

(1971) 11 DEL CK 0013
In the Delhi High Court
Case No : Civil Writ Appeal No. 332D of 1966

K. Gopalan

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-11-1971

Acts Referred:

Citation : (1972) ILR Delhi 438 : (1973) LabIC 287

Hon'ble Judges : V.S. Deshpande, J;Hardayal Hardy, J

Bench : Division Bench

Advocate : B.R. Iyengar, A.S. Nambiar, Lily Thomas, D.K. Kapur, Rishikesh and A.D. Chaudhary, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) The Employees' Provident Fund Act, 1952 (hereinafter called the Act) was enacted to provide for the institution of provident funds for employees in factories and other establishments. The original Schedule I of the Act specified the various industries to which the Act applied from its inception. Section 4 of the Act enabled the Central Government by notification to include other industries in Schedule I from time to time and to apply the provisions of the Act to them. All such notifications are required to be laid before Parliament after they are issued by section 4(2) of the Act. According to sub-section (3) of section I thereof, the Act applies to two kinds of establishments, namely :-

(A) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed,

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

SECTION 5 empowers the Central Government to frame the Employees' Provident Funds Scheme for the establishment of provident funds under the Act for

employees or for any class of employees and specify the establishments to which the said Scheme shall apply. The Central Government has framed the Employees' Provident Funds Scheme, 1952. This Scheme is amended each time its application is extended to a new establishment by a notification either u/s 4 or u/s 1(3)(b). Section 7(2) requires that all notifications amending the Scheme shall be laid before Parliament after they are issued. Though, Therefore, section 1(3)(b) itself does not contain the requirement that a notification issued there under should be laid before Parliament after they are issued, this result is achieved by section 7(2) inasmuch as the Scheme cannot be applied to the establishment to which the Act is extended by a notification u/s 1(3)(b) unless the Scheme itself is amended to apply to it. The notification so amending the Scheme and making it applicable to the establishment covered by the notification u/s 1(3)(b)-has to be placed before Parliament u/s 7(2). The Act does not, therefore, discriminate between factories to which it is applied by notification u/s 4 and establishments to which it is applied by notification u/s 1(3)(b) though the petitioners originally seemed to have been under such a misconception.

(2) On 20th April 1963, the Central Government issued Notification G.S.R. 728 in exercise to the powers conferred by clause (b) to subsection (3) of section 1 of the Act extending the application of the Act, inter alia, to "companies, societies, associations, clubs or troupes which give any exhibition of acrobatic or other performances or both. in any arena circular or otherwise or perform or permit any other form of entertainment in any place, other than a theatre, and require payment for admission into such exhibition or entertainment as spectators or audience". The notification came into force from 31st May 1963. The Provident Fund Commissioners have construed the words "troupes which give any exhibition of acrobatic or other performances" in the above notification to include circus companies. Accordingly a notice dated 10th December, 1965 was sent to this petitioner by the Regional Provident Fund Commissioner, Kanpur to comply with the provisions of the Act by deducting contributions to the Fund from the wages of the employees and by contributing equal amounts to the same and pay "the combined amounts into the Fund. At that time, the circus of the petitioner was camping at Agra. A similar notice was sent by the Regional Provident Fund Commissioner of Maharashtra to the petitioner in Civil Writ 764-D of 1966 on 5th April, 1966 because the circus of that petitioner was then camping at Bombay. The Regional Provident Fund Commissioner of Kerala sent two notices on 5th January, 1966 and 21st July, 1967 to the petitioners in Civil Writ 1585 of 1967 and Civil Writ 372 of 1968 respectively. The Regional Provident Fund Commissioner of Andhra Pradesh sent a notice on 5th March 1966 to the petitioner in Civil Writ 901-D of 1966.

(3) The validity of the Notification No. Gsr 728 dated 20th April. 1963 applying the Act to circuses has been challenged by all the petitioners mainly on the ground that section 1(3)(b) of the Act gives unlettered discretion to the central Government to apply the Act to any establishment it pleases and is, Therefore,

ultra virus the legislative power conferred on Parliament by the Constitution. For, Parliament cannot delegate the enunciation of legislative policy to the Central Government, that being an essential legislative function to be performed only by the Legislature. Enactment of section 1(3)(b) amounts to excessive delegation of legislative policy to the Executive and was, Therefore unconstitutional.

