(1993) 02 BOM CK 0036

In the Bombay High Court

Case No : Writ Petition No. 2795 of 1988

Sigon Tools and Plastics Pvt. Ltd. APPELLANT

Vs

Regional P.F. Commissioner and Another RESPONDENT

Date of Decision : 24-02-1993

Acts Referred:
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 2

Citation : (1993) 3 BomCR 224 : (1993) 95 BOMLR 881 : (1994) 1 LLJ 983

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : Arun Tripathi, for the Appellant; H.V. Mehta and R.C. Master, for the Respondent

Final Decision : Allowed

Judgement

B.P. Saraf, J.—The dispute in this writ petition relates to the date from which the petitioner should be covered under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 ("the Act").

2. The petitioner is a company incorporated under the Companies Act, 1956. It was incorporated on June 14, 1977 primarily with the object of carrying on the business of manufacturing, processing, converting, buying, selling, trading or otherwise dealing with plastics, plastic products etc. Steps were taken thereafter to set-up a factory for the purpose. The factory started functioning from December 26, 1980. On December 4, 1983, the petitioner applied to the Regional Provident Fund Commissioner, Maharashtra for getting registration number under the Act. Along with the application, a duly filled up questionnaire was also submitted. In reply to the query in column 6 of the questionnaire, it was stated as below:

The exact date on which the business/ operation/Manu fact-enced for the first time in the establishment.

activity done in November 1978, Manufacturing activity in Dec. 26, 1980.

In the forwarding letter with the question-naire, the petitioner also mentioned the fact that though the factory was established on December 26, 1980, a minor sale of Rs. 228/- had been effected in November, 1978. The petitioner also furnished a chart showing the number of employees employed from December 1980 till December 1983. This chart shows that in December 1980 only 4 persons had been employed. Thereafter, there was exchange of letters between the petitioner and the Regional Provident Fund Commissioner on the subject. In its letter dated April 4, 1985, the petitioner reiterated that its factory was established on December 26, 1980. The fact of sale of Rs. 228/- in the year 1978 was also reiterated. The Regional Provident Fund Commissioner thereafter issued a notice dated April 9, 1985 to the petitioner saying that the petitioner was "engaged in Plastic and Plastic Products, one of the Industries specified in Schedule-I" to which the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 had been made applicable u/s 1(3)(a) of the Act. It was, therefore, allotted a Code number and asked to implement the provisions of the Act. On receipt of the above notice, the petitioner by letter dated April 24, 1985, again intimated the respondent-Regional Provident Fund Commissioner that having started the manufacturing activities from December 26, 1980, the petitioner was entitled to an exemption for a period of 5 years from the date of commencement u/s 16(b) of the Act and, as such, his liability should be computed only with effect from December 26, 1985. The Regional Provident Fund Commissioner, by his letter dated July 23, 1987 (Exhibit U-1), rejected the contention of the petitioner and relying on the reply given by the petitioner to item No. 6 of the questionnaire, which has been set out above, wherein he had mentioned about carrying on of non-manufacturing activities from 1978, held that the petitioner''s establishment would be covered with effect from November 1978 when it had engaged itself in purchase and sale of goods, and giving the benefit of infancy period of 5 years provided u/s 16 of the Act, the establishment of the petitioner was correctly coverable with effect from December, 1983. It is this order of the Regional Provident Fund Commissioner which has been challenged in this writ petition.

2. Before dealing with the submissions of the petitioner, it is pertinent to mention that no counter has been filed by the respondent though long 5 years have passed since this writ petition had been filed. Under the circumstances, the factual statements made by the petitioner in its writ petition stand uncontroverted. It is also evident from the notice dated April 9, 1985 that the provisions of the Act have been sought to be made applicable to the petitioner treating it as a "factory" by taking resort to Section 1(3)(a) of the Act. The petitioner has not been held to be an establishment specified in any notification issued u/s 1(3)(b) of the Act.

4. The case of the petitioner althroughout was its establishment is a factory engaged in an industry specified in Schedule-1, which came into existence only on December 26, 1980. There does not appear to be any factual dispute in this regard. That being so, Section 1(3)(a) will be attracted. So far as the non-

manufacturing activity referred to by the petitioner in the questionnaire is concerned, it is submitted that by "non-manufacturing activities", the petitioner only meant activities for the purpose of setting up of the factory, not any business activity or trading activity as such. No trading activity was carried on by the petitioner during the period 1978 to 1980. It is also evident from the fact that admittedly there was no sale or purchase of any goods at all during this period except an isolated transaction of sale of goods worth Rs. 228/- in the year 1978. Such transaction, according to the petitioner, cannot be termed as carrying on of business of purchase or sale of goods. According to the petitioner, it is well settled that in order to hold that a person has been carrying on the business of selling or supplying goods, certain essential ingredients must be present, isolated casual sale of goods of Rs. 228/- in a period of 3 years cannot make a person dealer in those goods. The further case of the petitioner is that it is also not the case of the respondent that the petitioner was liable under this Act, not as a "factory" but as some other "establishment" falling under any of the categories specified in any notification issued u/s 1(3)(b) of the Act.

