

(2015) 03 BOM CK 0076
In the Bombay High Court
Case No : Writ Petition No. 352 of 2014

Johnson and Johnson Employees" Union	APPELLANT
Vs	
The Commissioner, Employees Provident Fund Organisation and Others	RESPONDENT

Date of Decision : 10-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 17B, 17-B
Industrial Disputes Act, 1947 — Section 25-FF

Citation : (2015) 5 ABR 469 : (2015) 6 ALLMR 244 : (2015) 3 BomCR 738 :
(2015) 145 FLR 815 : (2015) LabIC 4110 : (2015) LLR 813 : (2015) 4 MhLj 912

Hon'ble Judges : Revati Mohite Dere, J.;V.M. Kanade, J.

Bench : Division Bench

Advocate : Arshad Shaikh and Mahesh Londhe i/b Sanjay Udeshi and Co., for the Appellant; Suresh Kumar, Advocates for the Respondent

Final Decision : Allowed

Judgement

Revati Mohite Dere J.

1. By this petition, preferred under Article 226 of the Constitution of India, the Petitioner Union seeks the following principal reliefs :

"(a) That this Hon''ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus, or any other appropriate writ, order or direction under Article 226 of the Constitution of India directing the Respondent No.1 to forthwith recall, rescind and / or revoke its decision to treat Account No. MH/18838 as an inoperative account;

(b) That this Hon''ble Court be pleased to issue further appropriate writ, order or directions, directing Respondent No. 1 to credit Account No. MH/18838 with interest due on and from 01.04.2011 till date and further till closure of the account by permissible withdrawal thereof by the employees."

2. Few facts as are germane for deciding the petition are :

The petitioner is a registered trade union incorporated under the Trade Unions Act. The first respondent is the Commissioner of Employees"" Provident Fund Organisation, and as such, is responsible for the administration of the provident fund of the employees, under the Employees"" Provident Fund and Miscellaneous Provisions Act, 1952. The second respondent i.e. Johnson and Johnson Ltd. is a Public Limited Company, who sold and transferred its factory at Safed Pool, Andheri, Mumbai to the third respondent i.e. PRS Permacel Pvt. Ltd., a company of the Premchand Group, headed by one Mr. Sushil Premchand. The members of the petitioner were working with the second respondent factory at the time when the second respondent sold and transferred its Andheri plant to the third respondent.

3. It appears that pursuant to an agreement of sale dated 10th August, 1999, the second respondent sold the factory premises to the third respondent, as a going concern. The petitioner Union had hence filed a complaint alleging unfair labour practices, being Complaint (ULP) No. 854/1999 under the MRTU and PULP Act in the Industrial Court. It appears that during the pendency of the said complaint before the Industrial Court, the third respondent sought its impleadment in the said proceedings. Both, the second and the third respondent individually informed the Industrial Court, that the third respondent had purchased the Permacel division of Johnson and Johnson Ltd., as a going concern, and that the services of the employees were not going to be interrupted and that they were to be considered in service. The said complaint was dismissed by the Member, Industrial Court vide judgment and order dated 13th February, 2004. The said complaint raised several grounds including one of transfer under Section 25-FF of the Industrial Disputes Act, 1947. It is pertinent to note, that in view of the statement made by the second and third respondent, the learned Member, Industrial Court, observed that the third respondent was running the undertaking and paying salaries and was also extending the service conditions to the employees. The Industrial Court also observed that the third respondent had accepted all the liabilities, with respect to the service conditions of the employees, which they had got under various settlements with the second respondent. The said judgment and order was challenged by the petitioner before the learned Single Judge of this Court. The said writ petition was dismissed vide judgment and order dated 14th July, 2004, after observing in para 24 as under :

".....The transaction between the First and the Second Respondents took place nearly five years ago. The Second Respondent has continued to subsist for over the last five years. Above all, it would not be possible to set the clock back. The Second Respondent has assumed the obligation of performing all the covenants that bind the First Respondent in respect of the terms and conditions of service of the workmen under the settlements that were entered into by the First Respondent with the Union. There is no interruption in the continuity of service.

