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High Court Of Kerala

Case No: A.S. No. 147 of 1954

Kokkalai Rice and Oil Mills Foundry etc.		APPELLANT
	Vs	
Regional Provident Fund Commissioner		RESPONDENT

Date of Decision: Aug. 8, 1960

Acts Referred:

- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 1, 1(3), 16, 17, 2(f)

Citation: (1960) KLJ 1126

Hon'ble Judges: M.A. Ansari, C.J; T.C. Raghavan, J; M. Madhavan Nair, J

Bench: Full Bench

Advocate: P.K. Subramonia Iyer, C.S. Ananthakrishna Iyer, P. Ramanarayanan, P.V. Krishna Iyer, P.S. Krishna Iyer and T.S. Venkiteswara Iyer, for the Appellant; K.V. Surianarayana Iyer, Advocate-General and P. Balagangadhara Menon, Government Pleader, for the Respondent

Judgement

Madhavan Nair, J.

This case raises certain questions as to the scope of the Employees'' Provident Funds Act, 1952 (hereafter referred to as ''the Act''). The appellant is the owner of a factory at Kokkalai, Trichur, where several industries like rice and oil mills, foundry and engineering works, and soap works are carried on; and the respondent is the Regional Provident Funds Commissioner, Trivandrum.

2. On 31--10--1952 the respondent issued a letter to the appellant requesting him to furnish the declaration and the list required by paragraphs 33 and 36(1) of the Employees'' Provident Funds Scheme 1952 and intimating him that collection of contributions to the Fund would commence from the 1st November, 1952. That letter is marked in this case as Ext. A. Subsequently on 10-3 -- 1953, he sent another letter to the appellant, demanding deposit of the contributions to the Fund and the

administrative charges as enjoined by the Act and the Scheme. That letter is produced as Ext. B. In it the respondent explained the reasons for his demand thus:

Your factory comes within the coverage of the Employees'' Provident Funds Act in view of the fact that some departments therein are engaged in some industry specified in the schedule, that it has been in existence for more than three years, and that it ordinarily employs fifty or more workers daily.

On receipt of Ext. B, the appellant sent a reply to the respondent denying his liability to make contributions to the Provident Fund as none of the industries carried on by him fell within the purview of the Act. The respondent then sent another letter dated 21--3--1953, marked here as Ext. C, to the appellant wherein he clarified his stand thus :

I write to inform you that in case of an establishment which carries on several departments in the same premises, if some of the departments only are covered by the Employees'' Provident Funds Act, 1952, the entire establishment will fall within the coverage of the Act. Therefore if fifty or more persons are employed in the entire establishment, it will be covered by the Act. You are, therefore, requested to comply with the instructions issued in this office letter.....dated 10--3--19153.

As the appellant did not comply, the respondent issued a notice, Ext. D, to the appellant on 30--5--1953 calling upon him to remit the contributions and administrative charges as directed in Ext. B, without further delay, lest appropriate action might be taken against him in the matter.

3. On 15--6--1953, the appellant moved Original Petition No. 78 of 1953 in the erstwhile Travancore-Cochin High Court for a writ in the nature of certiorari to call to the High Court ''the notices dated 31--10--1952, 10--3--1953, 21--3--1953 and 30--5--1953 issued by the respondent'' (Exts. A, B, C and D mentioned above) to be quashed on the ground that the factory concerned did not come within the purview of the Act and as such the said notices were ultra vires the respondent.

4. M.S. Menon J. before whom the Original Petition came up for disposal, held:

.....It is clear that the petitioner is the manager of a composite factory which is engaged among other things in one of the industries specified in Schedule I and that the foundation for his prayers is that as far as the scheduled industry is concerned he is employing only 33 persons and no more. The total number of employees in the factory, however including those employed in the scheduled industry, is over 50 and so the only question that arises for decision is whether the number specified in section 1(3) of the Act as necessary to attract the enactment should he in the scheduled industry, itself or whether it is sufficient if that number is employed in the factory as a whole.

[Quoting S. 1(3) of the Act] I see no ambiguity in the provision and to my mind it is quite clear that the unit for determining the application of the Act is the factory and

not the component part thereof. On the wording of the section as it stands, the clause "in which fifty or more persons are employed" must necessarily apply to "factories" and not to "industry".

As I read the section the questions to be posed in order to decide whether the Act is applicable to a factory, are :

(1) Is the factory engaged, either wholly or in part, in one or more of the scheduled industries? and

(2) Does the factory employ, not necessarily in a scheduled industry, 50 persons or more?

