

(1966) 11 MP CK 0011

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No"s. 495 of 1964, 134, 387 and 491 of 1965 and 30, 31, 64 and 387 of 1966

Radhakrishan Narayandas, a firm

APPELLANT

Vs

Regional Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 09-11-1966

Acts Referred:

Provident Funds Act, 1952 — Section 1(3), 4, 7A, 8

Citation : AIR 1967 MP 157 : (1970) ILR (MP) 266 : (1967) JLJ 86 : (1967) 2 LLJ 649

Hon'ble Judges : P.V. Dixit, C.J;R.J. Bhawe, J

Bench : Division Bench

Advocate : G.P. Singh, for the Appellant; K.A. Chitale and H.L. Khaskalam, Government Advocate, for the Respondent

Judgement

Dixit, C.J.—This order will also govern the disposal of Misc. Petitions Nos. 496 of 1964, 134 and 387 of 1965 and 30, 31, 64 and 387 of 1966.

2. The petitioners in these eight cases are engaged in the business of manufacture and sale of Bidis. By these applications they challenge the applicability of the Employees Provident Funds Act, 1952, (hereinafter called the Act), and the Employees Provident Funds Scheme, 1952, (hereinafter referred to as the Scheme), to their establishments. They pray that the notices issued to them by the Regional Provident Fund Commissioner, Madhya Pradesh (hereinafter called the Commissioner), requiring them to remit the Provident Fund contributions and administrative charges and to submit the statements required of them under the Act and the Scheme within the periods specified in the notices, be quashed by the issue of writs of certiorari and the Commissioner be restrained from enforcing the provisions of the Act against them.

The Commissioner has also determined provisionally the amount payable by some of the petitioners and has issued notices to them u/s 7A of the Act asking them to appear and to show cause why a final order determining the amount

payable by them in respect of their establishments should not be made. Those petitioners seek writs of certiorari for quashing these notices also. In M. P. No. 491 of 1965, proceedings have also been initiated against the petitioners in that case for recovery of the amounts of Provident Fund and administrative charges as arrears of land revenue. A writ has been sought for quashing those proceedings also.

3. Before stating the submissions put forward by the learned counsel appearing for the petitioners and dealing with them, it is necessary to refer to the relevant provisions of the Act having a bearing on the questions to be determined in these petitions. Section 1 of the Act, after setting out the title of the Act and saying that it extends to the whole of India except the State of Jammu and Kashmir, makes a provision for the applicability of the Act to "establishments". Sub-section (3) of that section is as follows--

"(3) Subject to the provisions contained in Section 16, it applies--

(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, and

(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 16 provides that the Act shall not apply to the establishments mentioned in that provision. Schedule I specifies various industries. An industry engaged in the manufacture of Bidis is not one of the enumerated industries. By Clause (g) of Section 2, "factory" has been defined thus--

" "factory" means 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;"

Section 4 gives to the Central Government the power to add to Schedule-I. It runs as follows--

"4. (1) The Central Government may, by notification in the Official Gazette, add to Schedule I any other industry in respect of the employees whereof it is of opinion that a provident fund scheme should be framed under this Act, and thereupon the industry so added shall be deemed to be an industry specified in Schedule I for the purposes of this Act.

(2) All notifications under Sub-section (1) shall be laid before Parliament, as soon as may be, after they are issued".

Section 7A deals with the determination of moneys due from employers. It is in the following terms--

"7A. (1) The Central Provident Fund Commissioner, any Deputy Provident Fund

Commissioner or any Regional Provident Fund Commissioner may, by order, determine the amount due from any employer under any provision of this Act or of the Scheme and for this purpose may conduct such inquiry as he may deem necessary.

(2) The officer conducting the inquiry under Sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908, for trying a suit in respect of the following matters, namely :--

- (a) enforcing the attendance of any person or examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavit;
- (d) issuing commissions for the examination of witnesses;

any such inquiry shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196, of the Indian Penal Code.

(3) No order determining the amount due from any employer shall be made under Sub-section (1) unless the employer is given a reasonable opportunity of representing his case.

(4) An order made under this section shall be final and shall not be questioned in any court of law."

4. On 17th March 1962, a notification was issued by the Central Government in exercise of the powers conferred by Section 1(3)(b) of the Act applying the Act with effect from 80th 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. That notification was published in the Gazette of India, dated the 17th March 1962. It runs as follows--

"6. S. R. 346. In exercise of the powers conferred by Clause (b) of Sub-section (3) of Section 1 of the Employees Provident Funds Act 1952 (19 of 1962) the Central Government hereby applies the said Act with effect from 80th 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 warehouses established under any Central or State Act."

