(1981) 04 BOM CK 0047

Bombay High Court

Case No: Misc. Petition No. 1485 of 1979

V. Venkatesh		APPELLANT
	Vs	
Union of India and others		RESPONDENT

Date of Decision: April 28, 1981

Acts Referred:

- Employees Provident Fund and Family Pension Act, 1952 - Section 1(3), 1(5), 16, 2(A), 7A

Citation: (1981) 43 FLR 65 : (1982) 1 LLJ 162

Hon'ble Judges: M.L. Pendse, J

Bench: Single Bench

Judgement

1. The short question is which arises for determination in this petition is whether is whether the petitioner working in the Head Office of respondent No. 3 is entitled to claim advantages of the provisions of the Employees Provident Funds and Family Pension Fund Act, 1952 (hereinafter referred to as the "Act") after the establishment covered by S. 1(3)(a) of the Act was closed.

2. The facts of the case are not in dispute and before adverting to the question urged at the Bar, it would be desirable to set out the relevant facts. The petitioner joined the service of respondent No. 3 on March 3, 1965, as a stenographer. The respondent No. 3, M/s. Bose Investments (Pvt.) Limited, had only an office where about 10 employees were working and had no other business. On October 4, 1967, respondent No. 3 secured a factory from Alfa Rubber Company under an agreement of leave and licence. Rubber products were manufactured in the said company and 24 persons were employed in the said factory. On December 29, 1967, on the visit of the provident Fund Inspector, it was noticed that respondent No. 3 had an establishment which is a factory engaged in an industry specified in schedule I of the Act and in which twenty or more persons were employed. Accordingly, respondent No. 3 was called upon by the Regional Provident Fund Commissioner to register the establishment of respondent No. 3, an the same was covered by the

provisions of the Act. In the view of the application of the Act, it was necessary for respondent No. 3 to make deduction from the salary of the petitioner and contribute it in the funds of the Regional Provident Fund Commissioner. The factory taken over by respondent No. 3 was permanently closed on July 10, 1969, and, thereafter, respondent No. 3 ceased to make any deduction from the salary of the petitioner as, according to respondent No. 3, the petitioner and the employees working in the head office were no longer covered by the provisions of the Act.

3. The petitioner continued in the employment of respondent No. 3 till May, 1974, when his services were terminated. The petitioner instituted Suit No. 4349 of 1975, in the Bombay City Civil Court against respondent No. 3 for the recovery of an amount of Rs. 9,600 and for a declaration that the termination of services was illegal and he should be deemed to have continued in the services. The parties arrived at a settlement before the Bombay city Civil Court and on July 25, 1978, the consent terms were filed where by a decree for an amount of Rs. 12,500 was passed against respondent respondent No. 3. The petitioner accepted the said amount in full and final settlement of all his claims against respondent No. 3. During the pendency of the suit, the petitioner was enquiring from respondent No. 2 about the amount of contribution which respondent No. 3 was required to make for the periods between July 10, 1969, and May, 1974, when the petitioner''s services were terminated. The petitioner was claiming that till May, 1974, he was covered by the provision of the Act and that respondent No. 3 was bound to contribute and deposit the amounts with respondent No. 2. The petitioner did not receive a satisfactory answer to his demand and thereupon, instituted the present petition on June 27, 2979, under Art. 226 of the Constitution of India for seeking a direction to respondent No. 2 to hold an enquiry as contemplated under S. 7A of the Act. The grievance of the petitioner was that the Regional Provident Fund Commissioner was not holding any enquiry to demand the amount due to the petitioner from respondent No. 3. The learned single Judge, before whom the petition was moved for admission, adjourned the hearing and directed respondent No. 2 to hold the requisite enquiry and pass appropriate orders. On September 29, 1979, respondent No. 2 passed an order holding that nothing was due from respondent No. 3 to the petitioner as the factory was closed from July 10, 1969, and the provision of the Act became inapplicable. The petitioner thereupon amended the petition and sought further reliefs to the effect that respondent No. 2 should be directed to reconsider his decisions and to award the amount of Rs. 13,660 to the petitioner from respondent No. 3. The petitioner was thereafter summarily rejected by the learned single judge but that order was set aside by the Division Bench of this Court in an appeal preferred by the petitioner and the proceedings are remitted for disposal on merits. Accordingly, the petition is set down before me for hearing.

