

(1961) 08 KL CK 0023
In the High Court Of Kerala

Joseph

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 30-08-1961

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1, 12, 14B, 16, 17

Citation : (1961) 5 KLJ 1203 : (1962) 1 LLJ 745

Hon'ble Judges : M.S. Menon, J;C.A. Vaidialingam, J

Bench : Division Bench

Judgement

C.A. Vaidialingam, J.—In both these writ petitions, the question that arises for consideration is as to whether the provisions of the Employees' Provident Funds Act (Central Act XIX of 1952), will apply to an establishment, notwithstanding the fact that there has been a reduction in the number of employees in the said concern.

2. Before we consider the legal contentions that have been raised by Sri T.N. Subramonia Ayyar, learned Counsel for the petitioners, and the learned Government Pleader appearing for the respondents, It is desirable to state a few facts.

3. So far as O.P. No. 1362 of 1959 is concerned, the petitioner which is a rubber estate, seeks to have two orders quashed, namely, Exs. A and B, dated 15 April 1959 and 8 October 1959, respectively. Under Ex. A, the Regional Provident Fund Commissioner, Trivandrum, declines to grant the exemption asked for by the petitioner from the provisions of the Employees' Provident Funds Act, 1952, on the ground that there has been a partition of the estate into eight shares in June 1957. Under Ex. A, the officer informs the petitioner that the Employees' Provident Funds Act, 1952, and the Employees' Provident Funds Scheme, 1952, do not permit the Murukkummood estate being left out of the ambit of the Act and the scheme due to partition. Again, the petitioner seems to have made a

fresh application to the same authority for reviewing the order Ex. A. That request was again turned down by the subsequent order, Ex. B, dated 5 October 1959. Under Ex. B, which again is a communication sent by the Regional Provident Fund Commissioner to the petitioner on 5 October 1959, the former informs the latter that the petitioner's contention that the Provident Funds Act and the scheme should not at all apply to the estate inasmuch as it was partitioned in 1958 and each of the subdivided units employs less than fifty workmen, cannot be accepted. The officer further expresses his view that the estate, which had originally employed more than fifty workmen, has come within the purview of the Act and the scheme in April 1957 itself and therefore he further states that no change in conditions seems to have taken place to justify the claim that the Act and the scheme are no longer applicable.

4. Apart from these two communications, we may also advert to certain other correspondence that appears to have passed between the petitioner and the department. In June 1957, there was a partition of this estate, and it is the case of the petitioner that after the partition of the estate into eight shares, the extent of the property in his hands is considerably less and the number of workmen employed by him is less than ten; and therefore he informed the department stating that in view of the partition, the estate in his hands is not liable to make any contribution under the Act. There was a reply from the department under Ex. R.2, dated 24 September 1958, wherein the Regional Provident Fund Commissioner after adverting to the application, dated 16 September 1958, made by the petitioner, states that the petitioner cannot plead exemption from paying contribution and complying with the provisions of either the Act or the scheme, based upon the partition and he also states:

The fact that the estate has been divided by metes and bounds will not break up the parent estate into units as the partitions are situated in the same premises and the old employees and the kind of plantations continue.

5. The Regional Provident Fund Commissioner further states that

the fact that the subdivisions of the Murukkumood estate are in the ownership of different persons is immaterial, as the continuity of the parent estate has been maintained although the management may have fallen into new and separate hands.

In view of all these matters, the Commissioner informs the petitioner that his request to exempt him from complying with the provisions of the statute and scheme cannot be accepted.

6. Again, on 29 April 1959, there was an application reiterating the same request from the party and the answer to that, as we have already mentioned in Ex. B, dated 5 October 1959. There is again one more communication which has to be adverted to and that is a communication Ex. R5, dated 10 November 1959, sent by the Central Provident Fund Commissioner, New Delhi. The said officer informs the petitioner that for the purposes of the Employees' Provident Funds Act,

1952, all the partitioned units will be deemed as one establishment and will remain covered under the Employees' Provident Funds Act, 1952, and that each unit will have to comply with the provisions of the Employees' Provident Funds Act and the scheme in respect of the employees engaged by it.