That being the position, no case for interference is made out. The petition accordingly stands dismissed. There shall be no order as to costs."

(emphasis supplied)

(It may be noted, that the first respondent, is the second respondent and, the second respondent, is the third respondent in the present case.)

4. The said judgment and order was confirmed by the Division Bench of this Court. An SLP filed against the said orders was withdrawn by the petitioner. According to the petitioner, even during the pendency of the said proceedings, the members of the petitioner continued to perform their duties normally and peacefully, save and except, between 29th July, 2006 and 17th December, 2011, when they were kept away from the establishment. The validity of the said action has been challenged by way of writ petitions, being Writ Petition Nos. 878 of 2011 and 1968 of 2011 and the same are pending.

5. In the present petition, the issue is with regard to deposit of the provident fund contribution of the members of the petitioner Union, initially by the second respondent and, after its sale, by the third respondent with the first respondent, in different accounts. The issue is who is responsible for rendering the account inoperative. It may be noted, that initially, the provident fund contribution, which was deducted from the employees' salaries was deposited by the second respondent-Johnson and Johnson in their Provident Fund Office, Thane in Account No. MH/18838, and after the sale, the third respondent i.e. M/s. PRS Permacel Ltd. was depositing the said provident fund contribution of the employees, at the same Thane Office, but in a different account, being A/c. No. MH/44095. It appears that the amounts standing to the credit of the employees, in Account No. MH/18838 was not transferred to the new account, nor were the accumulations paid over to the employees. Vide letter dated 15th February, 2001, the petitioner union sought from the first respondent, certain details regarding the annual returns for the year 1999-2000 filed by the second respondent with the first respondent. The first respondent vide letter dated 26th February, 2001, informed the petitioner Union that the second respondent-Johnson and Johnson under Code No. MH/18838 had submitted its annual returns, Form No. 6 and 3-A with reference to its employees. In the said returns, there was a remark "resigned on 10.08.1999" in the column remarks on Form No. 3-A. The petitioner was also informed that the second respondent had not submitted Form No. 10 in respect of those employees. In view of the alleged false statement made by the second respondent, the petitioner called upon the first respondent to disclose the steps taken by them, for the said false statement made by the second respondent, that the employees had resigned on 10th August, 1999. The first respondent vide letter dated 13th June, 2002 informed the petitioner that they had sought an explanation from the second respondent, with regard to the correct status of the employees, whose reason for leaving service was shown as having "resigned". It also appears, that the fact of the new account being opened by the third respondent was brought to the notice of the

Industrial Court, which was seized of the complaint (ULP) No. 854/1999. According to the petitioner, as the Industrial Court was of the opinion that the employees were continued in service of the third respondent, the false information given by the second respondent to the first respondent, would not cause any loss to the employees and by taking necessary steps, the provident fund accounts may be continued. According to the petitioner, the Industrial Court had made it incumbent upon the third respondent, to take all necessary steps, for getting the requisite forms filled in from the employees and for submitting the same, to the Provident Fund Office, so that, the accounts would automatically be transferred.

6. Vide letter dated 8th June, 2005, the first respondent called upon the second respondent to forward certain documents mentioned therein, to enable their office to change the name of the establishment and sought the compliance position under the new code number. In the said letter, the first respondent had stated, that unless and until permission was given by their office, to change the name and implement the new code number, all liabilities would accrue to the second respondent. It appears that, despite the letter, the second respondent, did not provide the necessary information sought for by the first respondent.

7. Thereafter, certain correspondence was exchanged by some of the employees of the petitioner Union and the first respondent. In one of such letter, the first respondent had communicated to Shri Kopare, an employee, who had sought certain information under the R.T.I Act, that all the information sought for, was supplied to the Advocate of the Union and that the company i.e. Johnson and Johnson had not submitted the requisite Form No. 10, with regard to the resignation of the employees from the company.

