

(1968) 04 BOM CK 0009
In the Bombay High Court
Case No : Misc. Petition No. 233 of 1965

Varjivandas Hirji and Co.

APPELLANT

Vs

D.T. Ghatpande and Another

RESPONDENT

Date of Decision : 01-04-1968

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3)

Citation : AIR 1969 Bom 95 : (1968) 70 BOMLR 500 : (1968) MhLj 717

Hon'ble Judges : Patel, J;Nain, J

Bench : Division Bench

Advocate : Atul M. Setalvad, for the Appellant; Rangnekar, for the Respondent

Judgement

Nain, J.—This is a petition under Article 226 of the Constitution of India. The petitioners are a partnership firm engaged in the business of manufacturing and dealing in Asafoetida. Respondent No.1 is the Regional Provident Fund Commissioner appointed by the Central Government for the State of Maharashtra. He has also been appointed by the Government of Maharashtra as an Inspector under S.13 of the Employees' Provident Funds Act, 1952. Respondent No.2 is the Union of India. Respondent No. 1 has applied to the petitioners the provisions of the Provident Funds Act under a Notification issued by the Central Government on 7th March 1962 under S. 1(3)(b) of the Employees' Provident Funds Act, 19 of 1952 whereby the provisions of the said Act have been made applicable to every trading or commercial establishment employing 20 or more persons. The petitioners contend that they are an establishment which is a factory engaged in the manufacture of Asafoetida and under S. 1(3)(b) the provisions of the Employees' Provident Funds Act can only be applied to establishments which are not factories and that Respondent No.1 has no jurisdiction to apply the said Act to them. They, therefore, seek a Writ of Mandamus or Prohibition or other appropriate Writ prohibiting the respondents from enforcing the provisions of Employees' Provident Funds Act against them. The Employees' Provident Funds Act, 19 of 1952, is hereinafter for brevity's

sake referred to as "The Act", and the Notification dated 7th March 1962 is hereinafter referred to as "the Notification".

2. In the petition the petitioners have impugned the validity of S. 19A of the Act as being ultra vires the Constitution. Mr. Setalvad for the petitioners has told us that before us the petitioners do not wish to take up this contention. Section 19A provides that if any difficulty arises in giving effect to the provisions of the Act, or if any doubt arises as to whether any particular establishment is or is not an establishment to which the Act applies by virtue of a Notification under S. 1(3) (b), such doubt or difficulty has to be resolved by the Central Government and its order in such cases is made final. We invited the attention of Mr. Rangnekar for the respondents to this provision and asked him if the Central Government would like to resolve this difficulty or doubt, and whether Respondent No. 1 was prepared to refer the matter to the Central Government. Mr. Rangnekar informed us that as the matter involved a difficult question of interpretation of the provisions of the Act, the Government would like the matter to be decided by the Court and that they do not wish to take up a contention that S. 19A barred the jurisdiction of the Court.

3. The petitioners state in the petition that they are a partnership firm registered under the provisions of the Indian Partnership Act 1932. They state that they carry on business as the manufacturers of Asafoetida and gum, and among other things they are dealers in Asafoetida and gum. For their business the petitioners have two premises, one is situated at 240, Samuel Street, Bombay, and the other at Dariasthan Street, Wadgadi, Bombay. The processing of gum and the manufacturing of compounded Asafoetida of various varieties is carried out by the petitioners at their premises at Dariasthan Street, while their administrative offices are situated at 240, Samuel Street. The petitioners state that they employ 19 persons as labourers on daily wages in connection with their manufacturing business and 12 persons in connection with their administrative work. They further state that their premises at 240, Samuel Street, are registered under the provisions of the Bombay Shops and Establishments Act.