(4) Secondly, the notices issued by the various Provident Fund Commissioners to the petitioners demanded compliance by the petitioners with the provisions of the Act and the Scheme from 31st May 1963 when. the Act and the Scheme became applicable to circuses. But these notices were sent to the petitioners years after 31st May 1963. The petitioners complain that the notices amount to a retrospective application of the Act and the Scheme to the petitioners and that this was not permissible and was, Therefore, illegal.

(5) Thirdly, the nature of the circuses is unique. The circuses have no fixed location. The artistes are employed by them as teams and these teams are paid remuneration as independent contractors. They are not employees of the proprietors of the circuses. The shows are given by the circuses only on some days but not all round the year. The circuses move from place to place. They employ local labour to do the menial jobs and discharge them before moving to another place. They are not, Therefore, covered by the meaning of the word "establishment" as used in section 1(3)(b) of the Act. Further, they are not troupes which give any exhibition of acrobatic or other performances" and are not, Therefore, covered by the notification Gsr 728 of 1963. The circuses are, Therefore, still outside the purview of the Act and the Scheme.

(6) The petitions were defended by the Central Provident Funds Commissioner who is in-charge of the implementation of the Scheme framed under the Act. The allegations of the petitioners were denied. An additional defense was that the petitioners should have availed themselves of the alternative statutory remedies available to them under sections 7A and 19A of the Act before approaching this Court in its writ jurisdiction. The question whether this Court has the territorial jurisdiction to entertain the writ petitions was referred to by the learned counsel for the respondents in argument but this defense was not raised in the returns filed for the respondents. It is because the impugned notification No. 728 of 20th April, 1963 has been issued by the Central Government which is located at Delhi that the writ petitions have been filed against the Central Government in this Court. This point was not, Therefore, pressed.

(7) When the writ petitions were filed, some of the contentions raised by the petitioners appeared to be substantial and the writ petitions were, Therefore, referred to a Division Bench by one of us (Hardy J. as he then was). We consider below the contentions raised by the petitioners in the order in which they are set out above.

1. In Mohmedalli and Others Vs. Union of India (UOI) and Another, , the very first contention was that section 1(3)(b) conferred uncontrolled and uncanalised

power on the Central Government. Rejecting this contention, the Supreme Court observed in paragraph (6) of the report as follows :-

IT cannot be asserted that the powers entrusted to the Central Government to bring within the purview of the Act such establishments or class of establishments as the Government may, by notification in the Official Gazette, specify is uncontrolled and uncanalised. The whole Act is directed to institute provident funds for the benefit of employees in factories and other establishments as the preamble indicates. The institution of provident funds for employees is too well- established to admit of any doubt about its utility as a measure of social justice. The underlying idea behind the provisions of the Act is to bring all kinds of employees within its fold as and when the Central Government might think fit after reviewing the circumstances of each class of establishments".

We may further point out that the discretion of the Central Government in extending the Act is confined by the following two guidelines, namely:-

- (1)The Act can apply only to establishments, and
- (2)The establishments must employ twenty or more persons.

The Central Government cannot travel beyond these guidelines. Further, safeguards have been enacted in the Act itself to prevent arbitrary exercise of its powers by the Government. An aggrieved party can dispute the applicability of the Act or the Scheme on any ground, namely, that it is not an establishment or that for other reason the Act and the Scheme do not apply to it, etc., before the Provident Fund Commissioner u/s 7A of the Act and can approach even the Central Government u/s 19A of the Act as was pointed out by this Court in *Wire Netting Stores Vs. Regional Provident Funds Commissioner and Others*, . In view of these guidelines and the safeguards and because of the Supreme Court decision this contention of the petitioners is totally untenable.

2.The Notification No. Gsr 728 of 20th April, 1963 applied the Act to the circuses of the petitioners and Notification No. Gsr 853 dated 10th May 1963 amended the Employees' Provident Funds Scheme, 1952 by inserting the establishments covered by Notification No. Gsr 728 dated 20th April, 1963 as Item No. (xxxii) in clause (b) of sub-paragraph (3) of paragraph I of the Scheme. Both these notifications were placed before Parliament u/s 7(2) as shown by the Lok Sabha Revised List of Business for Tuesday, May 7, 1963, Item II. The application of the Act and the Scheme to the circuses of the petitioners was the result of these notification. It was not postponed till the issue of any notice to them by the Provident Fund Commissioners demanding the payment of contributions to the Funds or directing the petitioners to comply with the provisions of the Act. The notices issued by the Provident Fund Commissioners were only reminders to the petitioners of the duty to comply with the Act and the Scheme. No question of retrospective application of the Act and the Scheme arises inasmuch as the petitioners have not been asked to comply with them from 31st May 1963. If the