8. As some of the employees were out of employment and as some had not received their wages, for eight months, they approached the first respondent, through the petitioner Union, seeking grant of advances under para 68-H (1) of the Employees' Provident Fund Scheme, 1952. As the first respondent failed to consider the same, the members of petitioner Union preferred a writ petition in 2007, being Writ Petition (Lodging) No. 704 of 2007, seeking inter alia a mandamus to authorize payments to the members of the petitioner from their respective Provident Fund Accounts, to the extent of their own contribution upto the date of payment. Vide order dated 30th April, 2007, in view of the statement made by the respondents, that without prejudice to the rights and contentions of any of the parties, the contribution made by the workmen to the their provident fund, to the extent requested by them, would be paid to them within four weeks, the petition came to be disposed of. Accordingly, employees were permitted to withdraw the amounts from both the accounts without mentioning the words "discharged or retrenched".

9. Sometime in January/February, 2011, a press note appeared in a newspaper, that on and from April, 2011, the inoperative accounts with the Provident Fund Office would not carry any interest. Accordingly, an opinion was sought by the

Union as to whether the Account No. MH/18838 would be considered as an inoperative account. The opinion received was that since they were not employees who had ceased to be in the employment, there would not be any occasion to treat their account as inoperative accounts under para 60 r/w 72. The workmen/employees had resumed work, were receiving work and wages and had no reason to believe that their Account No. MH/18838 would be treated as inoperative account. According to the petitioner, it is only when one of its terminated employee happened to make an inquiry with the Provident Fund Organisation, regarding his accumulation, that he received information that his Account No. MH/18838 was being treated as an inoperative account and that the interest payment thereon, was stopped. Since the information received was an oral information, the petitioner filed an application dated 17th March, 2013 under the Right to Information Act, 2005 and sought certain information in writing. On the query made, the first respondent, by its letter dated 13th March, 2013 informed, that no inquiry was under process against the second respondent, in respect of the alleged false statement made by the company that the employees had "resigned". The information received from the first respondent suggested that for the year 2011-12, no interest had accrued in the accounts of the workmen since the accounts were being considered to be inoperative from 1st April, 2011 i.e. from the date of the Government Notification. It is in these circumstances that the present petition has been filed.

10. Mr. Shaikh, learned Counsel for the petitioner contended that under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and the Employees' Provident Fund Rules, 1952, the onus was on the second and third respondents, to ensure that the account was transferred from the second respondent to the third respondent, since none of the employees were either discharged, terminated or had resigned. He submitted that even the first respondent had failed in its statutory duty to take steps against the respondents under the said Act. He submitted that even otherwise, the said Notification came into force on 1st April, 2011 and would not apply to the employees of the petitioner Union. He submitted that a perusal of the record shows that the second respondent had failed to submit the requisite Form 10 with the first respondent and had in fact, given false information to the first respondent of "resignation", for which, the first respondent had failed to initiate any action against the second respondent. Mr. Shaikh submitted that the members of the petitioner Union cannot be held responsible for the false information and for dereliction of duties of the second and third respondents. He submitted that it was the responsibility and duty of the second respondent, to protect the provident fund, which was due and payable to its employees. He, therefore, submitted that the decision of the first respondent treating the Account No. MH/18838 as inoperative account, under said para 72(6) of the Provident Fund Scheme, 1952 be revoked and the first respondent be directed to credit Account No. MH/18838 with interest due on and from 1st April, 2011 till date and further till closure of the account.