In 1964 and in the following year the Commissioner addressed communications to the petitioners drawing their attention to the fact that the Act and the Scheme applied to their establishments and that they had not taken any steps to comply with the provisions of the Act and the Scheme. The Commissioner made it very clear to the petitioners that while their Bidi factories were not covered by the Act

and the Scheme, their "trading" and "commercial" establishments fell within the purview of the Act and the Scheme. Thereafter some correspondence was exchanged between the petitioners and the Commissioner, and ultimately the Commissioner issued to the petitioners the impugned notices. It may be stated that in response to the notices issued to them none of the petitioners, except the petitioners in M. Ps. Nos. 387 of 1965, and 30 and 31 of 1966, appeared before the Commissioner to show cause against the making of any order holding them liable for payment of Provident Fund and administrative charges.

5. The argument of Shri G. P. Singh, learned counsel for the petitioners in M. P. No. 491 of 1965, which was adopted by learned counsel appearing for the petitioners in other cases, was that the scheme of the Act was to make it applicable only to industries specified in Schedule-I; that whereas Clause (a) of Sub-section (3) of Section 1 made the Act applicable to every establishment which is a factory engaged in any industry specified in Schedule I, Clause (b) was an enabling provision giving to the Central Government the power to make the Act applicable to establishments other than the factory establishments in industries specified in Schedule I; that, therefore, the notification, which the Central Government issued on 17th March 1962 in exercise of its powers u/s 1 (3) (b) of the Act, must be read as referring to "trade" and "commercial" establishments in any industry specified in Schedule-I; and that as Bidi Industry was not one of the industries specified in Schedule-I, the notification dated the 17th March 1982, read with Section 1(3) of the Act, had not the effect of making the Act applicable to the petitioners' "trading" and "commercial" establishments. Learned counsel proceeded to say that any other construction of Section 1 (8) (b) of the Act would make Section 4 of the Act redundant.

It was also submitted that the petitioner's Bidi manufactory was registered as "factory under the Factories Act; that it no doubt purchased raw material and sold Bidis; but this activity of purchase of raw material and sale of Bidis afforded no justification whatsoever for splitting up the factory establishment into "trading and commercial establishment" and "factory establishment"; and that the entire factory, wherein bidis were manufactured raw materials were purchased and Bidis were sold was one unit and to this factory establishment the Act did not apply as the Bidi industry was not one of the industries specified in Schedule-I.

Learned counsel also made the grievance that the provisional assessment against the petitioners was made without giving them an opportunity of hearing as laid down in subsection (3) of Section 7A; and that the respondents were not justified in initiating proceedings against the petitioners for recovery of the Provident Fund amount and administrative charges when the amount due from the petitioners had not been finally determined by the competent authority

6. There is no substance in any one of these contentions The plain language of Clauses (a) and (b) of Section 1 (3) of the Act shows that whereas by Clause (a) the Act has been made applicable to every establishment which is a factory engaged in any industry specified in Schedule-I and in which the prescribed

minimum of persons are employed, Clause (b) makes a provision for the applicability of the Act to "any other establishment" employing twenty or more persons or class of such establishments with the Central Government may by notification specify in that behalf. The expression "any other establishment" occurring in Section 1 (3) (b) is in contradistinction to the word "factory" used in Clause (a) and means any establishment which is a "non-factory establishment". There are no words in Clause (b) indicating that a non-factory establishment, to which the Act may be made applicable by the issue of a notification in exercise of the power under that clause, must be also of an industry specified in Schedule-I. Clause (b) clearly gives to the Central Government the power to apply the Act to "any other establishment", that is to say, an establishment which is not a factory-establishment, no matter whether the "any other establishment" belongs to an industry specified or not specified in Schedule-I.

Such a reading of Section 1 (3) does not make Section 4 otiose. That section gives to the Central Government the power to issue a notification adding to Schedule-I any other industry. When such an addition is made, that Act would then apply to the factory establishment of the industry as provided by Clause (a) of Section 1 (3). It must be noted that Clause (b) does not give to the Central Government the power to extend the applicability of the Act to factory establishments not specified in Schedule-I. It only enables the Central Government to make the Act applicable to non factory establishments. That being so the exercise of the powers under Clause (b) of Section 1 (3) so as to make the Act applicable to non-factory establishments even in an industry not specified in Schedule-1 cannot make Section 4 superfluous.

