(1969) 12 MP CK 0007

In the Madhya Pradesh High Court

Case No : M. P. No. 455 of 1968

M/s. Dayabhai Khushalbhai Patel and another — APPELLANT

Vs

Regional Provident Fund Commissioner, Indore M. P. — RESPONDENT

Date of Decision : 19-12-1969

Acts Referred:
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A

Citation : (1970) JLJ 435 : (1970) MPLJ 338

Hon'ble Judges : Shiv Dayal, J;K. L. Pandey, J

Bench : Division Bench

Advocate : R. S. Dabir and N. S. Kale, for the Appellant; B. B. L. Shrivastava, for the Respondent

Final Decision : Allowed

Judgement

K. L. Pandey, J.

This petition under Articles 226 and 227 of the Constitution is directed against-

(i) a notice dated November 22, 1967 intimating to the petitioners the provisional assessment u/s 7A of the Employees'' Provident Funds Act, 1952 (hereinafter called the Act) and permitting them to make, if they so desired, a representation against it;

(ii) an order dated March II, 1968 requiring the petitioners to comply with tie provisions of the Act;

(iii) another order dated July 5, 1968 holding that the establishment belonging to the petitioners was governed by the provisions of the Act and the scheme framed thereunder and a notice of even date directing the petitioners to comply with the requirements of the Act; and finally

(iv) an order dated September 7, 1968 directing the petitioners to submit the prescribed returns and/ or to remit the provident fund dues.

The facts giving rise to this petition may be shortly stated. The petitioners manufacture bidis at Bilaspur and several other outstations. They also sell bidis so manufactured. The petitioner No. 1 runs a rice mill too but it is not connoted in any way with the business of manufacture and sale of bidis and that petitioner is duly complying with the provisions of the Act in regard to the employees of the rice mill. The manufacture of bidis is not an industry mentioned in Schedule I to the Act, but the Central Government applied its provisions to certain trading and commercial establishments by Notification No. a. S. R. 346 dated March 17, 1962 issued u/s 1(3)(b) of the Art. That notification reads:

G. S. R. 346. In exercise of the powers conferred by clause (b) of sub-section (3) of section I of the Employees'' Provident Funds Act, 1952 (19 of 1952), the Central Government hereby applies the said Act with effect from 30th April 1962 to every Trading and Commercial Establishment employing twenty or more persons each and engaged in the purchase, sale or storage of any goods, Including establishments of exporters, importers, advertisers, commission agents and brokers and commodity and stock exchanges but not including part or werehouses established under any Central or State Act.

By two notices dated May 19, 1964 and August 28, 1964, the Regional Provident Fond Commissioner, Indore (respondent) intimated to the petitioners that the provisions of the Act applied to the petitioners'' establishment concerning the manufacture and sale of bidis and required them to pay the provident fond dues. Being aggrieved, they challenged the legality of those notices in this Court in Miscellaneous Petition No. 495 of 1964. That petition and several other petitions were disposed of by common order passed in Messrs Radkakishan Naryandas v. The Regional Provident Fund Commissioner, Madhya Pradesh 1967 M P L J 71 (,M. P. No, 495 of 1964 decided on the 9th November 1966.). This Court held:

(i) The Act applies to the petitioners'' establishment if they satisfy the requirements of the Notification No. G. S. R. 346 dated March 17,1962.

(ii) The question whether a particular establishment is part of the factory establishment or whether certain employees are engaged in the factory establishment, or other establishments, should be determined in the inquiry u/s 7A of the Act.

After the decision of this Court, there was an enquiry u/s 7A of the Act. By a communication dated November 22, 1967, the petitioners were informed about the provisional assessment and intimated that they could, if they so desired, make a representation against it. In the course of the enquiry, the respondent passed the other two impugned orders dated March 11, 1968, and July 5, 196S. Thereafter, the respondent passed the final order dated September 7, 1968 setting out his reason for holding that the provisions of the Act applied to the petitioners'' establishment. All these orders have been challenged on the several grounds set out in paragraph 9 of the petition.

The reasons which led the respondent to hold finally that the Act-applied to the petitioner''s establishment would appear from the following excerpts culled from the order dated July 5, 1968:

At Bilaspur, enquiry was made from the partner Shri Venubhai Patel and it was found that the following persons work exclusively on the sales side in the Bilaspur shop:

(1) Shri Dileahwar Pd. Sharma

(2) Shri Surtiram, Advertiser

(3) Shri Amarnath

(4) Shri Kanthilal

(5) Shri Shankarrao Car and Truck drivers

(6) Shri Jharurao

(7) Shri Shankarbhai Patel

(8) Shri Kanubhai Patel

Total: 8

In addition, the establishment has depots at Champa, Naila, Ratanpur, Bhatapara, Sheori-narayan, Pendra, Mungely, Thakhatbur, Simga, Lormi, Raipur, Pendra Road, where the bidis are manufactured and they are also sold. In short, Manager of the depot looks for the manufacture of bidis as well as their sale and therefore 12 more persons are enganged in the sale of bidis (though partly) in this concern. The total employment is therefore 20 and it was ordered that the establishment was rightly covered and instructions were issued to make compliance vide this office order dated 5-2-1968.