11. Per contra, Mr. Suresh Kumar, learned Counsel appearing on behalf of the first respondent vehemently opposed the petition. He contended that by virtue of paragraph 57 of the Employees' Provident Fund Scheme, 1952, transfer of the provident fund of the employees from one establishment to another is effected after receipt of Application Form No. 13 from the said employees. He submitted that by virtue of paragraph 57, it is the statutory responsibility of the employee, to apply for transfer of the balance provident fund from his previous account to his account in the new establishment, where he takes up employment. He submitted that the employees were aware that the second respondent had sold and transferred its unit to the third respondent in 1999 and hence, ought to have approached the first respondent's office and submitted an appropriate application, seeking transfer of the provident fund. He submitted that some of the employees had filled in Form No. 14 and accordingly, their transfer was effected from the previous employer i.e. Johnson and Johnson Ltd. (MH/18838) to the third respondent i.e. M/s. PPS Permacel Pvt. Ltd., with interest, as the forms were submitted by these employees, within the statutory period or before the implementation of the Notification dated 15th January, 2011. He further submitted that in view of Notification dated 15th January, 2011, which substituted certain words in sub-para (6) of paragraph 72 of the Employees' Provident Fund Scheme, 1952, if any employee did not apply for withdrawal under paragraphs 69 or 70 or transfer the provident fund from one account to another, within thirty-six months of leaving the service, the interest after completion of third year shall not be credited to his account, under paragraphs 60(6) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. He submitted that in view of the statutory provisions, the first respondent had performed its duty and as such, no fault can be found in the act of the first respondent making the Account No. MH/18838 inoperative. The second and third respondents supported the submissions canvassed by the first respondent.

12. Heard learned counsel for the parties at length. Perused the petition, reply filed by the first respondent and the documents and the orders tendered by the parties.

13. Considering the rival submissions, the short question that arises in the present petition, is whether the Account No. MH/18838 could be treated as an "inoperative account" by the first respondent, in the facts of the present case.

14. A few relevant provisions which have a bearing, are set out hereinunder :

Section 17-B and Section 60(6) of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, reads as under:

"17B. Liability in case of transfer of establishment.-Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under

any provision of this Act or the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, in respect of the period up to the date of such transfer:

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer."

"60. Interest

(1) to (5)

(6) Interest shall not be credited to the account of a member from the date on which it has become Inoperative Account, under the provisions of sub-paragraph (6) of paragraph 72."

Para 57 and para 72 of the Employees' Provident Fund Scheme, 1952 , read as under:

"57. Inter-State transfer of members

(1) Where a member of the Fund ceases to be employed in one region and secures employment in another region in an establishment to which this Scheme applies or which is an exempted establishment or which is not covered under the Act but has a provident fund scheme of its own, he may apply to the Commissioner within whose jurisdiction he was previously employed, in such form as the Commissioner may specify, for transfer of balance of the provident fund in his existing account to his account in the other region.

(2) Where a member of the Fund ceases to be employed in one establishment and secures employment in another establishment in the same region, he may apply to the Commissioner of the region, in such form as the Commissioner may specify for the transfer of balance of the Provident Fund in his previous account to his account in the new establishment where he takes up the employment."

"72. Payment of Provident Fund

(1) to (5)

(6) Any amount becoming due to a member as a result of:

(i) supplementary contribution from the employer in respect of leave wages, arrears of pay, instalment of arrears contribution received in respect of a member whose claim has been settled on account but which could not be remitted for want of latest address, or

(ii) accumulations in respect of any member who has either ceased to be employed or died, but no application for withdrawal under paragraphs 69 or 70 or transfer, as the case may be has been preferred within a period of thirty-six months from the date it becomes payable, or if any amount remitted to a person, is received back undelivered, and it is not claimed again within a period of three years from the date it becomes payable shall be transferred to an account to be

called the Inoperative Account:

Provided that in the case of a claim for the payment of the said balance, the amount shall be paid by debiting the Inoperative Account.

(7)"

15. A perusal of Section 17B of the Act shows that where the establishment has been transferred either by sale, gift, lease or licence or in any other manner whatsoever, the liability would be that of the employer and the person to whom the establishment is so transferred, to pay the contribution and other sums, due from the employer under any provision of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 or the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be. In the present case, the second respondent had sold the premises by an agreement of sale dated 10th August, 1999 to the third respondent. In fact, by virtue of some orders passed by various Courts, the members of the petitioner Union were deemed to be in continuity of service.

