

(1957) 12 AHC CK 0025

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 2095 of 1957

N.K. Industries (Private) Ltd., Kanpur

APPELLANT

Vs

Regional Provident Fund Commissioner, U.P.

RESPONDENT

Date of Decision : 19-12-1957

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 16(1), 19A, 2, 5

Citation : AIR 1958 All 474 : (1958) 28 AWR 325 : (1958) 2 LLJ 19

Hon'ble Judges : J. Sahai, J

Bench : Single Bench

Advocate : J. Swarup, for the Appellant; S.S. Dhawan, for the Respondent

Final Decision : Dismissed

Judgement

J. Sahai, J.—The petitioner Messrs. N.K. Industries (Private) Ltd. are carrying on the business of manufacturing oil under the name and style of Messrs. Rajendra Prasad Oil Mills. With effect from June 1, 1954, a separate department for the manufacture of tins was established in the said mills. This department employs ten persons only. Messrs. Rajendra Oil Mills were informed by circular No. 168 dated August 2, 1956, by the Regional Provident Fund Commissioner, that the provisions of the Employees Provident Funds Act, 1952, had been extended to thirteen additional industries including edible oils and fats by means of notification No. S. R. O. 1956 dated 4th July, 1956.

It is alleged by the petitioner that this letter was received sometime in the first week of August 1956. The Rajendra Oil Mills were dosed for indefinite period with effect from 4th August, 1956 and the factory was not working at the time when the circular was received. The factory resumed work in February 1957. and it is alleged that the Provident Fund scheme was made applicable by Messrs. Rajendra Oil Mills to the workers having a continuous service of more than 240 days with effect from 1st March, 1957.

On 2nd April, 1957 Sri B.B. Singh, Provident Fund Inspector visited the factory and thereafter a letter was received from opposite party by which Messrs. Rajendra Prasad Oil Mills were required to implement the Employees Provident Fund scheme with effect from 1st July, 1954 and thereafter to deposit employer's share of contribution for the period 1st July, 1954 to 28th February, 1957 and to pay 3 per cent, administrative charges on both employer's and employees' contribution. Messrs. Rajendra Prasad Oil Mills were further asked to pay damages on the said alleged dues u/s 14-B of the Act from the date on which according to them the payment fell due to the date of the actual payment.

The basis of demand was that on 1st June, 1954 Messrs. Rajendra Prasad Oil Mills employed more than 50 persons and that they were engaged in the manufacture of tins from the said date which according to the opposite party was the industry included in Schedule I of the Act on that date. The petitioner alleges that the manufacture of tins was separate from the manufacture of oils and it could not come within the definition of "electrical, mechanical or general engineering products" as mentioned in schedule I of the Act.

Even if it did the manufacture of tins having been started on opposite party's own showing with effect from 1st June, 1954, the provisions of the Provident Funds Act and the Employees Provident Fund Scheme cannot be made applicable to it by virtue of the provisions of section 16 of the Act prior to 1st June, 1957. The petitioner took up that position with opposite party and sent a reply on behalf of Rajendra Prasad Oil Mills on 22/26th May, 1957. A reply to the aforesaid letter was received on 24th July, 1957 in which it was contended that the manufacture of tins was covered by the expression "electrical, mechanical and general engineering products" occurring in schedule I of the Act and as the factory was engaged in the manufacture of oil and tins simultaneously on 1st June, 1954 employing more than 50 persons as a composite unit, it became subject to the provisions of the Act with effect from 1st June 1954.

By this letter the opposite party demanded from the petitioner the employer's share of contribution, administrative charges for the period 1st July, 1954 to the 28th February, 1957 and the petitioner was threatened in case of non-compliance with action u/s 14-B of the Act. The opposite party by his letter no. 7926/UO/ III/ S.R.O. dated 13-8-57 which was received by the petitioner on 27-8-1957 has threatened to take legal action against the petitioner for non-compliance with the aforesaid orders.