4. The main contention advanced by Shri Dharap, the learned counsel appearing in support of the petition, is that once is an employee working in the Head office was covered by the provisions of the Act, then such employee would be entitled to the

advantages of the provisions of the Act even though the factory was closed on July 10, 1969. Shri Dharap placed strong reliance upon the provisions of S. 1(5) of the Act to claim that the provisions of the Act continued to apply notwithstanding the fact that the number of persons employed falls below twenty. On behalf of respondent No. 2, Shri V. Prasad, Regional Provident Fund Commissioner, has filed a return sworn on December 12, 1979 and claimed that the order passed in an enquiry under S. 7A of the Act is in accordance with law. On behalf of respondent No. 3, Shri Ardhendu Sheker Bose, a Director of the Company, has filed a return sworn on May 30, 1980, supporting the submission of respondent No. 2. In view of the rival contentions, it is necessary to determine whether the employee of the Head Office can claim advantage of he provisions of the Act notwithstanding the fact that the factory was closed from July 10, 1969.

5. Section 1(3) provides that subject to the provisions contained in S. 16, the Act 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. Shri Dharap did not dispute that respondent No. 3 was covered because of the provisions of S. 1(3)(a) of the Act only. The Alfa Rubber Company taken over by respondent No. 3 was admittedly a factory engaged in industry specified in Schedule I of the Act. The factory had employed 24 persons, on respondent No. 3 taking over the factory, the establishment was covered by the provisions of the Act. Exhibit "2" annexed to the return of respondent No. 2 clearly indicates that the name of the establishment was "Bose Investments Private Limited" and it has its Head Office at "D'' Mello Bhavan, P. D'' Mello Road, Fort, Bombay." While its factory was at "Star Metal Refinery Compound" Vikhroli. Bombay-400083. As stated here in above about 24 persons were employed in the factory, while about 10 persons were working in the Head Office. By coverage of respondent No. 3 as an establishment under S. 1(3)(a) of the Act the advantages of the provision of the Act was made applicable not only to the persons, employed in the factory but also to the employees at the Head Office. That was necessary because of the provisions of S. 2A of the Act which reads as under :
"For the removal of doubt it is hereby declared 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 part of the same establishment."

Respondent No. 3 accordingly made deduction from the salary of the employees of for the purpose of contribution to the fund set up by the Regional Provident Fund Commissioner. The deduction ceased from July 10, 1969, as the factory was closed.

6. The grievance of Shri Dharap is that even though the factory was closed, the employees at the office were entitled to claim advantage of the provisions of the Act

and respondent No. 3 was bound to make contribution is in respect of the plaintiff''s service till May, 1974 Shri Sethna, the learned counsel appearing on behalf of respondent Nos. 1 and 2, on the otherhand, submits that once the establishment which is a factory engaged in an industry specified in Sched. I of the Act was closed, then the allied departments of the establishment of respondent No. 3 would not be covered by the provisions of the Act. In my judgment the submission is correct and deserves to be accepted. The Act does not define the terms "establishment", but the plain reading of S. 1(3)(a) of the Act makes in clear that the word "establishment" is synonymous with a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed. Section 1(3)(b) of the Act refers to the establishments which do not fall under sub-s. (3)(a) of S. 1 of the Act but which the Central Government may specify by notification in the Official Gazette. Section 2(g) of the Act defines "factory" as any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily carried on, whether with the aid of power or without the aid of power. It is obvious that the establishment referred to in sub-s. (3)(a) of S. 1 of the Act is a factory in which a manufacturing process is carried on. The said requirement is absent in provisions of S. 1(3)(b) of the Act. The term "manufacture" has been defined under S. (2)(sic) of the Act as any process for making, altering, repairing, ornamenting, etc. It is not in dispute that respondent No. 3 was not carrying any manufacturing process in the Head Office at any stage. It is also not in dispute that respondent No. 3 was not doing any business at the Head Office. In these circumstances Shri Dharap submits that once the employees working at the Head Office were covered by the provisions of the Act, then even though the factory was closed, such employees are entitled to the advantages of the provisions of the Act. The submission cannot be accepted. The employees at the Head Office were covered because of the provisions of S. 2A of the Act. It is obvious that once the establishment as contemplated by S. 1(3)(a) of the Act comes into existence, then the allied branches or departments of such establishment would get advantage because of S. 2A of the Act. Such an advantage to the branches or departments of the establishments is because of the existence or the continuance of the establishment. The departments of the branches of the establishment totally rely upon the continuance of the establishment. Once, the establishment is closed or ceased to function, then the departments or the branches of the establishment which otherwise not covered by the provisions of the S. 1(3)(a) of the Act cannot claim advantages of the Act.