16. Even from a perusal of Section 17-B, it is evident, that it is both, the employer i.e. second respondent who had sold the establishment to another establishment i.e. the third respondent and the third respondent, who would both, be jointly and severally liable to pay the contribution and other sums due under the Act or the Rules.

17. Section 57 deals with Inter-State transfers of members. Its application to the facts of this case, as contended by Mr. Suresh Kumar, is totally misconceived. A perusal of Section 57 would reveal its non-application to the present case, inasmuch as, none of the members of the petitioner Union can be said to have ceased "to be in employment". Section 57 contemplates two contingencies; one where a member of the Fund ceases to be employed in one region and secures employment in another region in an establishment to which this scheme applies and the second contingency; where a member of the Fund ceases to be employed in one establishment and secures employment in another establishment in the same region. As is evident, neither of the two contingencies have arrived in the present case, to attract the provision of Section 57. As is seen, from the preceding paragraphs, the second respondent sold the factory premises to the third respondent as a going concern. Admittedly, there was continuity in service of the employees. Thus, by no stretch of imagination, it would be said that the employees of petitioner Union had "ceased" to be employed or had secured employment elsewhere, so as to attract the applicability of paragraph 57 of the said Act, as contended by Mr. Kumar.

18. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 was enacted to provide social security to the industrial workers. One of its main object is to provide retirement and old age benefits, such as provident fund, superannuation pension, invalidation pension, family pension, etc. and to do all acts pursuant to the same, as stipulated in the Act and Rules. Considering the

object of the Act, it was the responsibility of the first respondent to ensure that the object sought to be achieved by the Act, is implemented by the employers i.e. in the present case respondent Nos. 2 and 3. It appears from the record, that it was the responsibility of the second respondent to transfer the funds in the account maintained by the third respondent. In fact, the second respondent, without any justification, stated that the employees had resigned from their employment, which was not the case. The requisite Form 10 was not filled in by the second respondent, despite the mandate of the Act and the Rules. Section 14 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 contemplates penalty under the said Act for failing to make payments by the employer towards the pension scheme. It also entails punishment by the employer for knowingly making a false statement or false representation in order to avoid making such payment. It appears that no steps were taken by the first respondent against the second respondent. It was a case of sale by the second respondent in favour of the third respondent, by which the employees continued to be in employment with the third respondent and as such there was no question of any resignation of the employees. The responsibility, therefore, was entirely of the second and third respondents to ensure that the provident fund account was transferred, as required under the Act and the Rules thereunder, to respondent No.3's account. It is evident that no steps were taken by either of the respondents, as was required of them under Section 17-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. We also find that the members of the petitioner, despite bringing to the notice of the first respondent, that there was no resignation as stated by the second respondent, in its letter dated 26th February, 2001 and that Form 10 was not filed by the respondent No.2, the first respondent failed to take any action as against the second respondent. As set out earlier, Section 57 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 has no application to the facts of the present case and as such, we are of the opinion, that the first respondent has wrongly come to the conclusion that the A/c. No. MH/18838 was an inoperative account. Accordingly, we direct the first respondent to forthwith recall, rescind, revoke its decision to treat A/c. No. MH/18838 as an inoperative account. The first respondent to credit A/c. No. MH/18838 with, interest at 9% per annum, due on and from 1st April, 2011 till date and further till closure of the account by permissible withdrawal by the employees.

19. Petition is allowed on the aforesaid terms and is disposed of accordingly.

20. At this stage, learned Counsel appearing on behalf of the respondent No.2 seeks stay of this order. Since, we have not passed any order directing payment of interest by the respondent No.2, we do not see any reason why this order should be stayed. Hence, request for stay is declined.