4. Respondent No. 1 has filed an affidavit dated 16-12-1965 in reply to the petition, wherein he has stated that the inquiries made by his office showed that the Petitioners are manufacturing and storing compounded Asafoetida at Dariasthan Street and that the minimum number of persons employed by the petitioners' establishment at both the places of business was 40 during the period April to December 1962, 35 in 1963, 34 in 1964 and 45 in the month of January 1965. In the said affidavit respondent No. 1 contends that the Act and the Scheme are applicable to the petitioners' establishment as it is a trading and commercial establishment engaged in the purchase, sale or storage of Asafoetida, and that their Department at Dariasthan Street is part of their establishment.

5. The respondents have admitted that the petitioners manufacture and store compounded Asafoetida both at Dariasthan Street and in their office at 240,

Samuel Street, Bombay. There is a dispute as to the number of persons employed, but that is not material because it is agreed that the petitioners employ more than 20 persons. There is no dispute about the fact that the Departments at Dariasthan Street and at 240, Samuel Street, are part of the same establishment. In fact Section 2A of the Act provides that where an establishment consists of different departments or has branches whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment.

6. The only controversy is that the respondents contend that the petitioners are a trading and commercial establishment within the meaning of the Notification, while the petitioners contend (a) that they are not a trading and commercial establishment and (b) that even if they are such establishment, the Notification u/s 1(3)(b) of the Act cannot apply to such establishments which are factories.

7. In order to appreciate these two contentions of the petitioners it is necessary to refer to some of the provisions of the Act and to the Notification which is the subject matter of the controversy. The preamble to the Act provides for the institution of provident fund for employees in factories and other establishments. Section 2(g) defines a "factory" as meaning 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. It will be noticed that the definition of the word "factory" in this Act is different from the definition of the same word in the Factories Act. S. 2(ia) defines manufacturing or "manufacturing process" as meaning any process for making, altering, repairing, finishing, washing, cleaning breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal. S. 4 of the Act empowers the Central Govt. to add to Schedule I by a Notification any industry which was not originally included in it under S. 1(3)(a). Sub-section (2) of the said section provides that all Notifications under sub-section (1) shall be laid before the Parliament as soon as may be, after they are issued. Section 1 contains the short title, extent and application of the Act, and sub-section (3) reads as under:

"1 (3)-Subject to the provisions contained in S.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:

Provided that 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 any establishment employing such number of persons less than (twenty) as may be specified in the notification."

The Notification in controversy is published in Part II, Section 3, sub-section (i) of the Gazette of India dated 7th March 1962, and reads as under:

"Government of India,

Ministry of Labour and Employment

Dated, New Delhi 7-3-62.

NOTIFICATION

G. S. R. 346. In exercise of the powers conferred by clause (1)) of sub-section (3) of Section 1 of the Employees' Provident Funds Act, 1952 (19 of 1952) the Central Government hereby applies the said Act, with effect from the 30th April 1962, to every trading and commercial establishment employing twenty or more persons each and engaged in the purchase, sale or storage of goods, including establishments of exporters, importers, advertisers, commission agents and brokers, and commodity and stock exchanges but not including banks or warehouses established under any Central or State Act

8. The Act applied originally to factories engaged in 6 industries specified in Schedule I, which is referred to in Section 1(3)(a) of the Act. The Act has subsequently been extended to several other industries by notifications issued under S. 4. The Act was amended by Act 94 of 1956, whereby the present sub-section (3) was substituted for the old one, whereby clause (d) was introduced for the first time. By the amending Act 46 of 1960 the number of persons employed was reduced from 50 to 20 in all the parts of sub-section (3).