petitioners maintain that for any period after 31st May 1963 to the receipt of the notices by them or thereafter the number of their employees was less than twenty or for any other reason the Act and the Scheme was not applicable to them, then the petitioners will have ample, opportunity of bringing these facts to the notice of the Provident Fund Commissioners by filing the returns about their respective establishments in the prescribed forms. "Their contentions would be considered by the Commissioners and by the Central Government and would be decided u/s 7A and section 19A of the Act. But the Commissioners are bound to enforce the Act and the Scheme against the petitioners from 31st May 1963 onwards. In doing so. they are not retrospectively applying the Act and the Scheme to the circuses of the petitioners. This contention also, Therefore, fails,

3.The word "establishment" has a broad as well as a narrow meaning. Broadly it means that "something that has been established" that is to say, any organisation, particularly of business or industry. In the narrower sense, it may at times mean a more or less fixed and usually sizable place of "business or residence together with all the things that are an essential part of it. It is clear that the word is not used as relating to a place of business in section 1(3) of the Act. Section 1(3)(a) refers to an establishment which is a factory. Section 2(g) defines a "factory" to mean any premises in any" part of which a manufacturing process is carried on. While factory means premises, it is not necessary that the factory must be permanently fixed at one place. Even if it shifted from one place to another it will be the same factory moved to a different place. The identity of the factory does not depend on its location but on its entity. If the composition of the ownership or management of the factory remains the same, a change of place of the premises would make no difference to its identity. The word "establishment" in section 1(3)(a) would, Therefore, continue to apply to the factory even though the factory may be shifted from place to place.

(8) The same reasoning applies to the words "any other establishments" in section 1(3)(a). The dichotomy between section 1(3)(a) and section 1(3)(b) is between an establishment which is a factory and an establishment which is not a factory. The identity of the non factory establishment also depends on the particular ownership or management of it and not on the place at which it may situated at any particular time. Applying this test to the circuses of the petitioners, it is clear that the Gemini Circus or the Reyman Circus would be the same establishment whether it is performing in Kerala or in Uttar Pradesh or in Maharashtra or in any other place whatever. The reason is that the circus proprietorship or the, management remains the same and, Therefore, it is the same circus wherever it goes. This is made clear by the Explanation to section 16(1) of the Act that an establishment shall not be deemed to be newly set up merely by reason of a change in its location.

(9) Shri B. R. L. Iyengar, learned counsel for the petitioner in CW. 332-D of 1966, argued that, even though, the circuses may be establishments in the dictionary sense, they should not be regarded as establishments u/s 1(3)(y) of the Act. He

argued that the various provisions of the Act and the Scheme would show that only certain kinds of establishments were contemplated by section 1(3)(b). For instance, the proviso to section 1(5) of the Act showed that the working of an establishment has to be fairly continuous. This is also emphasized by paragraph 26 of the Scheme. Now, what is continuous is a relative matter. Certain types of industry or business may be working day and night while others can work only at intervals. Intermittent working may be discontinuous in one sense if we are concerned with the working of any particular day or time. But if the working is to be viewed over a period of time such as one year, then the same establishment which intermittently works throughout the year would have to be regarded as an establishment with a continuous working. It is in the very nature of the circus business that its working cannot be continuous in the sense of working day in and day out. It has to give rest to the artistes. It has to avoid rains as it works in tents and not in buildings. It also has to spend time in traveling. These hindrances are inevitable. But the intention of a person who carries on the circus business is to work continuously excepting these intervals which cannot be avoided in the nature of things. A circus is, Therefore, a continuous business and not a casual business. It would be casual only if people come together for a particular performance only without the intention of carrying on a business over a period of time by repeating the performances at suitable times and places.