7. Shri Dharap did not dispute that the employees of the Head Office of respondent No. 3 were not entitled to the coverage of the Act as long as the factory was not taken over by respondent No. 3 Shri Dharap submits that once the employees of the Head Office were covered because of the existence of the establishment. Then the cessation of the establishment would not automatically take out the employees of the Head Office from the coverage of the Act. It is not possible to accept this submission because the sole reliance in support of the claim is the provision of S.

1(5) of the Act. Section 1(5) of the Act reads as under :

"An establishment to which this act Applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty."

The plain reading of this sub-section makes it clear that application of the Act, notwithstanding the fact that the number of employees falls below twenty, depends on the existence or the continuance of the establishment. By no stretch of imagination sub-s. (5) of S. 1 would have application the establishment itself is closed. Sub-section (5) of S. 1 of the Act would be attracted in cases where the establishment continues but the number of employees falls below twenty. In my judgment, the reliance of shri Dharap on the provisions of sub-s. (5) of S. 1 of the Act is totally misconceived. Shri Dharap was unable to point out any provisions of the Act to indicate that even after cessation of the establishment, the allied departments or branches which are not independently covered by the provisions of sub-S. (3)(a) of S. 1 of the Act would be entitled to claim benefit of the provisions of the Act. In these circumstances, the view taken by respondent No. 2 that respondent No. 3 are not liable to contribute any amount from the closure of the factory till the termination of the service of the petitioner is correct and requires no interference.

8. Shri Sethna, referred to a decision of the Supreme Court in the case of the The Associated Industries (P) Ltd. Vs. The Regional Provident Fund Commissioner, Kerala Trivandrum, The question which arose for consideration of the Supreme Court whether was the factory run by the Associated Industries (P.) Limited falls within S. 1(3) of the Act. The appellant was running a tile factory and an engineering works at Quilon. One of the contentions urged was that the factory must be exclusively engaged in any industry specified in Schedule I of the Act. While repelling this contention, Shri Justice Gajendragadkar, as he then was, speaking for the Court, relied upon an earlier decision of the Supreme Court in the case of the The Regional Provident Fund Commissioner, Bombay Vs. Shree Krishna Metal Manufacturing Co., Bhandara, and observed :

"In the case of The Regional Provident Fund Commissioner, Bombay Vs. Shree Krishna Metal Manufacturing Co., Bhandara, , this Court has held that S. 1(3)(a) does not lend itself to the construction that it is confined to factories exclusively engaged in any industry specified in Schedule I. It was observed in that connection that when the Legislature has described factories as factories engaged in any industry, it did not intend that the said factories should be exclusively engaged in the industry specified in Schedule I. Consistently with this view, this Court further observed that the word ''factory'' used in S. 1(3)(a) has a comprehensive meaning and it includes premises in which any manufacturing process is being carried on as described in the definition and so, the factory engaged in any industry specified in Schedule I does not necessarily mean a factory exclusively engaged in the particular industry specified in the said Schedule. In construing the scope of S. 1(3)(a) this Court held

that composite factories came within its purview and that the fact that a factory is engaged in industrial activities some of which fall under Schedule and some do not will not take the factory out of the purview of S. 1(3)(a)."