9. The first contention of the petitioners is that they are not a trading or commercial establishment because (a) their dominant activity is manufacturing and dealing in Asafoetida is a minor activity. (b) that they sell only goods manufactured by themselves and this will not constitute them a trading or commercial establishment. As for the second part of their contention. they have stated in Para 1 of their petition that they "carry on business as manufacturers of Asafoetida and gum and inter alia dealers in asafoetida and gum". There is no statement that their business as dealers in Asafoetida and gum is confined to selling goods manufactured by themselves. A dealer means a trader or a person who buys goods and sells them without processing them. We have no material to come to the conclusion that apart from manufacturing and selling their own goods, the petitioners do not buy and sell Asafoetida in the market. There is, therefore. no substance in the contention that they are not a commercial or trading establishment on this ground. But assuming that they sell only goods manufactured by themselves. they would still be a trading or commercial establishment as has been held by the Supreme Court in the judgment D/- 21-3-1963 in the case of Basantlal Jam V. Regional Provident Fund Commr.. Writ Petn. No. 86 of 1962 (SC). In that case the petitioner manufactured Indian sweets in one premises where he employed 18 persons, and sold them in a separate retail shop where he employed 16 persons. The Act was applied to him

by virtue of the same notification as in this case. The petitioner contended that the two branches were distinct and separate and were not part of the same establishment. This contention was negated. The second contention of the petitioner was that as he sold the goods manufactured by himself, he did not purchase or sell or store any goods so as to fall within the scope of the notification. The Supreme Court held that the finished product was still goods within the meaning of the notification and, therefore, the petitioner's business consisting of two parts viz. manufacture and sale of sweet-meats, came within the purview of the notification. In view of this judgment even if the business of the petitioners in this case was exclusively to sell goods manufactured by themselves, they would still be a trading and commercial establishment. Also in view of the same judgment the contention that their dominant activity was manufacture and that dealing in Asafoetida was a minor activity, even if factually correct would not survive. The petitioners have cited to us a judgment of the Supreme Court in the case of *The Regional Provident Fund Commissioner, Bombay Vs. Shree Krishna Metal Manufacturing Co., Bhandara*, . This was a case not u/s 1(3)(b) but u/s 1(3)(a) of the Act. In that case the establishment carried on two manufacturing businesses, one of which fell in Schedule I and the other did not. It was held that if the dominating activity fell within Schedule I, the entire establishment would attract the provisions of Section 1(31(a)). That case has, in our opinion, no relevance to the contention of the petitioners u/s 1(31(b)), which is directly governed by the case of *Basantlal* referred to above.

10. We must here observe that there remains the contention of the petitioners that even if they are a trading and commercial establishment, a Notification u/s 1(3)(b) cannot apply to such establishments which are factories; and conversely that it can only apply to establishments which are not factories. This contention turns on the interpretation of Section 1(3)(b) of the Act and was neither raised nor decided in *Basantlal*'s case.

11. It has been argued by Mr. Setalwad for the petitioners that Section 1(3)(a) applies to every establishment (a) which is a factory, (b) engaged in any industry specified in Schedule I, and (c) in which 20 or more persons are employed. All the three conditions must co-exist in order to bring an establishment within the meaning of clause (a) of sub-section 1(3). If any of these conditions is not satisfied, the provisions of clause (a) will not be attracted. Mr. Setalwad has argued that if the first condition is satisfied, viz. (a) that an establishment is a factory, but the condition (b) is not satisfied because the factory is not engaged in an industry specified in Schedule I and the Central Government want to extend the Act to such establishment, they can by a notification u/s 4 add that industry to the Schedule and lay the notification before the Parliament. He pointed out that the Central Government have in fact, time and again, exercised this power and added numerous industries to Schedule I. He further argued that if the first condition (a) is satisfied, viz. that the establishment is a factory, but the condition (c) is not satisfied because the factory does not employ 20 or more persons and the Central Government want to extend the Act to such