7. We have referred to some of the correspondence that passed between the department and the petitioner in respect of the partition, which has been placed before the department, because in the counter-affidavit filed by the respondents in this writ petition, a contention has been raised that there are disputed questions of fact regarding the so-called partition relied upon by the petitioner and therefore this Court should not exercise its powers under Article 226. It is rather regrettable that in view of the categorical affirmation of the partition, not only by the Regional Provident Fund Commissioner, Trivandrum, but also by the Central Provident Fund Commissioner, New Delhi. In the various communications to which we have already adverted, the department should still take such a stand in the Gaunter-affidavit that has been filed before us. Even apart from that, neither in Ex. A nor in Ex. B is there any whisper to the effect that the Regional Provident Fund Commissioner is not accepting either the factum of partition or the genuineness of the partition stated to have been entered into in the family of the petitioner as early as June 1957. On the other hand, both Exs. A and B, as well as the several communications issued by the Commissioners from Trivandrum and New Delhi, to the petitioner, clearly in our opinion, proceed on the basis that they accept both the truth and genuineness of the partition and also that there has been a division of the estate. But the only stand that they seem to have taken is, that, notwithstanding such a division, it cannot be stated that the unity of the estate can be broken so as to make the Act cease to apply in respect of the estate. That is a point of law to which we will advert presently.

8. We are prepared to concede, that regarding this question of law which we are called upon to decide in these writ petitions, there is a conflict of views expressed by some of the High Courts in the Union. That is, the Bombay High Court has taken the view that once the Act applies,, notwithstanding the fact that there has been a subsequent reduction in the number of employees, the Act will continue to apply and therefore the employer cannot escape his liability to make the contribution under the Act. On the other hand, the Punjab High Court, the Mysore High Court, and recently the Allahabad High Court, have expressed views to the contrary and in fact, the Punjab High Court and the Allahabad High Court have expressly dissented from the view expressed by the Bombay High Court. There is also this circumstance, that the Allahabad High Court has expressly approved of the decision of the Punjab High Court. We will advert to these decisions presently.

9. Before we go into the scheme of the Act. And also the decisions bearing on this matter, we will also complete the narration by referring to the facts in O.P. No. 13 of 1960. This relates to another rubber estate; namely, Kottamanda estate, and it belonged originally to the petitioner and a third party and they were owning it as

partners. The provisions of the Act appear to have been applied to this plantation in April 1957. On 1 March 1958 the estate appears to have employed additional 64 hands on a temporary basis and on 30 November 1958 the partnership between the petitioner and the third party was dissolved and each of the partners divided the estate in two equal shares. The share so obtained by the petitioner, was again subdivided on the same date into six shares and only one share in the said six shares was retained by the petitioner. It is brought to our notice that the C schedule properties in the partition, dated 30 November 1958, have been allotted to the petitioner and along with the properties fifteen labourers have also been taken over by the petitioner. The petitioner appears to have informed the authorities concerned by his letter, dated 24 November 1958, Ex. A, stating that as the properties have been divided and as he is in possession of a very small portion of the estate, employing only fifteen labourers, the provisions of the Act did not apply to him. But evidently the department was not inclined to accept this plea put forward by the petitioner, as will be seen by the communication, Ex. D, dated 17 December 1959. The Regional Provident Fund Commissioner informs the petitioner that there have been contributions and administrative charges due in respect of this estate from December 1958 till the date of the letter, namely, 17 December 1959, and he calls upon the petitioner to remit the provident fund contribution, together with the administrative charges, within the time mentioned therein. There is also a threat that if the amount is not so paid or deposited, the rate of damages on the delayed payment is liable to be enhanced to 25 per cent of the arrears as provided in Section 14B of the Employees Provident Funds Act, 1952. On receipt of this communication, the petitioner has filed this writ petition in this Court and seeks the issue of a writ of prohibition restraining the authorities concerned, from proceeding to enforce the provisions of the Act.

