

MANU/MH/1209/2004

Equivalent Citation: (2005)IILLJ108Bom

IN THE HIGH COURT OF BOMBAY

O.S.W.P. No. 529/2004

Decided On: 05.07.2004

Appellants: **Edelstahi Agencies (P) Ltd.**

Vs.

Respondent: **Regional Provident Fund Commissioner**

Hon'ble Judges/Coram:

Dr. D.Y. Chandrachud, J.

Counsel:

For Appellant/Petitioner/Plaintiff: S.C. Naidu and Jay Choksi, Advs., i/b., C.R. Naidu & Co.

For Respondents/Defendant: R.C. Master, Adv. for Respondent No. 1

Case Note:

Service - Voluntary Coverage of Establishment under Sections 1(3) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 - By impugned order, authority called upon Petitioner to deposit amount of Rs. 2,07,732/- as and by way of penal damages under Section 14B and interest under Section 7Q of the Act - Hence the Petition - Whether proceedings which had been adopted by the Respondent were without jurisdiction - Held, establishment of Petitioner was not factory as defined in Section 2(g) - At no stage Petitioner employed more than 20 persons - Therefore, provisions of Section 1(3) of the Act were clearly not attracted - Petitioner sought voluntary coverage under Section 1(4) in its application - Authorities, however, sought to cover the establishment of Petitioner under Section 1(3) - There was no notification in Official Gazette applying provisions of Act to establishment of Petitioner - In absence of notification under Section 1(4), it could not be said that provisions of Act had been made applicable to establishment of Petitioner - Hence, jurisdiction of Respondent to initiate proceedings under Section 14B read with 7Q had not been attracted - Petitioner had deposited amount which was demanded in pursuance of proceedings under Section 7A - Such amount had to be treated and regarded as amount deposited towards contribution which was due in pursuance of application for grant of voluntary coverage - Proceedings which had been adopted under Section 14B read with Section 7Q were manifestly without jurisdiction and were unsustainable - Unless conditions precedent for applicability of the Act were fulfilled, it was not open to Respondent to subject Petitioner to action under Sections 14B and 7Q - Court directed Respondent to issue notification under Section 1(4) of the Act as expeditiously as possible and further directed Petitioner to continue to deposit contribution from time to time which will then be accounted for once voluntary coverage to the establishment of Petitioner is accepted - Petition Disposed of.

JUDGMENT

D.Y. Chandrachud, J.

- 1.** Rule, returnable forthwith. Counsel appearing on behalf of the Respondent waives service. By consent, taken up for hearing and final disposal.
- 2.** The Petitioner is an indenting agent and was incorporated on November 16, 1994. As an indenting agent the Petitioner is required to liaise with customers in India and place orders on their behalf with its principals. On September 4, 1995, the Petitioner addressed a letter to the Regional Provident Fund Commissioner, applying for coverage of its establishment under Section 1(4) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 on a voluntary basis "with effect from December 1, 1995 the last date of the month in which the notification is published in the Gazette of India." The Petitioner undertook as an employer to pay its share of the Provident Fund contribution at the rate of 10% as provided under Section 6 of the Act read with paragraph 29 of the scheme framed thereunder. The Petitioner stated that a majority of the employees had also agreed to such coverage and the employees were willing to pay their contribution at the rate of 10%. A copy of the written consent of the employees was also enclosed.
- 3.** No action appears to have been taken by the Department at that stage upon the request for voluntary coverage. On January 31, 1996, the office of the Regional Provident Fund Commissioner addressed a communication to the Petitioner stating that the establishment of the Petitioner was being brought within the purview of the Act and the scheme with effect from November 30, 1995. The Petitioner it must be noted had sought coverage on a voluntary basis under the provisions of Section 1(4). The letter of the Regional Provident Fund Commissioner dated January 31, 1996 provided that the establishment was being covered under Section 1(3)(b) as a trading and commercial establishment to which the provisions of the Act have been made applicable by the Government of India in a notification issued under Section 1(3)(b). The Petitioner was accordingly directed to implement the provisions of the Scheme with effect from December 1, 1995.
- 4.** On May 2, 1997, the Petitioner requested the authorities to clarify the applicability of the Act, especially the date from which coverage could be extended. The Petitioner addressed a further letter dated October 21, 1997. In the meantime, it is common ground that the Petitioner started complying with the provisions of the Act with effect from September 1, 1997 and deposited the monthly contribution in accordance with the provisions of the Act in the State Bank of India, Dahisar (West), Branch. On May 11, 1998 the Petitioner informed the Respondent that it had commenced depositing its monthly contribution with effect from September 1997 and that the applicability of the Act may be given effect to from September 1, 1997.
- 5.** The Respondent thereupon issued a summons to the Petitioner for a proceeding under Section 7A of the Act claiming that the Petitioner had not deposited its dues for the period commencing from November 30, 1995 and ending on November 30, 1998. This culminated in an order under Section 7A forwarded to the Petitioner under cover of a letter dated April 15, 1999. Under the order, the Petitioner was directed to deposit an amount of Rs. 1,22,032/- for the period between November 1995 and November 1998. The Petitioner complied with the aforesaid order by its letter dated June 4, 1999 and remitted the payment which was required to be made in pursuance thereof.