And if the answer to both the questions is "yes" and the factory does not come within section 16.....there can be no doubt that the Act is applicable, and that no exemption is available on the ground that the persons employed in that portion of the factory which is engaged in a scheduled industry is less than 50. The section is clear on the point, and no other inference is apparently possible in the context of the sections that follow, for example, section 19-A(ii), introduced by the Amending Act No. 37 of 1953.

The petition fails and is dismissed with costs.....

5. This appeal is from the above-said order. It is noteworthy that Sahai J. for the Allahabad High Court agreed completely with the dicta in the above-said order and followed the same in N.K. Industries (Private) Ltd., Kanpur Vs. Regional Provident Fund Commissioner, U.P., . But, it was dissented from by Balakrishna Ayyar J. of the Madras High Court in The Madras Pencil Factory Vs. The Regional Provident Fund Commissioner, No. 111 Mount Road, Madras, .

6. The question that materially arises in the case is whether in the case of a factory where an industry included in Schedule I of the Employees'' Provident Funds Act and other industries not so included in the Schedule are carried on, the number of employees specified in Section 1 (3) of the Act as necessary to attract the application of the Act should be in the scheduled industry itself, or whether it is sufficient if that number is employed in the factory as a whole. This depends upon the construction of Section 1 (3) of the Act -- particularly on the answers to the question whether the words "in which fifty or more persons are employed" relate to "factories" or to "industry" mentioned in the section. The Allahabad High Court held in N.K. Industries (Private) Ltd., Kanpur Vs. Regional Provident Fund Commissioner, U.P., and in Regional Provident Fund Commissioner, U.P., Kanpur Vs. Great Eastern Electroplator Ltd., that the said words relate to ''factories'' and not to ''industry''. The Madras High Court also took the same view in The Madras Pencil Factory Vs. The Regional Provident Fund Commissioner, No. 111 Mount Road, Madras,). On the other hand, the Bombay High Court in Oudh Sugar Mills Ltd. Vs. Regional Provident Fund Commissioner, Bombay,) held that the said words govern or qualify the

phrase ''industry specified in schedule I'' and not the word ''factories''.

7. Section 1 (3) of the Employees'' Provident Funds Act, 1952, before its amendment in 1956, read as follows:--

Subject to the provisions contained in Sec, 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.

In the first clause of this provision, it is not clear whether the expression "in which fifty or more persons are employed" is attached to the word ''factories'' or to the word ''industry''. The learned counsel for the appellant contended, that the sequence of the expressions in the clause would show that the said expression qualifies the word ''industry'', as that is the one immediately preceding the adjectival phrase "in which fifty or more persons are employed", and not the word ''factories'' which is away from it. This argument appears to be attractive. But, it is belied by the second clause in the sub-section where, in authorising the Central Government to extend the application of the Act, the expression used is "to all factories employing such number of persons less than fifty as may be specified". This clearly shows that the number of persons prescribed relate to ''factories''. The provisions in Sections 2 (f), 3, 5 and 17 of the Act also support the above conclusion. So also does Section 19--A (inserted in the Act by Ordinance I of 1953 and Act 37 of 1953) which made provision for solving doubts or difficulties as to "whether fifty or more persons are employed in a factory". The real legislative intent was well manifested by the subsequent enactment of Act 94 of 1956 recasting Section 1 (3) of the Act as :
Subject to the provisions contained in Sec. 16, it applies to every establishment which is a factory engaged in any industry specified in Schedule I and in which fifty or more persons are employed.

The addition of the word ''and'' in this new section shows beyond any doubt that the expression engaged in any industry specified in Schedule I" and the expression "in which fifty or more persons are employed" both qualify the word ''factories''. We are therefore in respectful agreement with the views expressed by the Allahabad High Court and the Madras High Court on the construction of Section 1(3) of the Act and are constrained to differ from that expressed by the Bombay High Court. We hold that the expression "in which fifty or more persons are employed" in Section 1(3) of the Employees'' Provident Funds Act, even as it stood originally, before its amendment in 1956, related to "factories" and not to "industry" mentioned in the said Section.

8. The next question is as to the import of the expression ''factory'' in Section 1(3) of the Act, whether it would take the entire establishment or only a particular unit of it where one of the specified industries is carried on. The word ''factory'' is defined in Section 2 (g) of the Act as meaning:

Any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on.....

This indicates that the word ''factory'' would denote the entire premises in any part of which a specified industry is carried on, and not only the particular part thereof engaged in such industry. We are glad to note that Balakrishna Ayyar J. of the Madras High Court also took the same view in The Madras Pencil Factory Vs. The Regional Provident Fund Commissioner, No. 111 Mount Road, Madras, :

It seems to me that the proper way of looking at the matter is this. First of all we ask: to what does the section apply ? The answer at once emerges that it applies to "factories", that is to say, to premises in any part of which manufacturing process is carried on, whether with or without the aid of power. We next ask, to what kinds of factories does it apply?