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The establishment filed affidavits in which it was stated that the persons working as Car and Truck Drivers work mostly for transport of bidis, leaves etc. and are working on the private vehicles of the partners of the firm. Similarly affidavits were filed by others that they are working on the manufacturing side of the establishment. I cannot believe when enquiry was made on the spot. 8 persons are engaged in the head office in the sale of bidis while in the sub-offices 1 man looks after the sale of bidis though partly.

It has been contended that a man, who is looking to manufacture as well as sale when manufacture is predominant, could not be covered towards sales side. I am of the view that the person looking towards sale of bidis, though partly, is liable for benefits of the provident fund under the head ''Trading and Commercial Establishment and accordingly the establishment is liable for coverage under the Employees1 Provident Funds Act and the Scheme framed thereuder and I hold it was rightly covered with effect from 1-5-1962.

It would appear from the extracts reproduced above that the petitioner''s establishment is a composit one, that is to say, it employees numerous persons for manufacture of bidis and it has also engaged several persons for sale of bidis so manufactured. As already indicated, the manufacturing side of the establishment constituting a factory or factories is not an industry included in Schedule I to the Act. That being so, the persons employed on the manufacturing side must be excluded from consideration. There is a difference of judicial opinion on the question whether, when an establishment manufactures several articles some of which are mentioned in the schedule, the question of applicability of the Act should or should not be determined upon a consideration of the main or dominant purpose of the establishment. In this connection, we may refer to Oudh Sugar Mills v. Regional Provident Fund Commissioner 1957 N L J 284 -A1 & 1957 Bom. 149; The Madras Pencil Factory Vs. The Regional Provident Fund Commissioner, No. 111 Mount Road, Madras, ; and N.K. Industries (Private) Ltd., Kanpur Vs. Regional Provident Fund Commissioner, U.P., . In the case before us, we are not concerned with, and we need not express any opinion on, that particular aspect of question. However, it has been held that when a factory manufactures goods as end products some of which are included in the schedule and others are not so included; the Act does not apply to the whole factory but applies to that section of the factory which produces goods included in the schedule. So, in Nagpur Glass Works Ltd. Vs. Regional Provident Fund Commissioner, Bombay, at p. 154, Mudholkar J. stated:

''We are however of the opinion that the Act cannot apply to the whole factory inasmuch as at the relevant date glass was not included in the Schedule. It applies only to the section producing ''burners and metal lamps''. These products are final products manufactured for sale and their production is an industry in itself. Therefore, while provident fund contribution cannot be demanded in respect of all the 420 workers, it can be demanded in respect of 137 workers engaged in the particular section manufacturing burners and metal lamps." In our opinion, similar considerations should apply to the trading and commercial section of the petitioner''s establishment if 20 or more persons be found therein engaged.

However, in this particular case, the question is somewhat difficult because in the petitioner''s establishment, there is not a separate well defined section which could be called a "trading or commercial section" dealing with purchase, sale or storage of goods within the meaning of the Central Government a Notification No. G. S. R. 346 dated March 17, 1962. When the same person, is engaged to work in the manufacturing section as well as in the commercial section, we are of the view that, for purposes of applicability of the Act, he should be regarded as forming part of one or the other section in accordance with the preponderance of the duties assigned to him. That means that if the bulk of his duties relate to the manufacturing section, he does not form part of the commercial section. It would be otherwise if his duties are mainly concerned with the trading activities of the establishment.

In this case, we notice that the respondent has included in the commercial section the number of employees of which has been found to be just twenty, car and truck drivers numbering three employed in the head-office at Bilaspur. Prima facie, these employees would not be concerned, or mainly concerned, with the selling establishment. In the same way, one person from each of the outstations has been included, although they are predominantly manufacturing centres, only because Borne sales also are made there. The view taken appears to be that one employee from each of these centres should be included because he is booking towards the sales side "though partly" no matter howsoever little. As we have indicated earlier, this approach in computing the number of persons engaged in the commercial section is erroneous, In view of these apparent errors, the orders dated July 5, 1968 and September 7, 1968 cannot be sustained. We would, therefore, quash these orders and leave it to the respondent to determine the question afresh with advertence to the observations we have made earlier in this order.

The result is that this petition succeeds and is allowed to this extent that the orders dated July 5, 1968 and September 7, 1968 are quashed. In all the circumstances of the case, the parties are left to bear their own costs and the outstanding amount of security is directed to be refunded.