10. There is no controversy that the notification by the Central Government making the Act applicable to the plantations in question, namely, the rubber plantations, was issued on 13 February 1957 and the Act was to have effect from 30 April 1957. So far as the estate covered by O.P. No. 1362 of 1959 is concerned, there is also no controversy that on the date of the coming into force of the Act in respect of this plantation, the industry was employing certainly fifty persons or more. But the point that is raised is that by virtue of the partition in June 1957, there has been a reduction in the extent of the estate in the hands of each sharer and the petitioner is employing only less than ten employees in respect of the estate in his possession.

11. In order to appreciate the legal contention that has been raised by Sri T.N. Subramonia Ayyar that though the Act may apply at a particular stage because of an establishment employing fifty persons or more on the relevant date, the Act will cease to apply; when there has been a reduction in the number of employees employed by the respective petitioners. In the two writ petitions, it is necessary to refer to some of the provisions of the enactment itself. The Act was passed in 1952 and under Sub-section (3) of Section 1 it is provided as follows:

(3) Subject to the provisions of Section 16, it applies--

(a) to every establishment which is a factory engaged in Industry specified in Schedule I and in which fifty or more persons are employed; and

(b) to any other establishment employing fifty or more persons or class of such establishments which the Central Government may, by notification In the official Gazette, specify in this behalf.

12. There Is a proviso to Sub-section (3) to the effect that

the Central Government may, after giving not less than two months" notice of its intention to do so, by notification in the official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than fifty as may be specified in the notification.

13. It may be mentioned at this stage that admittedly rubber plantations are not included in Schedule I of the Act. Therefore, prima facie, under Clause (a) of Sub-section (3) of Section 1, the Act will not apply ipso facto. A notification was issued by the Central Government by virtue of the powers vested in it under Clause (b) of Sub-section (3) of Section 1 extending the provisions of the Act to rubber plantations also by its notification, dated 13 February 1957, and as we have already stated, the Act itself came into force with regard to the rubber plantation with effect from 30 April 1957. Sub-section (4) of Section 1 may not be very material because It only provides that

Notwithstanding anything contained in Sub-section (3) of this section or Sub-section (1) of Section 16, where it appears to the Central Government whether on an application made to it 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, it may, by notification, in the official Gazette, apply the provisions of this Act to that establishment.

14. Section 2 is the definition section and Clause (g) of Section 2 defines the term "factory" and Clause (i) again defines "industry." Section 3 gives power to the Central Government to apply the Act to an establishment which has a common provident fund with another establishment and Section 4 gives power to the Central Government to add to the matters mentioned in Schedule I. It is not really necessary for us to consider the various other provisions excepting Sections 12 and 17 on which some reliance has been placed by the learned Government Pleader for the respondents. Before we go to those sections, we may also refer to Section 5 which provides as follows:

5. (1) The Central Government may, by notification in the official Gazette, frame a scheme to be called the Employees" Provident Fund Scheme for the establishment of provident funds under this Act for-employees or for any class of employees and specify the establishments or class of establishments to which the said scheme shall apply and there shall be established, as soon as may be,

after the framing of the scheme, a fund in accordance with the provisions of this Act and the scheme.

(2) A scheme framed under Sub-section (1) may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in the scheme.

15. Section 12 makes it obligatory on the part of the management or the employer to which any scheme applies

not to make any alteration or reduce directly or indirectly the wages of any employee to whom the scheme applies or the total quantum of benefits. In the nature of old age pension, gratuity or provident fund to which the employee is entitled under the terms of his employment, express or Implied.

Section 16 is to the effect:

This Act shall not apply to any establishment until the expiry of three years from the date on which the establishment is, or has been, set up.

Then there is an explanation. Under Sub-section (2) there is also another provision to the effect:

If the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the official Gazette, and subject to Such conditions as may be specified in the notification, exempt that class of establishments from the operation of this Act for such period as may be specified in the notification.

16. Apart from Section 16, there is also power given u/s 17 to the appropriate Government by notification in the Gazette, and subject to other conditions that may be specified, to exempt from the operation from all or any of the provisions of the scheme any establishment mentioned in the various clauses mentioned therein.