The learned Judge further observed in paragraph 7 of the judgment as under :

"This decision makes it clear that S. 1(3)(a) is not confined only to factories which are exclusively engaged in industry to which Schedule I applies but it also takes in composite factories which run industries some of which fall under Schedule I and some do not. In order to make the position clear let us state the true legal position in respect of the scope of the application of S. 1(3)(a) in categorical terms. If the factory carries on the industry which falls under schedule I and satisfies the requirement as to the number of employees prescribed by the section, it clearly falls under S. 1(3)(a). If the factory carries on more than one industry all of which fell under schedule I and its numerical strength satisfies the test prescribed in that behalf, it is an establishment under S. 1(3)(a). If a factory runs more industries than one of which is the primary and the dominant industry and the others are feeders and can be regarded as subsidiary, minor, or incidental industries in that sense, then the character of the dominant and primary industry will determine the question as to whether the factory is an establishment under S. 1(3)(a) or not. If the dominant and primary industry falls under Schedule I, the fact that the subsidiary industries do not fall under Schedule I will not help to exclude the application of S. 1(3)(a). If the dominant and primary industry does not fall under Schedule I, but one or more subsidiary, incidental, minor and feeding industries fall under Schedule I, then S. 1(3)(a) will not apply. If the factory runs more industries than one, all of which are independent of each other, and constitute separate and distinct industries, S. 1(3)(a) will apply to the factory even if one or more, but not all of the industries run by the factory fall under Schedule I. The question about the subsidiary, minor, or feeding industries can legitimately arise only where it is shown that the factory is really started for the purpose of running one primary industry and has undertaken other subsidiary industries only for the purposes of the subserving and feeding the purposes and objects of the primary industries; in such a case, these minor industries merely serve as departments of the primary industries; otherwise if the industries run by a factory are independent or are not so integrated as to be treated as part of the same industry, the question about the principle and the dominant character of one industry as against the minor or subsidiary character of another industry does not fall to be considered.

It is necessary to mention that the provisions of S. 2A of the Act was inserted by Act No. 46 of 1960 with effect from December 31, 1960, and the said provisions had no application to the facts present before the Supreme Court. The observation made by Shri Justice Gajendragadkar was relied upon by Shri Sethna, and it was claimed that he basic necessary requirement for a coverage under the Act is the existence of the establishment and other allied, subsidiary, minor or feeding industries can claim the

advantage provided the dominant industry is one which is specified in Schedule I. The submission is correct. It is obvious that the feeding industries or the subsidiary industries are entitled to claim advantages provided the dominant or the main industry run by the employer is one as contemplated under Schedule I of the Act, Shri Sethna also invited my attention to a decision of the Mysore High Court in the case of Chhotalal Morarji Dhami Vs. Regional Provident Fund Commissioner and Others, , where the decision of the Supreme Court quoted above was relied upon. It is not necessary to consider the Mysore decision because it merely follows the dictum of the Supreme Court.

9. Shri Dharap relied upon the Full Bench decision of the Allahabad High Court in the case between Ramesh Metal Works and Another Vs. State, All and claimed that even if the Act has no application because of the closure of the establishment, still the advantages of the scheme under the Act is available to the petitioner. It is difficult to appreciate the force behind the submission. Certain observations made in the Allahabad High Court judgment were relied upon, but it is overlooked that the Allahabad decision was recorded when sub-S. (5) of S. 1 of the Act was not on the statute book. The observations relied upon would have no application on enactment of sub-s. (5) of S. 1 of the Act. In my judgment, the view taken by respondent No. 2 of the impugned order is correct and deserves to be upheld.

10. Accordingly, the petition fails and the rule is discharged, but, in the circumstances of the case, there will be no order as to costs.