

District Exhibitors Association, Muzaffarnagar and others

Vs

Union of India and others

Civil Appeals Nos. 998-999 of 1991

(K. Jagannatha Shetty, Yogeshwar Dayal JJ)

25.04.1991

JUDGEMENT

YOGESHWAR DAYAL, J.:-

1. Civil Appeals Nos. 998 and 999 of 1991 have been filed against the judgment of the Division Bench of the Allahabad High Court dated 1 st March, 1990 whereby the Allahabad High Court dismissed the writ petitions filed by the District Exhibitors Association, Muzaffarnagar and others as well as some other Theatres upholding the Notification dated 30th April, 1986 issued by the Central Government under S. 5 read with sub-sec. (1) of S. 7 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'the Provident Funds Act'). The main judgment was delivered by the High Court in the Civil Miscellaneous Writ Petition filed on behalf of Shakti Theatre, Civil Lines, Bijnore, which was followed in the petition filed by the District Exhibitors Association, Muzaffarnagar and others and some other writ petitions. Before us also the Notification dated 30th April, 1986 of the Government of India, Ministry of Labour, amending the Employees' Provident Funds Scheme, 1952 (for short 'Scheme') issued under the Provident Funds Act has been challenged.

2. The Provident Funds Act came into force on 14th March, 1952. The preamble of the Act states that it is an Act to provide for the institution of provident funds, family pension fund and deposit-linked insurance fund for employees in factories and other establishments. The Act by S. 1(3) makes it applicable to every factory referred to in Cl. (a) and also to any other establishment referred to in Cl. (b) employing twenty or more persons or class of such establishments which the Central Government may, by Notification in the Official Gazette, specify in that behalf. The Scheme under S. 5 along with other schemes were issued in 1952. The Provident Funds Act by Notification of the Government of India issued on 31st July, 1961, under S. 1(3) was made applicable to cinema theatres employing twenty or more persons.

3. The Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981 (hereinafter referred to as 'the Cinema Theatre Workers Act'). received the assent of the President on 24th December, 1981, and was published in the Gazette on the same day. The Cinema Theatre Workers Act came into force with effect from 1 st October, 1984. The preamble of the Act says that it is to provide for the regulation of the conditions of employment of certain cine workers and cinema theatre workers and for matters connected therewith. S. 2(a) defines 'cinema theatre' to mean a place which is licensed under Part III of the Cinematograph Act, 1952, or under any other law for the time being in force in a State for the exhibition of cinematograph films. S. 24 enacts:

"The provisions of the Employees' Provident Funds and Miscellaneous Provisions

Act, 1952, as in force for the time being, shall apply to every cinema theatre in which five or more workers are employed on any day, as if such cinema theatre were an establishment to which the aforesaid Act had been applied by a notification of the Central Government under the proviso to sub-sec. (3) of S. 1 thereof, and as if each such worker were an employee within the meaning of that Act."

4. The Notification of the Government of India amending the Scheme under the Provident Funds Act was issued in conformity with S. 24 of the Cinema Theatre Workers Act. The impugned Notification dated 30th April, 1986 is being reproduced for facility of understanding the submissions made on behalf of the appellants :-

" NOTIFICATION

G.S.R. In exercise of the powers conferred by S. 5 read with sub-sec. (1) of S. 7 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), the Central Government hereby makes the following Scheme further to amend the Employees' Provident Funds Scheme, 1952 namely;

1. This Scheme may be called the Employees' Provident Funds (Amendment) Scheme, 1986.

2. In the Employees' Provident Funds Scheme in paragraph 1, in sub-paragraph (3) ' in Cl. (b) after item (XOVII) the following item shall be added, namely:

'(XOVII) as respect the Cinema Theatre employing 5 or more workers as specified in S. 24 of the Cine Workers and Cinema Theatres Workers (Regulation of Employment) Act, 1981 (50 of 1981) be deemed to have come into force with effect from the 1 st day of October, 1984'.