7. Our attention has been drawn to the decision of the Kerala High Court in *P. F. Inspector, Quilon v. Kerala Janatha Printers and Publishers (P) Ltd.*, Trivandrum AIR 1965 Kar 130. In paragraph 9 of the judgment in that case, it has been observed by the learned Judges of the Kerala High court that--

"By Clause (a) of Sub-section 3 of Section 1 only factories employing twenty or more men engaged in specified industries are brought within the Provident Funds Act. To all other establishments, factory or non-factory, whether engaged in industry or otherwise, the Act may be applied by resorting to notification under Clause (b) of Sub-section 3 of Section I. Factories engaged in industries other than those mentioned in Schedule 1 may also be brought within the ambit of the Act by a notification u/s 4, thus adding to Schedule I."

With all due respect to the learned Judges, we are unable to agree with their view that the Act may be applied by resorting to a notification under Clause (b) of Sub-section (3) of Section 1 "to all other establishments, factory or non-factory, whether engaged in industry or otherwise", it is no doubt true that the power under Clause (b) can be exercised so as to make the Act applicable to non-factory establishments, whether engaged in an industry specified or not specified in Schedule-I. But that power cannot clearly be exercised for making the Act applicable to factory establishments in an industry which has not been specified

in Schedule-I. The construction put by the Kerala High Court on Section 1(3) (b) makes Section 4 of the Act altogether redundant.

8. The argument that if in a manufacturing concern registered as a factory there are establishments employed in the manufacturing process as well as establishments engaged in trading and commercial matters, then the factory cannot be split up, is altogether untenable. Sub-section (3) of Section 1 itself recognises the distinction between a "factory establishment" and "any other establishment". The factory establishment has to be understood bearing in mind the definition of the word "factory" given in Section 2(g) of the Act.

9. The complaint that the petitioners have not been given a reasonable opportunity of representing their case against the applicability of the Act to their "trading" and "commercial" establishments, is unsubstantial. Sub-section (1) of Section 7A lays down that the authorities mentioned in that sub-section may, by order, determine the amount due from any employer under any provision of the Act or of the Scheme and for this purpose may conduct such inquiry as he may deem necessary. The second sub-section defines the powers the officer conducting an enquiry under Sub-section (1) has for the purpose of such inquiry. Sub-section (3) lays down that no order determining the amount due from any employer shall be made under Sub-section (1), unless the employer is given a reasonable opportunity of representing his case.

Here, what happened was that when the petitioners failed to remit the Provident Fund contributions and administrative charges and to submit the statement which they were required to under the Act and the Scheme, the Commissioner issued notices to them u/s 7A stating the amount, which according to the Commissioner was payable by them, and asking them to show cause why a final order determining the amount payable by them in respect of their establishments should not be made. These notices fully satisfied the requirements of Sub-section (3) of Section 7A. It is true that the notices mentioned that the amount due from the petitioners had been determined "provisionally" and Section 7A does not speak of any provisional assessment. But merely because there is in the Act no provision for determination of "provisional assessment", it does not follow that the notices, which were issued to the petitioners asking them to show cause why a final order in regard to the amount payable by them should not be made, were not in accordance with Sub-section (3). The competent authority is not precluded u/s 7A from making its own estimate of the amount payable by an employer before issuing him a notice in terms of Sub-section (3)

The mention in the notice of the estimate formed by the competent authority was only for the purpose of informing the petitioners of the amount expected from them and giving them an opportunity of representing their case fully not only on the question of the applicability of the Act to their establishments but also on the question of the amount due from them in the event of it being held that the Act was applicable to their "trading" and "commercial" establishments. The estimate made by the competent authority about the amount due from the

petitioners was after all a provisional one; it was not a final determination of the amount u/s 7A. The notices that were given to the applicants were for the purpose of giving them a reasonable opportunity of representing their case before the making of a final order u/s 7A. In our opinion, the notices issued to the petitioners, far from denying to the applicants the reasonable opportunity contemplated by Sub-section (3), gave them full opportunity of representing their case completely.

10. The objection of the petitioners in M. P. No. 491 of 1965 that the Commissioner was not justified in initiating recovery proceedings without making any final order u/s 7A is well founded. It is plain enough that there has to be a final determination of the amount due from an employer before he can be called upon to pay it. Proceedings for the recovery of moneys due from an employer cannot be initiated merely on the strength of a provisional determination of the amount due from him. The recovery proceedings commenced against the petitioners in M. P. No. 491 of 1965 must, therefore, be quashed

11. Before us, it was admitted on behalf of the Commissioner that in none of the cases before us an order u/s 7A finally determining the amount due from the employer concerned had been made. Having regard to the fact that the implications of the Act and the Scheme were not understood by all concerned for a long time after the Act was applied by the notification dated the 17th March 1962 to trading and commercial establishments, the Commissioner rightly and commendably expressed before us his willingness to give to the petitioners, who had not appeared before him and showed cause in response to the notices issued to them, an opportunity of representing their case before making any final order u/s 7A against anyone of them. The Commissioner agreed to bear such petitioners on 15th December 1966.