We now find that two requirements have to be satisfied: One is that 50 or more persons must be employed in the factory. The other is that the factory must be engaged in one of the industries specified in Schedule I.

The observation of Sahai J. in N.K. Industries (Private) Ltd. v Commissioner R.P. Fund,

The Act would apply to factories employing fifty or more persons though in that department of the factory in which that particular industry is carried on less than fifty persons are working

clearly shows that the above-said construction was adopted by that learned Judge also. On the other hand, in Nagpur Glass Works Ltd. Vs. Regional Provident Fund Commissioner, Bombay, -- Paragraph 12 Mudholkar and Tambe JJ. held that the word ''factory'' must be taken to mean the section in the factory which is engaged in the industry specified in Schedule I. We are unable to agree with this. We hold that the word ''factory'' in Section (1)3 of the Employees'' Provident Funds Act means the whole of the premises in any part of which a scheduled industry is carried on and not the particular unit thereof which is actually engaged in such industry.

9. It was argued that each industry within the premises of a factory must be taken to constitute a factory, an independent factory within the meaning of the Employees'' Provident Funds Act. Neither in the Original Petition, nor in the Memorandum of Appeal has the appellant raised such a specific constitution. Consistent with the view that we have expressed above, we can only repel this contention.

10. The further question is what is meant by "the factories engaged in an industry specified in Schedule I". Mudholkar J. in Oudh Sugar Mills Ltd. Vs. Regional Provident

Fund Commissioner, Bombay, took the view that it refers to a factory whose main business is a Scheduled industry, and not to a factory which carries on a scheduled industry as accessory to its main business.

The fact that a scheduled industry was carried on as merely accessory to the main business of the factory that would not change the nature of the factory and therefore if in carrying on the business of manufacturing and selling vegetable oil, a section of the factory manufactured tin containers for the sole purpose of packing the oil the factory cannot be said to be carrying on a scheduled industry even though the latter activity comes expressly within the schedule of the Act.

But this was dissented in the same Judgment by Tambe J. who observed:

.....With utmost respect to my learned brother, I do not find myself in agreement with the view taken by him that where the principal object of an industry does not fall within the meaning of the First Schedule of the Act then even if certain scheduled articles for being used in that industry only are manufactured, the provisions of the Act are not attracted.

The view taken by Mudholkar J. was adopted by Balakrishna Ayyar J. in The Madras Pencil Factory Vs. The Regional Provident Fund Commissioner, No. 111 Mount Road, Madras, . His Lordship held that in order to say that a factory is engaged in a particular industry, that industry must be the primary activity of the factory.

It is the "factory" which must be engaged. In other words that must be the primary activity of the factory. If with a view to carry out its primary activity, it is incidentally engaged in something else, it will not alter its primary character. The learned Government pleader argued that the section does not say that the factory must be wholly engaged in the specified industry.

That is no doubt so. But this does not mean that the construction contended for by the learned Government Pleader is correct. In order to get the result he is contending for, we will require the addition of a wholly new set of words in Sec. 1(3). We shall require words to the effect that if any part of a factory is engaged in making any article that falls within the scope of Schedule I, then the whole factory would be deemed to be engaged in such industry.

The learned Government Pleader argued that the Act is a benevolent enactment, and that, therefore, we must try to extend its scope as far as possible. It seems to me that it is for the Legislature to say how far it will go. A Court can only take the words as they are written in the statute. Suppose in the present case a jury were to be taken round the factory of the petitioners and after they have seen it and they come out of it they are asked : what is this factory engaged in, the only answer they would give is that it is engaged in making pencils.

That it seems to me, is the proper approach to the question. Of course, I agree that a factory may be engaged in producing more than one article. In such a case it

would be perfectly correct to say that the factory is engaged in producing all those articles. I have no doubt whatever that the word "engaged" in sub-sec. 3 of Sec. 1 refers to the primary activity of the factory. I have quoted the above from paragraph 7 of the judgment of the Bombay High Court in Oudh Sugar Mills Ltd. Vs. Regional Provident Fund Commissioner, Bombay, and I repeat my respectful agreement with it.

We are unable to agree with this view. We take the words in Section 1(3) of the Act as they stand. They do not warrant an enquiry as to whether a particular industry that is carried on in a factory is the primary activity therein or is only an accessory activity. If a factory carries on a scheduled industry, in any part thereof, that factory in its entirety would come within the expression "factories engaged in any industry specified in Schedule I".