17. The learned Government Pleader in particular relied upon Sub-clause (2) of Clause (6) of Sub-section (1) of Section 17 which makes provision for the amount of accumulations to the credit of an employee in the provident fund being transferred when the employee leaves employment and seeks reemployment in another establishment to which the Act applies.

18. We may also mention that there was an amendment of the statute in 1960 by the Employees' Provident Funds (Amendment) Act, 1960 (Act XLVI of 1960). Under Sub-section (2) of Section 1 of the Amending Act, it is provided:

It shall come into force on such date as "the Central Government may, by notification in the official Gazette, appoint."

19. There is no controversy that the amending Act also has come into force on 31 December 1960 by virtue of the notification Issued on 22 December 1960.

20. There is one other amendment which, in our opinion, is very important and that is the amendment effected by 3. 2 of the Amendment Act. By Section 2 of the Amendment Act, in the original Section 1 of the Employees Provident Funds Act, 1952, in Sub-section (3), for the word "fifty," wherever it occurs, the word "twenty" is to be substituted, and then under Sub-clause (2) of Section 2 of the Amendment Act, a new Sub-section (5) is added to original Section 1 of the Act and that Sub-section (5) is as follows:

An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty:

Provided that where for a continuous period of not less than one year, the number of persons employed therein has been less than fifteen, the employer in relation to such establishment may cease to give effect to the provisions of this Act and any scheme framed there under, with effect from the beginning of the month following the expiry of the said period of one year, but he shall, within one month of the date of such cessation, intimate, by registered post, the fact thereof to such authority as may be specified by the appropriate Government in this behalf.

21. It will be seen, from the new Sub-section (5) Incorporated in the original Section 1 of the main Act, that express provision has been made for continuance of the Act, notwithstanding that the number of persons employed therein at any time falls below twenty. It is not necessary for us to consider the ambit of the proviso to Sub-section (5). We are adverting specially to the provisions of Sub-section (5) of Section 1 Incorporated by the Amendment Act, because In our view that clearly shows that the Parliament desired the Act to continue notwithstanding the fact that there has been subsequently a reduction in the number of persons employed. Such a provision, admittedly, is not to be found in the main Act as it stood prior to the said amendment. The absence of such a provision in the original Act, in our opinion, clearly indicates that the Act will continue to apply, only if fifty or more persons are employed at all material times. We may also state that the decisions quoted before us at the Bar, and to which we will refer later, had no occasion to consider the change effected by the Amendment Act of 1960.

22. According to Sri T.M. Subramonia Ayyar, learned Counsel for the petitioners, the essential requisite for the Act to apply is contained in Sub-section (3) of Section 1 of the Act, 1952, as it stood prior to the amendment in 1960. That requisite is that the Act will apply only to an establishment which is a factory engaged in an industry specified in Schedule I and in which fifty or more persons are employed see Section 1(3)(a). Again, under Clause (b) of the said Sub-section (3), power is given to the Central Government to apply the provisions of the Act to any other establishment; but here again, the essential condition is that the said establishment must be employing fifty or more persons. Therefore, the learned Counsel urged that as will be seen from Clauses (a) and (b) of Sub-

section (3) of Section 1, for the Act to apply, the establishment must be employing fifty or more persons. In contrast to these provisions, the learned Counsel also relied upon the proviso to Sub-section (3) which gives power to the Central Government, after complying with the formalities mentioned therein, to apply the provisions of the Act to an establishment employing less than fifty persons. Therefore, if the Central Government wanted to apply the Act to an establishment employing less than fifty persons or to continue the application of the Act when there has been a reduction in the number of employees to less than fifty. It would have been perfectly within the competence of the Central Government to take action under the proviso to Sub-section (3). Admittedly, in this case, no action has been taken by the Central Government on the basis of the proviso. Again, that the Act by itself will not apply to an establishment employing less than fifty persons, is made clear, according to the learned Counsel, by Sub-section (4) of Section 1 whereby an agreement of the employer and the majority of employees, the Act can be applied by the Central Government. In our opinion, there is considerable force in these contentions of the learned Counsel, and we are inclined to agree with these contentions.