6. On November 13, 2003 the Respondent initiated proceedings under Section 14B of the Act read with Section 7Q for the levy of damages and interest on account of the payments which had been belatedly made. A total amount of Rs. 2,07,732/- was claimed to be due and payable. In response thereto the Petitioner submitted its reply dated December 17, 2003 contending that the coverage under the Act was sought by the Petitioner on a voluntary basis under Section 1(4). The Petitioner contended that at no stage had it engaged more than 20 employees and therefore, the provisions of Section 1(3)(b) would not be attracted. In the circumstances, it was submitted that since no notification had been issued under Section 1(4), the entire proceeding for the levy of damages was misconceived. Eventually, an order was passed on February 5, 2004 by the authority calling upon the Petitioner to deposit an amount of Rs. 2,07,732/- as and by way of penal damages under Section 14B and interest under Section; 7Q of the Act for the period between December 1995 and March 2002.

7. Counsel appearing on behalf of the Petitioner has urged that though an appeal would lie against an order under Section 14B by virtue of the provisions of Section 7I of the Act, no appeal is specifically provided for in respect of an order under Section 7Q. Moreover, it was urged that this Court would be justified in exercising the extraordinary jurisdiction under Article 226 since the basic submission of the Petitioner is that the proceedings which have been adopted by the Respondent are without jurisdiction. In the present case, it was sought to be urged that the Petitioner has less than 20 employees and therefore, Section 1(3)(b) of the Act had no application. The Petitioner had sought coverage under Section 1(4) of the Act and until date no notification has been issued by the Central Government nor is there any publication in the official gazette. In the circumstances, it was submitted that the amount which has been paid by the Petitioner in pursuance of the proceedings under Section 7A must be treated and regarded as an amount paid in pursuance of the application for voluntary coverage. Counsel urged that though the proceedings under Section 7A were without jurisdiction, the Petitioner does not seek a refund of the amount which has been paid, but in the interests of the employees, these amounts must be appropriated towards payment due upon the grant of voluntary coverage to the establishment of the petitioner.

8. A perusal of the record in the present case reveals that the Petitioner had sought a voluntary coverage in pursuance of the provisions of Section 1(4) of the Act. Section 1(4) provides thus:

"(4) 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."

9. In the application for voluntary coverage under the provisions of the Act, the Petitioner had relied upon the agreement which was entered into with a majority of its employees and had sought coverage with effect from December 1, 1995. Section 1(4) has an onerous provision, for it enables the Provident Fund Commissioner to apply the provisions of the Act notwithstanding anything contained in Section 1(3). Under Section 1(3) the Act applies (i) to every establishment which is a factory

engaged in any industry specified in Schedule I and in which 20 or more persons are employed and (ii) to any other establishment employing 20 or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette specify in this behalf. There is no dispute about the factual position that the establishment of the Petitioner is not a factory as defined in Section 2(g) because no manufacturing process is carried on therein. Moreover, there is no dispute about the factual position that at no stage has the Petitioner employed more than 20 persons. The Petitioner has furnished the details of the total number of its employees in a chart at Exhibit A to the Petition which is not disputed. Therefore, in the facts of this case the provisions of Section 1(3) of the Act were clearly not attracted. The Petitioner sought voluntary coverage under Section 1(4) in its application dated September 4, 1995. The authorities, however, sought to cover the establishment of the Petitioner under Section 1(3) by a communication dated January 31, 1996. This was evidently erroneous. Indeed in the affidavit-in-reply which has been filed on behalf of the Respondent the submission which has now been set up is that the coverage which has been sought to be extended to the Petitioner is under Section 1(4). Counsel appearing on behalf of the Respondent has also fairly stated before the Court that the establishment of the Petitioner is covered not under Section 1(3) but under Section 1(4). Hence, it is on the anvil of Section 1(4) that the jurisdiction of the Respondent in adopting proceedings for the recovery of damages must be scrutinized.