11. The learned counsel for the appellant submitted that the expression ''factory engaged in an industry'' may be taken as one indivisible concept; and the test must be to see if in such a qualified factory fifty or more persons are employed. We agree with this argument, though not in the way in which the learned counsel would have us to apply the same to the facts of the case. In order to decide the applicability of the Act, the questions that may be posed for consideration are:

(1) Is the establishment a factory within the meaning of the Act?

(2) Does the factory engage itself in one or more of the Scheduled industries. (It does not matter whether the factory engages in other industries also);

(3) Whether the factory employs fifty persons or more. (Here also it docs not matter whether all the employees so counted are concerned in a Scheduled industry or not. It is enough if the factory employs the required number of persons for all its works); and lastly,

(4) Whether any of the exemptions in Section 16 of the act would apply to the instant factory ?

Applying these tests, we find that the factory in this case is well within the ambit of the Employees'' Provident Funds Act, 1952 and that the appellant, employer, was thereof liable to make his contributions as required in the notices impugned in this case.

12. The next question is whether the liability of the appellant to make the contributions under paragraphs 30-32 of the Scheme can now be enforced. The learned counsel for the appellant contended that if we do not quash the impugned notices that would virtually be allowing the respondent to enforce the Act retrospectively, which the law does not allow, and relied on Aluminium Corporation of India Ltd. Vs. Regional Provident Fund Commissioner and Others, in support thereof. In that case, the employer sought information from the Government, and the Government wrote back in reply on 19--1--1953 that the Act would not apply to

his factory; and this information was reiterated by the R.P.F. Commissioner in his letter dated 23--3--1953 addressed to the employer. It was only on 23--10--1957 that the Government took decision that the factory came within the purview of the Act and required the employer to pay up his share of the contributions and administrative charges due from 1--11--1952 the date when the Act was put into force. It was a clear case of retroaction. But, it has nothing parallel to the facts of the case before us.

13. Here, the respondent had intimated the appellant in time on 31--10--1952 that the collection of Provident Fund contributions would commence on 1--11--1952 and that the appellant''s factory came within the ''coverage'' of the Act and the Scheme. In his letters of 10--3--1953, and 21--3--1953 he explained to the appellant clearly and correctly how the factory came within the coverage of the Act which came into operation on 1--11--1952, and demanded remittance of the contributions due as per the Act and the Scheme; and in Ext. D notice he threatened the appellant with ''appropriate action'' if he persisted in default to remit his contributions to the Provident Fund. The appellant then rushed to this court and moved for an injunction to restrain the respondent (Commissioner) from taking action against him for not remitting the contributions to the Fund which he alleged he was not in law bound to do. This court allowed his prayer on condition that he undertook not to alienate the plant and machinery of the factory till the disposal of this case. The appellant having executed the required undertaking the injunction became operative. In these circumstances it is not open to him to say that since the respondent did not collect the contributions in due time, he cannot now be allowed to collect or realise the same for the period that has gone by. It is common place that nobody shall be prejudiced by the act of Court. If we now find that the appellant''s contention that his factory was not within the coverage of the Act was unsustainable and therefore the demand made by the respondent was proper and legal, the issuance of injunction by this court at the instance of the appellant should not be allowed to prejudice the respondent in the enforcement of his legal rights. Any decision otherwise will be too dangerous to the administration of justice by the courts. In upholding the validity of the notices issued by the respondent to the appellant, we are not directing him now to enforce the Act against the appellant. That he had already done even by the notices impugned in this case. All that we have to do, and are doing by this decision, is to remove the obstacle placed by the appellant against the discharge of the function of the respondent under the Employees'' Provident Funds Act and the Scheme. It is then for the respondent himself to decide as to his future proceedings in the matter.

14. It was then contended that inasmuch as the appellant could not collect the employees'' contributions from their wages for the period in question and as he had closed the factory and disbanded all the employees in July 1955, the appellant should not now be compelled to pay his share of the contributions for any past period. According to the appellant, in the absence of contributions from the

employees, the Provident Funds Scheme cannot come into force; and in the absence of beneficiaries (employees) to avail of the Fund, for whom alone it was intended by the Act, no purpose will be served by collecting contributions from the employer. We are not accepting this contention either. If the appellant had been prejudiced by the proceedings which he himself had started, he has only to thank himself. If under the Act the appellant was bound to make his contributions to the Fund, we can only declare so in this proceeding and leave the consequences to shape themselves according to law.