23. Sri T.N. Subramonia Ayyar, learned Counsel, also urges that at the material time when the Act is sought to be applied to a particular establishment, the department must be able to satisfy this Court that the factory or the establishment employed fifty or more persons or that the Central Government has taken action under the proviso to Sub-section (3); or on the basis of Sub-section (4) of Section 1. When once there is a reduction in the number of persons employed, it is the contention of Sri Subramonia Ayyar that the Act also will cease to apply. The learned Counsel quite naturally relied upon the new Sub-section (5) introduced in Section 1 by the Amending Act of 1960, to which we have already adverted, stating in so many words that the Act will continue to apply notwithstanding the fact that there is a reduction in the number of persons employed. In a particular establishment or industry and in the absence of such a provision in the Act of 1952 as it originally stood prior to this amendment. On this basis Sri T.N. Subramonia Ayyar naturally contends that the legislature itself has not provided for the continued operation of the Act, notwithstanding that there is a subsequent reduction in the number of employees employed in an establishment.

24. The learned Counsel urged for our acceptance the three decisions of the Punjab, Mysore and Allahabad High Courts. The decision of the Punjab High Court is that of Bhandarl, C.J., and Dulat, J., reported in *Golden Silk Mills v. Central Provident Fund Commissioner* 1959--1 L.L.J. 58 and that of the Mysore High Court is that of a single learned Judge, namely, Hombe Gowda, J.; reported in *Subbarama Chetty v. Zavar All* 1959-2 L.L.J. 524, The decision of the Allahabad High Court is that of Bhargava, J., and J.N. Takru, J., reported in *State v. Jagraj* 1961--1 L.L.J. 671.

25. On the other hand, the learned Government Pleader has very strongly urged

for our acceptance the views expressed by Dixit, J., and Gokhale, J., of the Bombay High Court in the decision reported in *State v. Hathiwala Textile Mills* 1957-2 L.L.J. 202, Before we advert to this decision, we can very well dispose of the contention of the learned Government Pleader based upon the provisions of Sections 12 and 17 of the Act. We are not able to find any principle underlying either Section 12 or Section 17 which gives any indication to show that notwithstanding a subsequent reduction in the number of employees in a particular establishment or an industry, the Act will continue to apply. Section 12, as we have already mentioned, makes it obligatory on the part of an employer not to effect any changes in respect of his liability directly or indirectly regarding the wages of any employee to which the scheme applies. That proceeds on the basis that the Act and scheme apply to the particular establishment in question and the very question that we have to consider in this case is whether the Act and scheme apply. If the Act does not apply, it goes without saying that the scheme will not apply. Therefore, Section 12 does not in any way assist the learned Government Pleader. Again, Section 17 also, in our view, does not help the learned Government Pleader in his contentions. In particular, as we have mentioned, reliance is placed upon Sub-clause (2) of Clause (b) of Sub-section (1) of Section 17 which provides for the amount of accumulations standing to the credit of an employee, when he leaves a particular employment being transferred to another establishment where he seeks reemployment and to which the Act applies. That again, in our view, is merely consequential on the Act applying and the individual concerned having the benefit of the accumulated provident fund being transferred to another establishment. That does not give us any guidance or indication that the Act will continue to apply notwithstanding the fact that there has been a reduction in the number of workmen.

26. Learned Government Pleader further urged that the provisions of the Employees' Provident Funds Act, 1952, is a social piece of legislation and therefore having the broad principles and objects which were intended to be served by that ameliorative measure, we would so construe the provisions of the Act that it will result in a benevolent construction in favour of the persons sought to be benefited. As a proposition of law advanced by the learned Government Pleader, there certainly cannot be any quarrel. But the question is when the provisions of a particular section of a particular statute is very clear whether we should not give due regard to those particular provisions and come to a conclusion one way or the other based upon those provisions alone. Clearly the Act contemplates the employment of fifty or more persons for the Act to apply and in our view it is more or less an essential condition which should be satisfied, for not only the Act applying in the first instance but also for the Act continuing to apply at all material time. No doubt, it may be that when there is a reduction due to some reason or other, there may be a hardship. But in our view in the face of the clear provisions of the statute, considerations of hardship has no place in the construction of the particular section and we have also referred to the other circumstance, namely, that the Amendment Act of 1960 by introducing

the new Sub-section (5) to Section 1 of the main Act categorically makes a provision for the continued application of the Act, notwithstanding that there has been a reduction in the number of employees. That also gives an indication that the Parliament was aware of the difficulty in applying the provisions of the main Act, as it stood originally to establishments when there has been a reduction in the number of employees due to whatever reasons.

