident Fund Commissioner.

27. It is further contended that notification could be issued by the Regional Provident Fund Commissioner by virtue of delegation. No such

delegation, notification was placed before this Court. A reference is made to Section 19 of the Act which provides for delegation of the powers.

Section 19 provides that the appropriate Government may direct that any power or authority or jurisdiction exercisable by it under the Act, the

scheme, the family benefit scheme or insurance scheme, shall, in relation to such matters and subject to such conditions, if any as may be specified

in the direction, be exercisable also by such officer, authority subordinate to the Central Government or by the State Government by such officer or

authority subordinate to the State Government, as may be specified in the notification. Therefore Section 19 will take in the powers of delegation

by the State or Central Government only and not by Central Provident Fund Commissioner, who is an authority appointed under Sub-section (1)

of Section 5. Therefore, there could be no delegation by him, I nor other provision had been pointed out.

28. Section 5.6 provide for delegation, by the Central Board to the Executive Committee or to the Chairman of the Board or to any of its officers

and a State Board may delegate its Chairman or to any of its officers, subject to such conditions and limitations, if any, such of its powers and

functions under the Act. This has no application and it will not enable the Central Provident Fund Commissioner to delegate its functions in terms of

Sub-section (4) of Section 1 to the Regional Provident Fund Commissioner or the respondent. Therefore there could be no delegation at all even

by the Central Provident Fund Commissioner.

29. In the circumstances, the impugned action of the respondent in proceeding further in the absence of any notification and assessing the liability

and calling upon the petitioner to pay or compel the respondent to pay the sum of Rs. 63,424.45 under the impugned proceedings or any other

sum for any other subsequent period also cannot be sustained and the action of the respondent is illegal, without jurisdiction and the petitioner is

not liable to subscribe so long as no notification has been issued under Sub-section (4) of Section 1 of the Act.

30. In the result, the impugned proceedings is quashed and the writ petition is

allowed. The parties shall bear their respective costs. Consequently, the connected writ miscellaneous petitions are closed.