On these facts the present writ petition has been filed. The grounds taken in the petition are that the manufacture of tins was not covered by schedule I of the Employees' Provident Funds Act, that only 10 persons were employed in the manufacture of tins in 1954 and as such the Act could not be applied to the persons engaged in that industry, that the Employees Provident Funds Act: did not apply to oil industry on 1st June, 1954, that the opposite party not having realised the demand at the proper time could not claim to demand it with retrospective effect i.e. from 1-6-1954, that inasmuch as the tins were

manufactured for the purpose of filling oil manufactured by the petitioner and not for sale the same could not be classified as industry for the manufacture of tins, that no employee's share of contribution having been deducted in respect of the workers from 1st June, 1954 to 28-2-1957 and most of the workers having left services of the concern the employer's share of contribution and administrative charges cannot be claimed, that no administrative charges can be levied in respect of the period from 1st June, 1954 to 28th February, 1957 and that the order of the Regional Provident Fund Commissioner dated 18-7-1957 infringes the fundamental right of the petitioner guaranteed under the Constitution.

A counter affidavit has been filed on behalf of the respondents which is sworn by Raj Ku-mar Rastogi, Provident Fund Inspector, Kanpur. In this counter affidavit it is alleged that in addition to the manufacture of oil the petitioner company also carries on the manufacture of tin containers and the number of employees in the tin containers manufacturing section of the factory increased from 10 in June, 1954 to 48 in January, 1957. It is further alleged that at the time when the circular letter was sent to the petitioner the fact that the petitioner was also engaged in the manufacture of tin containers was not known to the opposite party nor was it brought to his notice by the petitioner.

It is also alleged that the Central Government's notification no. S.R.O. 1509 is a notification, framing a scheme under the Employees' Provident Funds Act, 1952. Its date is 2-9-1952 and not 2-9-1957. It is also sworn in this affidavit that tin containers manufactured by the petitioner are not used by Messrs. Rajendra Oil Mills only but are sold to other oil concerns controlled and operated by the petitioner. In the rejoinder affidavit filed by the petitioner and sworn by Hari Chand Gupta it is stated that the number of workers in the tin manufacture department on or about 2nd August, 1956, the last date covered by the writ was 8.

The managerial staff and watch and ward section which look after the whole section were 10 and that employed by the contractor engaged for the purpose of soldering tins was about 13. These persons were not the employees of the applicant. It is also alleged that the employees are not entitled to take any benefit out of the employer's share of contribution unless the employees have also paid their share of contribution. No attempt is being made to realise their contribution even if it is payable. It is further alleged that many of the employees working during the period covered by the writ are no longer in the service of the petitioner.

2. I have heard Mr. Jagdish Swarup, for the petitioner and Mr. S.S. Dhawan for the respondent. The main question to be considered in this case is whether the provisions of the Employees Provident Funds Act, 1952 apply to the case of the petitioner. The "application of the Act is provided for in Section 1(3) of the said Act which reads as follows :--

""Subject to the provisions contained in Section 16, it applies in the first instance

to all factories engaged in any industry specified in Schedule I in which fifty or more persons are employed, but the Central Government may after giving not less than two months notice of its intention so to do, by notification in the official gazette, apply the provisions of this Act, to all factories employing such number of persons less than fifty as may be specified in the notification and engaged in any such industry." The expressions "factory," "industry" and "employee" have also been defined in the Act. The definition of "factory" runs as follows :--

"any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on whether, with the aid of power or without the aid of power."

The definition of "industry" reads as

"any industry specified in Schedule I, and includes any other industry added to the schedule by notification u/s 4;"

The word "employee" has been defined in the following words:--

"any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of a factory, and who gets his wages directly or indirectly from the employer, and includes any person employed by or through a contractor in or in connection with the work of the factory."

The point therefore to consider is whether the expression "in which fifty or more persons are employed" applies to "factories" or to "industry". The petitioner's case is that it relates to "industry" and not to "factories". To my mind the words "in which fifty or more persons are employed" relate to "factories" and not to "industry. I say so because the latter part of this section, which is as follows, to my mind, makes it clear:--

"..... but the Central Government may, after giving not less than two month's notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act, to all factories employing such number of persons less than fifty as may be specified in the notification and engaged in any such industry."

It appears to me that the words "engaged in any such industry" are in connection with the words "to all factories" and not with "such number of persons less than fifty". If the words "after giving not less than two months notice of its intention so to do, by notification in the Official Gazette" and the words "as may be specified in the notification" are removed the sentence will run thus:--

"but the Central Government may apply the provisions of this Act to all factories employing such number of persons less than fifty and engaged in any such industry."

It is obvious therefore that it is the strength of the factory and not of that department in which that particular industry is being carried on which is to be

considered. In other words the Act would apply to factories employing fifty or more persons though in that department of the factory in which that particular industry is being carried on less than fifty persons are working. In my opinion any construction other than the one I am giving would be in conflict with the rules of grammar.