27. Now coming to the decisions: No doubt, the decision of the Bombay High Court is directly in favour of the contentions raised by the learned Government Pleader for the respondents. As we have mentioned earlier, the Punjab High Court, the Mysore High Court, and the Allahabad High Court, have all agreed in dissenting from the view expressed by the Bombay High Court. No doubt, the Mysore High Court does not appear to have actually adverted to either the decision of the Bombay or the Punjab High Court but the conclusions arrived at by the Mysore High Court are contrary to the decision of the Bombay High Court, whereas the Punjab High Court has categorically expressed its dissent from the Bombay view and the Allahabad High Court has expressed its approval of the Punjab view.

28. It is really not necessary for us to consider the various decisions in any great detail except to refer to the recent judgment of the Allahabad High Court in *State v. Jagraj* 1961--1 L.L.J. 671 (supra) where both the decision of the Bombay and Punjab High Courts have been considered by the learned Judge Bhargava, J., speaking on behalf of the Court in *State v. Jagraj* 1961--1 L.L.J. 671 (supra) considers the reasons given by the learned Judges of the Bombay High Court for coming to the conclusion that the Act will apply, notwithstanding a subsequent reduction in the number of employees and also considers the reasons given by the Punjab High Court for coming to quite a contrary conclusion that the Act will not apply when there has been a subsequent reduction in the number of employees; and after adverting to both these decisions, observes at p. 673 as follows:

With great respect we are unable to agree with the observations of the Bombay Bench. The words "are employed" mean the present time, i.e., at the time when the offence is alleged to have been committed.

29. The learned Judges, after quoting an extract from the decision of the Punjab High Court finally wind up the discussion as follows:

We are in agreement with the view expressed by the Punjab High Court.

30. The actual extract quoted by the learned Judges from the judgment of the Punjab High Court was:

The liability under the Act is of an employer and is limited to the employer of fifty or more persons in a factory engaged in a scheduled industry.

Where a factory which was at one time employing more than fifty persons, has, as a result of partition between the owners been split up into two and the owner

of one of them has ceased to employ fifty or more persons after the coming into force of the Act, he would not be liable under the Act.

31. These are the observations which have been accepted in to by the learned Judges of the Allahabad High Court.

32. The learned Government Pleader has drawn our attention to another decision of the Bombay High Court, namely, the judgment of the learned Chief Justice and Dixit, J., in J.G. Vakharia v. Regional Provident Fund Commissioner 1957--1 L.L.J. 448. In our view, no assistance whatsoever can be derived by the learned Government Pleader from that decision because that decision proceeds practically on facts existing in the particular circumstances of that case and we do not see anything in that judgment which will lend support to the contentions of the learned Government Pleader.

33. After a consideration of the various contentions raised before us by Sri T.N. Subramonia Ayyar, counsel for the petitioner, and the learned Government Pleader appearing for the respondents and after a consideration of the decisions of the various High Courts referred to above, in our opinion, the reasoning contained in the judgments of the Punjab, Mysore and Allahabad High Courts appeals to us and with respect we are not able to accept the reasoning of the Bombay High Court. Respectfully following the decisions of the Punjab, Mysore and Allahabad High Courts, referred to above, we hold that the respondents have no jurisdiction whatsoever to enforce the provisions of the Employees' Provident Funds Act, 1952 (Act XIX of 1952), so long as the petitioner's establishment does not employ twenty or more people as required under the Amending Act of 1960.

34. Both the writ petitions are allowed as indicated above and each of the petitioners in the writ petitions will get his costs.