10. Section 1(4) postulates that it must appear to the Provident Fund Commissioner that the employer and the majority of employees in relation to an establishment have agreed that the Act should be made applicable to an establishment. Thereupon the Commissioner may apply the provisions of the Act to that establishment on and from the date of such agreement or from any subsequent date specified in the agreement by notification in the Official Gazette. All these conditions have to be satisfied, in the absence whereof, the application of the Act cannot be attracted under Section 1(4). That is indeed the law which has also been laid down by this Court in *Tech Movers Systems (India) (Private) Ltd. v. Regional Provident Fund Commissioner* 1995 II LLN 938. In the present case, the admitted position is that even as of date there is no notification in the Official Gazette applying the provisions of the Act to the establishment of the Petitioner. In its application dated September 4, 1995 the Petitioner had sought the application of the Act with effect from December 1, 1995 the last date of the month in which the notification is published in the Gazette of India. In the absence of a notification under Section 1(4) at this stage, it cannot be said that the provisions of the Act have been made applicable to the establishment of the Petitioner. In the circumstances, the jurisdiction of the Respondent to initiate proceedings under Section 14B read with 7Q has not been attracted.

11. Counsel appearing on behalf of the Respondent relied upon the proceedings which have been adopted under Section 7A of the Act and submitted that in pursuance thereof the Petitioner has complied with the order by depositing Provident Fund dues. Jurisdiction cannot be conferred by consent. The provisions of the Act cannot be made applicable merely by consent especially when a specified procedure is enunciated for voluntary coverage of an establishment under Section 1(4). The Petitioner has deposited the amount which was demanded in pursuance of the proceedings under Section 7A. This amount has to be treated and regarded as an amount deposited towards the contribution which is due in pursuance of the application for the grant of voluntary coverage. However, an application for the grant of voluntary coverage under Section 1(4) has to be dealt with on that basis, unless the Act otherwise applies under Section 1(3). In the present case, it has only been

urged before the Court that the provisions of the Act are attracted by virtue of Section 1(3) of the Act. In that view of the matter, the proceedings which have been adopted under Section 14B read with Section 7Q are manifestly without jurisdiction and are unsustainable.

12. Though ordinarily, in matters under the Act, this Court would relegate a party to the remedy of an appeal under Section 7I, the exercise of the extraordinary jurisdiction is warranted in the present case in view of the fact that the proceedings were manifestly without jurisdiction. The Respondent in his order dated February 3, 2004 is of the view that the submission made by the employer seems to be genuine. Yet, he was of the view that since the employer had remitted the EPF and allied dues with effect from December 1995, and was brought under the purview of the Act with effect from that date, he is liable to pay damages and interest. Reliance was also sought to be placed on the Section 7A order dated April 15, 1999. This is manifestly and clearly erroneous. Unless the conditions precedent for applicability of the Act are fulfilled, it is not open to the Respondent to subject the Petitioner to an action under Sections 14B and 7Q.

13. All that the authorities now have to do is to issue a notification in the Official Gazette applying the provisions of the Act from the date of the agreement or from such subsequent date as may be specified in the agreement. That is the plain intendment of Section 1(4). Unless the authorities do so, it will not be open to adopt penal proceedings of the nature that has been sought to be done. In the circumstances, the impugned order dated February 3, 2004 is quashed and set aside. The contributions deposited, however, shall not be returned to the Petitioner in view of the statement made on behalf of the Petitioner in these proceedings, and shall be appropriated towards payments due upon the application of the Act being attracted once a notification is issued under Section 1(4).

14. In order to obviate hardship to the employees and until a notification is issued under Section 1(4), the Petitioner shall continue to deposit the contribution from time to time which will then be accounted for once voluntary coverage to the establishment of the Petitioner is accepted. This direction is issued on the concession of counsel for the Petitioner.

15. It is manifestly in the interest of the employees that a notification under Section 1(4) of the Act is issued as expeditiously as possible. The Respondent shall now proceed to do so within a period of three months from today, subject to due satisfaction of all the required conditions, in accordance with law.

16. The Petition is accordingly disposed of.

17. There shall be no order as to costs.

18. Parties be given a copy of this order duly authenticated by the Associate/Personal Secretary of this Court.

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