15. We are happy to find that a similar contention advanced in N.K. Industries (Private) Ltd., Kanpur Vs. Regional Provident Fund Commissioner, U.P., was repelled by Sahai J. with the following observations:

The petitioner (firm) 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 employees concerned. There is a duty cast upon the petitioner to contribute both the shares, i.e., its share as also that of the employees. Inasmuch as the petitioner did not do so, it is to blame itself. I therefore do not see any force in this contention.

16. Further, it is incorrect to say that, in the absence of contributions from the employees, no purpose can be served by the collection of contributions and administrative charges from the employer. Under the Employees'' Provident Funds Scheme the employer''s contributions to the Fund and the employee''s contributions thereto are to be kept distinct in the accounts. Vide paragraphs 36(4) and 59 of the Scheme. Though the employees'' contributions are payable by the employer "in the first instance," it is expressed in paragraph 30 of the Scheme that such payment is only "on behalf of the employees;" and he is to withdraw the same from the wages of the employees concerned. The employee will be entitled to withdraw the entire sum contributed by him and by the employer only in certain circumstances specified in paragraph 69(1) of the Scheme; in other cases of withdrawal a proportion of the employer''s contribution, ranging from 15% to 75% thereof according to circumstances, is to be forfeited to the Fund; and the employer has no claim to such forfeited amount, which goes for the commonweal. The appellant cannot be allowed to defeat the benefits to the Fund by his inaction or mistaken proceedings.

17. It was submitted at the Bar by the learned counsel appearing for the R.P.F. Commissioner that he does not propose to collect the employees'' share of the contributions to the Fund in the instant case from the appellant-employer. But the appellant is in duty bound to pay up the employer''s share of the contributions to the Fund under paragraph 29 of the Scheme. We note that this concession is quite proper and fair in the circumstances of this case. This is what the Government of India directed in the Aluminium Corporation of India to do when they enforced the Scheme on the Corporation in 1957 with effect from 1--11--1952. (See Aluminium Corporation of India Ltd. Vs. Regional Provident Fund Commissioner and Others, .

What may be done in future with regard to such contribution when it is paid to the Fund will have to be decided in the first instance by the Commissioner and if the appellant has any real grievance in his decision, it will then be time for him to take appropriate proceedings thereupon. We do not commit ourselves to any expression of views on that matter.

18. We hold that the appellant is liable to pay his share of contributions to the Employees'' Provident Fund and that the demands made by the respondent-Commissioner are proper and legal. The appeal therefore fails; and it is hereby dismissed with costs, including Advocate''s fee Rs. 200/-.

Raghavan, J.

19. I agree, but I would add a few words on one point regarding the meaning of the expression "factories engaged in an industry specified in Schedule 1". The factory involved in the present case was engaged in three industries, viz., manufacture of soap, extraction of oil from copra and foundry and engineering works, the last of which alone was specified in Schedule I at the relevant time. These three industries are primary or main industries and no one of them can be said to be an industry accessory to either of the two. Therefore the distinction drawn by Mudholkar J. between primary business and accessory activity in Oudh Sugar Mills Ltd. Vs. Regional Provident Fund Commissioner, Bombay, and also by Balakrishna Ayyar J. in Madras Pencil Factory v R.P.F. Commissioner, AIR 1959 Mad 235 does not arise in the present case. In the present case the factory was engaged in all the three industries as main industries and one of such industries was included in the schedule to the Act and therefore the factory falls within the expression "factories engaged in an industry specified in Schedule 1". Therefore the Act applies. I shall now refer to two instances where the observations of Mudholkar J. in Oudh Sugar Mills case and the observations of Balakrishna Ayyar J. in the Madras Pencil Factory case will apply. Suppose a factory is engaged in two industries, one of which is its main or primary business and the other is only accessory or incidental and the former is a scheduled industry. In such a case the factory is engaged in a scheduled industry, because the main industry in which it is engaged is in the schedule to the Act and in that case even if the number of workers engaged in the scheduled industry is less than fifty, if the factory engages on the whole fifty or more workers, then the Act will apply to such a factory. If, on the other hand, the factory is engaged in two industries, one primary or main and the other accessory or incidental and the latter alone is a scheduled industry but not the former, then there is considerable force in the reasoning of Mudholkar J. in the Bombay case and Balakrishna Ayyar J. in the Madras case, that the factory is not engaged in a scheduled industry. In such a case, according to the above reasoning, even if fifty or more workers are engaged in the scheduled but accessory industry, the Act will not apply. According to me no question of such distinction arises in the present case and therefore I would refrain from expressing any opinion on that question. In other respects I agree with my

learned brother, Madhavan Nair J.