(10) It was then said that the artistes working in the circuses are not the employees of the circuses but independent contractors. The petitioners do not control the work or rather the method of the work of the artistes. The concept of employment has itself undergone a change with the growth of labour legislation. When employment was a personal relationship between the master and the servant, the test could be "whether the master can order or require not only what is to be done, but how it shall be done, in which case it is a contract of service". But as observed by Lord Parker, C.J., in *Morren v. Swinton and Pendlebury Borough Council*, (1965) 1 W.L.R. 576, that perhaps is an oversimplification..... The cases have over and over again stressed the importance of the factor of superintendence and control, but that it is not the determining test is quite clear. In *Cassidy v. The Minister of Health* 1951 2K, B. 343 Somervell L.J., referred to this matter, and instanced, as did Lord Denning in the later case of *Stevenson, Jordan & Harrison v. McDonald & Evans* 1952-1 T.L.R. 101 that clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, or a professional architect, or as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work, Therefore the absence of control and direction in that sense can be of little, if any, use as a test".

(11) These remarks equally apply to the circus artistes who are skilled persons and whose method of performance cannot be controlled by their employer. This is why section 1(e)(1) of the Act defines an "employer" to mean the owner or the

occupier of a factory or a person in the ultimate control of an establishment. The definition does not require that the method of the work of the employees should be controlled by the employer, Similarly, the definition of an "employee" in section 2(f) of the Act includes any person who is employed for wages in any kind of work or in connection with the work and includes a person, employed by or through a contractor in or in connection with the work. The usual distinction between an employee and an independent contractor is thus abandoned in the Act.

(12) It is nowhere pleaded by any of the petitioners that a circus as a business never employs more than twenty persons or that these persons never work for the employer beyond one or two performances or that a circus gives only one or two performances and does not carry on business with any continuity. It cannot be said, Therefore, that circus as a business is not an establishment within the meaning of section 1(3)(b) of the Act. If any particular circus among the petitioners circuses is such that it does not employ more than twenty persons with any sense of continuity, than such a particular circus can bring these facts to the notice of the Provident Fund Commissioner u/s 7A and avoid payment of any contributions whatever under the Act and the Scheme. Some particular circus may also succeed in getting an exemption from the application of the Act u/s 16. This does not mean that circus in general is not an establishment within the meaning of section 1(3)(b). We are of the view, Therefore, that circus as a business is an establishment within the meaning of section 1(3)(b) of the Act.

(13) The defense that the petitioners should have availed themselves of alternative remedies under the Act is not such as to come in the way of the Court to entertain these writ petitions. First, the petitioners challenged the validity of section 1(3)(b). This contention could not have been advanced by them before the authorities functioning under sections 7A and 19A of the Act. The other two contentions, namely, whether the circus is an establishment covered "by section 1(3)(b) or whether the notices given to the petitioners sought to recover contributions from them retrospectively could have been advanced before the authorities u/s 7A and u/s 19A of the Act. As recognised in the referring order, there is a conflict of judicial decisions as to the precise nature of the power of the Central Government u/s 19A. In *Wire Netting Stores v. Regional Provident Fund Commissioner* referred to above, however, this Court has suggested a construction of section 19A which would reconcile the conflicting views. Henceforth, Therefore, it would not be sufficient for a petitioner to say that he did not resort to the statutory remedy u/s 19A because of the conflicting judicial decisions as to its nature. As the petitioners were entitled to directly come before this Court without resorting to the statutory remedies in urging their first contention. the petitions had to be entertained by this Court. Once this was done, the other two contentions also could be considered by this Court. This defense is, Therefore, untenable.

(14) The vast majority of establishments have fairly fixed location of working, it

is only a few establishments like, a circus or traveling dramatic companies or traveling groups of musicians or other performers who are constantly moving from place to place. The Provident Funds Act and the Scheme do not seem to have made any separate provisions for such traveling establishments. Therefore, any of the Provident Fund Commissioners seems to be in a position to enforce Compliance of the Act and the Scheme against such an establishment if it is found within the territorial jurisdiction of the Provident Fund Commissioner. It is perhaps for this reason that administrative instructions have been issued that it is the particular Provident Fund Commissioner within whose jurisdiction the permanent head office of such a traveling establishment is situated who should enforce the compliance of the Act and the Scheme against a particular establishment. This would avoid inconvenience to both the authorities under the Act and the traveling establishment concerned. We have no doubt that these administrative instructions would be observed by the parties concerned. In other respects, a traveling establishment is in the same position as a non-traveling establishment and can comply with the Act and the Scheme just as well.

(15) For the above reasons all these writ petitions, namely, Civil writs 332-D, 764-D, 901-D of 1966 and 372 and 1585 of 1966, are dismissed; but in the circumstances without any order as to costs.