establishment they can by a notification under the proviso to Section 1(3) apply the Act any establishment employing less than 20 persons. From this, he argued that it is only when the first condition - condition (a) - is not satisfied because the establishment is not a factory that resort must be had to a notification under clause (b). Clause (b), therefore, would obviously according to him, apply when an establishment is not a factory. He contended that if Clause (b) applied to establishments which are factories the existence of Section 4 in the Act will be meaningless and Otiose. The Central Govt. could notify a class of establishments under clause (b) and apply the Act to industries other than those in Schedule I and avoid laying the notification before the Parliament. He also contended that there would be over-lapping between S. 4 and clause (b) and that neither such result was intended nor should the Court so interpret the sub-section as to lead to that result. He also contended that in the expression "any other establishment" in clause (b) the word "other" means not the same as already mentioned in clause (a) and as covered by it, and that "other" establishment in clause (b) must be separate in identity and distinct in kind from it. It must therefore be an establishment which is not a factory. We must concede that these arguments are plausible and it is not impossible to agree with them. But the other interpretation suggested by Mr. Rangnekar on behalf of the respondents is equally plausible and a possible interpretation. We cannot say that on a plain reading of section 1(3) alone it is not possible to come to the conclusion that the expression "any other establishment" in clause (b) could mean any establishment which did not fall in clause (a), whether such establishment be an establishment which is a factory or an establishment which is not factory. Mr. Setalwad contended that the interpretation suggested by Mr. Rangnekar will have to leave out of account firstly the scheme of the Act whereby extension of the Act to industries other than those in Schedule I is provided for Section 4. and extension of the Act to industries employing less than twenty persons is provided for by the proviso in Section 1(3) and only the extension of the Act to establishments other than factories remains to be provided for by clause (b). and secondly that such interpretation will render Section 4 meaningless, redundant and otiose and in any case superfluous, and thirdly the use of the word "other" in clause (b) would indicate an establishment of a kind different from and not the same as "an establishment which is a factory."

12. Mr. Rangnekar has taken us through the history of changes made in the Act from 1952 and has shown to us how initially the Act was made applicable only to factories employing fifty or more persons and engaged only in six industries and how today the Act has been made applicable to other establishments also. the number of persons employed has been reduced to twenty or more and a number of industries have been added to the Schedule. He has argued that the Act is a beneficent piece of legislation and where more than one interpretation of a provision is possible, the provision should be so construed as to benefit the largest number of persons. With this we, in principle, agree. The reply of Mr.

Setalwad to this point is that if the Government thinks that Asafoetida industry ought to be covered, they can add it in the Schedule by a notification. Only such notification will have to be laid before the Parliament and that there is no reason to fight shy of laying a notification before the Parliament if the scope of a beneficent legislation is to be extended to a larger number of persons.

13. We are, however, of the opinion that by the interpretation suggested by Mr. Rangnekar, Section 4 will not be rendered redundant or meaningless. u/s 4 the Central Government can by a notification add to Schedule I the entire industry, while u/s 1(3)(b) they can extend the Act even to a single establishment or a class of establishments. Clause (b) permits of classification within the industry, which Section 4 does not. u/s 4 either the entire industry has to be included or not included. Section 16 provides that the Act is not to apply to certain establishments. Subsection (2) of Section 16 provides that if the Central Government is of the opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient to exempt any class of establishments from the operation of the Act, it may by a notification do so. This would indicate that there could be several considerations such as financial position of any class of establishments or other circumstances due to which the Central Government may rightly like to extend the provisions of the Act only to a specified establishment or a specified class of establishments. Section 1(3)(b) will enable the Central Government to do this. They could possibly not do this u/s 4. The two provisions fulfil a distinct purpose, and there is no substance in the argument that the interpretation suggested by Mr. Rangnekar will render Section 4 meaningless.

14. We also find by going through the Act that the word "establishment" is used in sub-sections (4) & (5) of Section 1 and also in Sections 16 and 17 and may be in other parts of the Act, indicating that the word "establishment" is used as genus, of which a factory is a specie. It may be that to a certain extent the provisions of Section 4 may overlap the powers of the Government u/s 1(3)(b). But this we suppose would be a necessary measure as a matter of abundant caution to cover cases which would not fall u/s 1(3)(b). But as we have pointed out that Section 1(3)(1)) permits of not only classification but of application of the Act to an individual establishment, this provision serves a distinct purpose. There is nothing inconsistent in the scheme of the Act with the view that Section 1(3)(1)) applies to all establishments whether such establishments are or are not factories. The expression "any other establishment" in clause (b), is capable of the interpretation that the reference is to any establishment that does not fall under clause (a), whether such establishment is or is not a factory. We have therefore no hesitation in accepting that interpretation, as that interpretation will extend the benefit of this beneficent piece of legislation to a larger number of persons.