If the latter part of Section 1, Sub-section (3) of the Act makes it clear as, in my opinion, it does that the Central Government may apply the provisions of this Act to all factories employing such number of persons less than fifty irrespective of the number of persons employed in the department in which that particular industry is being carried on, the first part of this section should also be held to apply to all factories employing fifty or more persons though in the particular department in which that particular industry is carried on the number of persons may be less than fifty. The provisions of Section 19-A of the Act also support me in coming to the conclusion to which I have come. Section 19-A runs as follows:--

"If any difficulty arises in giving effect to the provisions of this Act, and in particular if any doubt arises as to-

(i) whether a factory is engaged in any industry specified in Schedule I; or

(ii) whether fifty or more persons are employed in a factory; or

(iii) whether three years have elapsed from the establishment of a factory; or

(iv) whether the total quantum of benefits to which an employee is entitled has been reduced by the employer, the Central Government may, by order, make such provision or give such direction not inconsistent with the provision of this Act, as appear to it to be necessary or expedient for the removal of the doubt or difficulty; and the order of the Central Government, in such cases, shall be final. The provisions of Section 19-A have been enacted with a view to give the Central Government the power to remove difficulties that may arise in giving effect to the provisions of this Act. Four difficulties could be contemplated and they are mentioned in this section. Sub-clause (ii) of this section indicates the mind of the legislature that the number of persons fifty or more was in relation to a factory and not to an industry. The use of the word "factory" and the exclusion of the word "industry" in this sub-clause conclusively proves this. If it was in relation to an industry the words would not have been "whether fifty or more persons are employed in a factory" but would have been whether fifty or more persons are employed in a factory and are engaged in that particular industry. Reading the Act as a whole I am of the opinion that the contention of the petitioner is not sound. My attention has been invited to two cases of the Bombay High Court. The first is Oudh Sugar Mills Ltd. Vs. Regional Provident Fund Commissioner, Bombay,

In that case a Division Bench of the Bombay High Court came to the conclusion that before the Act can be made applicable it must be found that the number of persons engaged in that particular industry should be more than fifty irrespective

of the number of persons employed in the factory. The other case is Nagpur Glass Works Ltd. Vs. Regional Provident Fund Commissioner, Bombay, , wherein the same view has been taken. With the greatest respect to the learned Judges of the Bombay High Court I am unable to agree frith their decisions.

Both the decisions were given by the same earned Judges i.e., Mudholkar and Tambe, JJ. In the reports of the two cases mentioned above there is no discussion in detail of the reasons of the learned Judges for coming to the conclusion at which they have arrived, A contrary view has been taken in the case of Kokkalai Rice and Oil Mills v. Regional Provident Fund Commissioner, Ori. Petn. No. 78 of 1953 D/-22-2-1954 (C), by the Travancore Cochin High Court. I find myself in complete agreement with the view that the Travancore Cochin High Court has taken and follow that decision.

3. The next point to be considered is whether the provisions of the Act would be applicable to the petitioner's case inasmuch as it is their allegation that the tin containers which they are manufacturing are for the purpose of filling oil manufactured by the petitioner and not for sale and as such the department of manufacture of tin containers could not be classified as industry for the manufacture of tins.

This allegation of the petitioner has been controverted by the respondents and in the counter affidavit sworn by Raj Kumar Rastogi, the Provident Fund Inspector, it has been stated that it is not correct that the petitioner manufactures tin containers only for the use of Messrs. Rajendra Prasad Oil Mills, Kanpur, but they also manufacture and sell tin containers to other oil concerns controlled and operated by the petitioner. I have already given the definition of "factory" as given in the Act in the earlier part of my judgment.

From the definition it would appear that the manufacturing process of scheduled article need not go on in the entire premises of the factory but it may go on in any portion of it. The definition of the word "industry" has also been reproduced by me in this judgment. To my mind the word "manufacturing" will include, making of goods even for the use of the factory itself. These definitions read together clearly indicate that if in a part of a factory any article which fell within the ambit of the first schedule is manufactured though not for the purpose of marketing it and the number of employees is fifty or more then the provisions of the Act would be attracted.