12. Shri Dharmadhikari, learned counsel appealing for the petitioner M/s Kale Khan Mohd. Hanif in M. P. No. 134 of 1965, made the additional argument that the establishments of that petitioner dealing with the purchase of raw materials, sale of Bidis and storage of Bidis were a part and parcel of the factory establishment, and consequently the Act was not applicable to any of the establishments of the petitioner's Bidi factory. So also. Shri Sapre, learned counsel appearing for the petitioner in M. P. No. 387 of 1966, advanced a supplementary argument that checking of the Bidis manufactured was part of the manufacturing process and, therefore, the number of Munshis engaged in checking the Bidis could not be taken into account in ascertaining the requisite number of employees required for the application of the Act to trading and commercial establishments.

These contentions may be disposed of by saying that the questions whether any particular establishment is a part of factory establishment, or whether certain employees are engaged in factory establishment or other establishments, are questions of fact to be determined by the officer holding the enquiry u/s 7-A of the Act. Those questions cannot be examined in these petitions when the

applicants did not appear before the Commissioner and invite him to adjudicate upon those questions and when an opportunity is now being given to them to appear before the Commissioner on 15th December 1966 for canvassing these and other questions.

13. Shri Sapre, learned counsel appearing for the petitioners in M. Ps. Nos. 64 and 387, both of 1966, also advanced the argument that the Act and the Scheme could not be applied to the petitioners' establishments retrospectively: and that there was no liability on the petitioners to pay any Provident Fund contribution or administrative charges for any period before the date on which the Commissioner comes to the conclusion that the Act is applicable to a particular unit and makes a demand for the dues. We are unable to accede to this contention. No demand has been made against any petitioner for the payment of any Provident Fund contribution or administrative charges for a period before 30th April 1962. It cannot, therefore, be contended that the Act and the Scheme have been applied to the petitioners retrospectively.

The notification dated the 17th March 1962 applied the Act to every trading and commercial establishment with effect from 30th April 1962. That notification, read with Section 1 (3) of the Act, clearly makes the petitioners liable for payment of Provident Fund contribution and administrative charges in respect of their trading and commercial establishments from 30th April 1962. On the issue of the notification u/s I (3) (b), the Act came into operation in regard to trading and commercial establishments proprio vigore from the date mentioned in the notification dated 17th March 1962, that is 30th April 1962.

Learned counsel referred us to the decision of the Madras High Court in K.R. Subbaier Vs. The Regional Provident Fund Commissioner, in support of the proposition that he urged, namely, that the provisions of the Act and the Scheme became operative against the petitioners only on and from the point of time when the Commissioner holds that a particular unit is within the ambit of the Act and the Scheme. This decision no doubt supports the contention of the learned counsel. But with all respect to the learned Judge of the Madras High Court deciding the case of K.R. Subbaier Vs. The Regional Provident Fund Commissioner, , we are unable to agree with the view expressed by him. As we read that decision, it appears to us that the learned Judge laid down the proposition that he did with reference to the liability for damages u/s 14-B of the Act. If by that observation he intended to lay down that an employer could be made liable under the Act and the Scheme only on and from the point of time the competent authority holds him liable and determines the amount payable by him then we are unable, with respect, to accept that view.

In this connection, a reference may be made to the decision of the Kerala High Court in Kunhipaly v. R. P. K. Commr. 1966 1 mpLJ 642 (Ker), where the view expressed by the Madras High Court in Subbaier v. R. P. F. Commr. (supra) was not accepted and the argument that the Act and the Scheme became operative only on and from the point of time when the authorities hold that a particular

unit is within the ambit of the Act and make a consequential demand in terms of the Act and the Scheme, was rejected. It was observed that the Act comes into operation by its own vigour; that it applies if the conditions stated in the Act are satisfied; and that its operation is not dependant on any decision being taken by the authorities under the Act.

14. For the foregoing reasons, it is declared that the Act applies to the petitioners' establishments if they satisfy the requirements of the notification and Section 1 (3) (b) of the Act. M. P. No. 491 of 1965 is allowed in part, and the recovery proceedings initiated against the petitioners in that case are quashed. All other petitions are dismissed. Those petitioners, who have not appeared before the Commissioner in response to the notices issued to them to show cause why the amount of Provident Fund contribution and administrative charges should not be determined against them, shall now appear before the Commissioner on 15th December 1966. In the circumstances of the case, parties shall bear their own costs of the petitions. In each case, the outstanding amount of security deposit shall be refunded to the petitioner concerned.