15. Mr. Rangnekar then argued that If the scope of clause (1)) is limited to non-factory establishments, even diamond merchants who may, according to him

employ one person to cut diamonds, and another person to polish them and several persons to sell them, will claim to be manufacturers and therefore factories, because they have to cut or polish diamonds before selling them and they will thus escape the operation of the Act. We are however not impressed by this argument, because if that were so" the fault will lie with the wideness of the definition of the words and expressions "factory", "manufacture" and "manufacturing process" in the Act. The object in so defining must have been to bring in larger number of establishments within the ambit of the Act Nothing would prevent the Govt. from adding an industry to the list of Industries in the Schedule I.

16. It is not alleged by the respondents that the contention, of the petitioners that they are a factory is false or mala fide. They allege that they employ 19 persons in the factory and 12 persons in the office. But in view of Section 2A it makes no difference where larger number of persons is employed because they have all to be added up. Raw Asafoetida is a strongly aromatic resinous gum and has to be mixed with wheat flour and non-resinous gum to be adapted for domestic or medicinal use. It is usually packed before sale. These processes clearly bring the activity of the petitioners within the definition of "manufacture" or "manufacturing process" and the petitioners are undoubtedly a factory although simultaneously, on their own admission, they are also dealers. Their entire establishment will however come under Clause (b) because of Section 2A of the Act.

17. The question canvassed before us came up before our learned brother Mr. Justice Padhye sitting as a single Judge at Nagpur in the case of Central Hindustan Orange and Cold Storage Co. Ltd. Vs. Prafullachandra Ramachandra Oza, . He also took the view that Clause (b) refers to establishments which are not included in Schedule I of the Act and to other establishments which are non-factory establishments, if there is a proper notification by the Central Government. He was of the view that the reading of the two clauses did not show that they were actually exclusive of each other. We respectfully agree with the conclusion to which Padhye, J., arrived.

18. Our attention is also drawn to the case of Provident Fund Inspector, Quilon Vs. Kerala Janatha Printers and Publishers (P) Ltd., Trivandrum and Another, . In this case validity of Section 15 of the Working Journalists (Conditions of Service) Act, 1955 was impugned. Section 15 of the Act extended the provisions of the Employees' Provident Funds Act to the working journalists at a time when the Act was applicable only to factories and not to non-factory establishments. The Act was applied to the working journalists not by a notification u/s 1(3)(b) but by S. 15 of the Working Journalists' Act itself. The Judgment in this case contains certain observations to the effect that by notification u/s 1(3)(b) the Act could be applied to all establishments, factory or non-factory. Although the question raised in this matter did not directly arise in that case because it turned on the effect of the extension of the Act by virtue of Section 15 of the Working

Journalists Act and not by virtue of a notification u/s 1(3)(b), we are in agreement with the observations of the learned Judges in that case. A Division Bench of the M. P. High Court has in the case of Radhakrishnan Narayandas, a firm Vs. Regional Provident Fund Commissioner and Another, , taken a contrary view and has dissented from the judgment of the Kerala High Court referred to hereinabove. But for reasons hereinabove stated we are unable to agree with the judgment in the M. P. case.

19. For reasons fully set out hereinabove, we hold that Clause (b) of Section 1(3) of the Employees' Provident Funds Act, 1952, empowers the Central Government to apply the Act to all trading or commercial establishments, whether such establishments are factories or not. Secondly, the Notification dated 7th March 1962 set out hereinabove will apply to such trading and commercial establishments, whether they are factories or not. The petitioners being such an establishment, the said Notification will apply to them.

20. In the premises the petition must be dismissed with costs and we order accordingly. The costs are quantified at Rs. 375.

21. Petition dismissed.