In the Bombay case reported in (S) Oudh Sugar Mills Ltd. Vs. Regional Provident Fund Commissioner, Bombay, one of the learned Judges, i.e. Tambe, J. took similar view though Mudholkar, J. took contrary view. I am in agreement with the views of Tambe J. and do not find any substance in this contention of the petitioner also.

4. The next submission of the learned counsel for the petitioner is that the Employees' Provident Funds Act, did not apply to the oil Industry on 1st June, 1954 and the opposite party had no jurisdiction to demand the employer's

contribution or any other dues in respect of workers engaged in oil industry on 1st June, 1954 and the demand in regard to them is wholly illegal. Section 16 of the Act runs as follows:--

"16 (1) This Act shall not apply to-

(a) any factory belonging to the Government or a local authority, and

(b) any other factory, established whether before or after the commencement of this Act, unless three years have elapsed from its establishment."

The petitioner's contention is that with effect from June 1, 1954 a separate department for manufacturing of tins was established in the Rajendra Prasad Oil Mills: It is contended that Section 1 of the Act is subject to the provisions of Section 16 of the Act and it is argued that inasmuch as the tin department came into existence only from 1-6-1954, the Act could not apply to the petitioner's case till three years after it, i.e. 1-6-1957, and in that view of the matter it is contended that the demand of the respondent for the employer's contribution of the provident fund from the petitioner was illegal. I am unable to agree with this contention because the words in Section 16(1)(b) of the Act are "unless three years have elapsed from its establishment", that is to say, from the establishment of the factory and not of the industry. Both the words "factory" and "industry" have been defined in the Act. The factory admittedly was established long before 1954. I, therefore, overrule this contention of the petitioner.

5. Lastly it is submitted that as no demand was made for about three years the vie-mand would be deemed to have been waived by the Regional Provident Fund Commissioner and in any case inasmuch as no deductions were made from the wages of the employees for this period and some of the employees have already left the service of the concern the employers cannot be made liable to make their contributions because even if those contributions were made by them in the absence of contributions from the employees the Provident Fund Scheme cannot come into force. In Schedule II of the Employees' Provident Funds Act, it is provided that provisions will be made in a scheme with regard to the time and manner etc. in which the contributions shall be made to the Fund by the employers and by, or on behalf of, employees, the contributions which an employee may, if he so desires, make under Sub-section (i) of Section 6, and the manner in which such contributions may be recovered. Chapter V of the Employees Provident Fund Scheme, 1952, deals with contributions. Paragraph 29 of that scheme runs as follows:--

"29(1) The contributions payable by the employer under the scheme shall be at the rate of one anna in the rupee of basic wages and the dearness allowance payable to each to whom the Scheme applies.

(2) The contribution payable by the employee under the Scheme shall be equal to the contribution payable by the employer in respect of such employee.

(3) The contribution shall be calculated on the basis of wages and dearness allowance actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis.

(4) Each contribution shall be calculated to the nearest quarter of a rupee, two annas or more to be counted as the next higher quarter of a rupee." Paragraph 30 of the Scheme runs as follows:--

"30. The employer shall, in the first instance pay both the contribution payable by himself (in this scheme referred to as the employer's contribution) and also, on behalf of the member employed by him, the contribution payable by the member (in this scheme referred to as the members' contribution)." This would show that it is the employer who is to make contribution both with regard to his share and with regard to the share of the employee. He can, under paragraph 32, recover the amount of the employee's contribution from the employee. Paragraph 32 of the Scheme runs as follows:--

"32. The amount of member's contribution paid by the employer shall, notwithstanding the provisions in this scheme or any law for the time being in force or any contract to the contrary be recoverable by means of deduction from the wages of the member and not otherwise: "

The Scheme was framed as far back as 2nd September, 1952. The petitioner should have made its own contribution and also that of the employees long before a demand was made from it. The petitioner could have after making the contribution of the employee's share recovered the same from the employee concerned. There is a duty cast upon the petitioner to contribute both the shares i.e. his share as also that of the employee, inasmuch as the petitioner did not do so, it is to blame itself. I, therefore, do not see any force in this contention either. The ground that manufacture of tins was not covered by schedule I of the Employees' Provident Funds Act has not been pressed before me. It has also not been shown to me as to how the order passed by the Regional Provident Fund Commissioner infringes any of the fundamental rights of the petitioner guaranteed under the Constitution.

6. In my opinion the petition is misconceived. I dismiss it, but in the circumstances of the present case, direct the parties to bear their own costs.