

(1994) 10 BOM CK 0013
In the Bombay High Court
Case No : Writ Petition No. 624 of 1992

Tech Movers Systems (India) P. Ltd.	APPELLANT
Vs	
The Regional Provident Fund Commissioner	RESPONDENT

Date of Decision : 19-10-1994

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(4), 7A

Citation : (1995) 4 BomCR 85

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

Bench : Single Bench

Advocate : J.P. Cama and K.P. Anilkumar, for the Appellant; R.C. Master, for the Respondent

Final Decision : Allowed

Judgement

B.P. Saraf, J.—Two important questions of law arise for consideration in this case. First, when the provisions of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 become applicable to an establishment under sub-section (4) of section 1 of the said Act. In other words, whether the provisions of this Act can be applied to an establishment falling under the above sub-section only after the issue of the notification in the Official Gazette as contemplated therein or may be applied provisionally from any date after the making of an application even before issue of such a notification. Second, whether the employer and or the employees having once agreed to the application of the provisions of this Act to the establishment in question, any one of them can opt out of the same at any time before the notification is made in the Official Gazette.

2. Before advertng to the above questions of law, it would be expedient to set-out briefly the facts of the case giving rise to these questions. The petitioner is a company incorporated under the Companies Act, 1956 and is engaged in the business of servicing of copiers and fax apparatus. The provisions of the Provident Fund Act were not applicable to the establishment of the petitioner under Clauses (a) and (b) of sub-section (3) of section 1 as it did not employ

more than 10 persons at any time. Besides, the establishment of the petitioner is not a factory within the meaning of section 2(g) of the said Act. No notification under the proviso to section 1(3) of the Act was also made by the Central Government applying the provisions of the said Act to the establishment of the petitioner or establishments of like nature. However, the petitioner and its workmen agreed that the provisions of the Provident Fund Act should be made applicable to their establishment and accordingly the petitioner made an application to the Regional Provident Fund Commissioner for coverage of its establishment under the provisions of section 1(4) of the Provident Fund Act. No notification was made under the said sub-section by the concerned Provident Fund Commissioner. The petitioner was however informed by the Regional Provident Fund Commissioner vide its letter dated 10-4-1989 that its request for application of the provisions of the Provident Fund Act u/s 1(4) of the Act was under investigation. By another letter dated 7-11-1989 the petitioner was informed by the office of the Regional Provident Fund Commissioner that vide section 1(4) of the Provident Fund Act their establishment had been brought under the purview of the said Act and the Scheme made thereunder with effect from 1-1-1989. A code number was allotted to the petitioner with coverage from 1-1-1989. The petitioner was also directed to implement the provisions of the Provident Fund Act and the Scheme with effect from 1-1-1989, the Family Pension Scheme with effect from 1-11-1989 and the Deposit linked Insurance Scheme from 1-1-1989. The petitioner was also called upon to deposit the total contribution under the three heads as given in the said letter within 15 days from the date of said letter. The petitioner did not pay the above referred amounts as according to it the provisions of the Provident Fund Act were not applicable to it as no notification contemplated by the sub-section (4) of section 1 of the Act had been made in the Official Gazette. On receipt of the show-cause notice dated 16-7-1990, the petitioner, by its letter dated 24-7-1990 informed the Assistant Commissioner of the Regional Provident Fund that as the provisions of the Act had not been made applicable to the petitioner by that time by making a notification in the Official Gazette in that behalf as contemplated in section 1(4) of the Provident Fund Act, it had decided to introduce some other scheme against the background of saving and security and did not wish to be voluntarily covered under the provisions of the said Act. The Regional Provident Fund Commissioner, however, in total disregard to the above communication, issued notice u/s 7-A of the Act to the petitioner and ultimately determined the amount payable by the petitioner as contribution under the Provident Fund Act with effect from 1-1-1989 at Rs. 93,701/- and intimated the same to the petitioner by order dated 27-3-1991. The petitioner objected to the above computation and the demand. By letter dated 9-9-1991, the petitioner made it clear to the respondents that it was not interested in the voluntary application of the Provident Fund Act to its establishment and that all the notices issued to it under the provisions of the said Act without issuing the notification u/s 1(4) of the Provident Fund Act were illegal. It was also made clear that the petitioner having made no deductions from the employees nor filed any returns under the

provisions of the Act and the Rules, could not be made liable for compliance with the provisions of the said Act. On the insistence of the respondents on recovery of the amount of contribution determined u/s 7-A of the Provident Fund as payable by the petitioner, the petitioner has filed this writ petition challenging all actions of the respondents under the provisions of the Provident Fund Act.

3. Admitted position in this case is that no notification has been made in the Official Gazette u/s 1(4) of the Provident Fund Act on the application of the petitioner to make the provisions of the Act applicable to its establishment. It is also uncontroverted position that the petitioner intimated the respondents about the change of its decision in that regard and informed him in clear terms that the petitioner company was no more interested in getting the provisions of the Provident Fund Act made applicable to its establishment. The questions that arises for consideration are whether the provisions of the Act can be applied at all to an establishment which is not covered by the provisions of the said Act on the basis of its agreement that the provisions of the Act should be made applicable to its establishment or the provisions can be applied only after a notification is made in the Official Gazette on the basis of such agreement. The second question that arises is whether once having agreed to the application of the provisions of the Provident Fund Act to the establishment concerned, it is open to the employer or the employees to change their decision and to opt out of the agreement earlier reached between them.

4. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("Provident Fund Act") applies to establishments specified in sub-section (3) of section 1 of the said Act and to establishments to which it may be applied by the Central Government under the proviso to the said sub-section by a notification in the Official Gazette in that behalf. Sub-section (4) is an enabling section which empowers the Central Provident Fund Commissioner to apply the provisions of this Act to an establishment, where the employer and the majority of the employees in relation to that establishment have agreed that the provisions of this Act should be made applicable to such establishment, by a notification in the Official Gazette on and from the date of such agreement or from any subsequent date specified in the agreement. Sub-section (4) of section 1 of the Provident Fund Act (as amended by Act XIII of 1988 w.e.f. 2-6-1988) reads :

"Notwithstanding anything contained in sub-section (3) of this section or sub-section (1) of section 16, where it appears to the Central Provident Fund Commissioner, whether on an application made to him in this behalf or otherwise, that the employer and the majority of employees in relation to any establishment have agreed that the provisions of this Act should be made applicable to the establishment he may, by Notification in the Official Gazette, apply the provisions of this Act to that establishment on and from the date of such agreement or from any subsequent date specified in such agreement."

5. On bare reading of sub-section (4), it is clear that the application of the provisions of this Act under this sub-section is dependent upon the fulfilment of

the following conditions :

- (i) the employer and the majority of the employees in relation to any establishment have agreed that the provisions of this Act should be made applicable to the establishment;
- (ii) the Central Provident Fund Commissioner is satisfied about such an agreement between the employer and the majority of the employees either on an application made to him on this behalf or otherwise; and
- (iii) a notification is made in the Official Gazette.

All these conditions are conditions precedent. These are cumulative and each one of them must be satisfied. It is only on the fulfilment of all these conditions that the provisions of this Act become applicable to an establishment which is not covered otherwise. The first condition is the agreement between the employer and the majority of the employees and the last is publication of a notification in the Official Gazette. Evidently, till a notification is issued on fulfilment of the first two conditions, the provisions of this Act would not become applicable to the establishment in question. However, while making the notification, power has been conferred on the Central Regional Provident Fund Commissioner to apply the provisions to that establishment on and from the date of the agreement or from any subsequent date specified in that agreement. In other words, a notification under sub-section (4) can also be made retrospectively. The retrospectivity may relate back only to the date of the agreement.

6. From the above discussion, it is clear that the provisions of the Act cannot be applied to an establishment which is not otherwise covered by taking resort to sub-section (4) of section 1 of the Provident Fund Act till a notification is made in the Official Gazette. In the instant case, no such notification had been issued on the date of the initiation of the proceedings u/s 7-A of the Provident Fund Act or till the date of the passing of the impugned order determining the contribution payable u/s 7-A. In fact no notification has been issued even till date. In that view of the matter, all the proceedings initiated under the Provident Fund Act against the petitioner are illegal and without jurisdiction. Such proceedings can not be sustained on the ground of reasonableness or equity or welfare of the employees as is sought to be done by the learned Counsel for the respondent in the present case. It is also clear that it is only while making the notification under sub-section (4) of section 1 of the Provident Fund Act that the provisions of the Act might be applied from the date of the agreement. But the date of applicability will be relevant only after the notification is made.

7. It is further clear from the provisions of sub-section (4) of section 1 that a notification can be made only where it appears to the Central Provident Fund Commissioner that the employer and the majority of the employees have agreed that the provisions of the Act should be made applicable to the establishment in question. This appearance or satisfaction should exist on the date of making of the notification. If before notification is made, either of the parties the employer

or the employees, change their mind and decide not to get the provisions of the Act applicable to the establishment, the Central Provident Fund Commissioner can not make a notification thereafter and impose the provisions of this Act on such an establishment against the wishes of the employer or the employees. I find it extremely difficult to accept the contention of the learned Counsel for the respondents that once the employer or the employees agree that the provisions of the Provident Fund Act should be made applicable to the establishment in question, it is not open to them to withdraw from that agreement and to stall the issue of notification u/s 1(4) of the Provident Fund Act applying the provisions of the said Act to the establishment. Any such interpretation will run counter to the object, scheme and the tenor of sub-section (4) of section 1 of the Provident Fund Act.

8. I am therefore of the clear opinion that till a notification is made in the Official Gazette, any of the parties can at any time opt out of the agreement to apply the provisions of the Provident Fund Act to their establishment and if they do so, it is not open thereafter to the Central Provident Fund Commissioner to issue a notification under sub-section (4) of section 4 and enforce the compliance of the provisions of the Provident Fund Act against their wishes.

9. In view of the above, the impugned actions of the respondents cannot be sustained. They are, therefore, set aside. The writ petition is allowed and rule made absolute in the above terms.

10. Under the facts and circumstances of the case, there shall be no order as to costs.