5. I have carefully considered the above submissions. I do not find any difficulty in accepting the contention of the petitioner that the date of commencement of its liability u/s 1(3)(a) cannot be determined by reference to the isolated sale of some goods worth Rs. 228/- in 1978. That may have some relevance, if at all, in finding out the liability by taking resort to Section 1(3)(b) which makes the provisions of this Act applicable to any other establishment or class of establishments which might be specified by the Central Government in this behalf. In that case, the Regional Provident Fund Commissioner will have to specifically say that the establishment of the petitioner falls in any of the categories specified in such notification. That has never been the case of the respondent. It is evident from its notice dated April 9, 1985 wherein it is clearly stated that the petitioner is liable u/s 1(3)(a) of the Act as a "factory". That being so, it is not open to the respondents at this stage to contend that the petitioner would be liable as "any other establishment" u/s 1(3)(b) of the Act.

6. The only controversy that has to be decided in this case, therefore, is about the date on which the establishment of the petitioner became a "factory" because by virtue of Section 1(3)(a) the Act applies only to an establishment which is a factory engaged in any industry specified in Schedule I and in which 20 or more persons are employed. "Factory" has been defined in clause (g) of Section 2 of the Act to:

"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 the power;"

From the above definition of "factory", it is clear that any particular premises or any part thereof can be treated as a factory only when some manufacturing process is carried on there. In the instant case, there is no dispute that the manufacturing process started only with effect from December 26, 1980. It is therefore on and from this date that the establishment of the petitioner became factory within the meaning of Section 1(3)(a) read with Section 2(g) of the Act and the liability has to be computed only with reference to this date giving benefit of the infancy period of 5 years as provided in Section 16(1)(b) of the Act.

7. The learned counsel for the respondents placed reliance on the decision of the Supreme Court in State of Punjab Vs. Satpal and Another, . This decision, in my opinion, has no relevance to the controversy in the present case. The controversy before the Supreme Court in the above case was in regard to the date from which the period of infancy mentioned in Section 16(i)(b) of the Act should be calculated. It was held that it should be calculated from the first day of the establishment of the factory and not from the moment of time when the figure of employment of 20 or more workmen is first reached. In the present case, it is not the claim of the petitioner that the claim of infancy should be calculated from the date when the figure of employment first reached 20. On the other hand, though the number of employees at the time of commencement was only 4, the petitioner himself claimed that the infancy period should be calculated from that date. In that view of the matter, the above judgment of the Supreme Court has no relevance in the present case.

8. Reliance is also placed on the decision of the Allahabad High Court in R.P.F. Commissioner v. G.B. Electroplator Ltd. 1958 II LLJ 676. In this case too, the controversy related to the date from which the infancy period u/s 16(1)(b) should be calculated-should it be from the date when the factory starts trial production or from the date of actual production? It was in this context that the Court held that where a factory starts its work on a trial basis, and real production starts on a later date, then, in the absence of any particulars, the trial period should not be excluded in determining the date upon which the factory was established. Thus, this judgment also has no relevance in deciding the controversy in this case.

9. Reliance was also placed on the decision of this Court in Sayaji Mills Ltd. Vs. P.A. Bhaskar, . The controversy in this case was whether the particular establishment was in fact, an industry for the purpose of claiming exemption u/s 16(1) or not. No such controversy is there in the case before me. Therefore, this judgment is also of no assistance to the respondent.

10. Considering the facts and circumstances of the case in the light of the foregoing discussion, I am of the clear opinion that the Regional Provident Fund Commissioner was not correct in applying the provisions of this Act to the establishment of the petitioner with effect from December, 1983. The petitioner will be liable to comply with the requirements of the Act with effect from December 26, 1985, that is, five years from the date on which the manufacturing process had been started in the premises of the petitioner.

11. In the result, the impugned order is set aside. The writ petition is allowed. The rule is made absolute. Any amount paid by the petitioner in pursuance of

any order of this Court for any period anterior to the date of commencement of the liability, shall be refunded to the petitioner within a period of 3 months from today.

12. Under the facts and circumstances of the case, I make no order as to costs. Certified copy expedited.