(No. S 35016/1/86-SSII)

Sd/- A. K. Bhattari

Under Secretary

30-4-1986"

5. A perusal of the Notification shows that the Scheme has been retrospectively made applicable in respect of cinema theatres employing five or more workers as specified in S. 24 of the Cinema Theatre Workers Act with effect from 1 st October, 1984 though the Notification was issued on 30th April, 1986. 1 st October, 1984 is also the date of coming into force of Cinema Theatre Workers Act.

6. Before the High Court the main arguments raised by the appellants were,-

a) that the Notification dated 30th April, 1986 was ultra vires of the provisions of the Provident Funds Act inasmuch as the Central Government could not extend the scheme to an establishment which is neither an industry nor a notified establishment under S. 3(b) of the Provident Funds Act;

b) that there was no liability under the Scheme framed by the Central Government to make contribution towards the provident fund in respect of the employees who ceased to be a cinema employee before the Provident Funds Act came into force from 30th April, 1986; and

c) that the demand of the Provident Funds Commissioner from the employers about the arrears of contribution even for pre-discovery period i.e. the date from which the Scheme became applicable to employers, who were called upon to pay contribution by notice, leads to hardship and injustice and, therefore, violates Art. 14 of the Constitution.

7. The High Court while dealing with, these submissions took the view that S. 24 of the Cinema Theatre Workers Act has applied the provisions of the Provident Funds Act to every cinema theatre in which five or more workers were employed on any day, as if such cinema theatre were an establishment to which the provisions of the Provident Funds Act had been applied by a Notification of the Central Government under the proviso to Cl. (b) of sub-sec. (3) of S. 1 of the Provident Funds Act. The High Court, in view of the averments made in the counter-affidavit filed on behalf of the respondent as well as on the interpretation of the Scheme, took the view that only those employees who were in employment on 30th April, 1986 and had not ceased working in a cinema in respect of whom the benefit was being claimed, could be entitled to get the benefit of the Scheme. In the notice the demand of contribution was sought under the Scheme in respect of the employees working on 30th April, 1986 with effect from 1st October, 1984. The High Court took the view that since the demand was made for the employers' contribution in respect of the employees who were working on 30th April, 1986, it was wrong to argue that the Scheme was being incorrectly applied. Those workers who had left the cinema and had ceased to be its workers on 30th April, 1986, would certainly not be entitled to any benefit under the Scheme. Regarding the challenge to the demand by the Provident Fund Commissioner from the employers about the arrears of contribution, the High Court felt that there was no substance in that argument.

8. Before us Mr. Satish Chandra, learned counsel for the appellants submitted:

i) that the Provident Funds Act would not be applicable so long as the Notification as required by the proviso to S. 1(3)(b) has not been issued;

ii) even if we assume that S. 24 of the Cinema Theatre Workers Act takes the place of a Notification being issued as contemplated by the proviso to S. 1(3) (b) of the Provident Funds Act, an express Notification under S. 5 is required to make the Scheme applicable to those establishments and without such a Notification the Scheme will not be applicable;

iii) that under S. 6 of the Provident Funds Act, the liability is only fixed for employers' share of contribution towards Provident Fund and there is no liability fixed to pay employees' share, and unless paragraph 36 of the Scheme is made applicable there is no liability of the employers to pay employees' share;

iv) that the Notification is very harsh and unjust as the appellants are being asked to pay the contribution of the employees' share to the Provident Fund Account retrospectively without the corresponding right of employer to recover it from the wages of employees.

9. It may be mentioned that the vires of any of the provision of the Provident Funds Act or the Scheme has not been challenged before us. As would be seen from the preamble of the Provident Funds Act, the Act is intended for the benefit of the employees. It is also so clear from its objects and reasons extracted below:-

"The question of making some provision for the future of the industrial worker after he retires or for his dependants in case of his early death, has been under consideration for some years. The ideal way would have been provision through old age and survivors' pensions as has been done in the industrially advanced countries. But in the prevailing conditions in India the institution of a pension scheme cannot be visualised in the near future. Another alternative may be for provision of gratuities after a prescribed period of service. The main defect of a gratuity scheme, however, is that amount paid to a worker or his dependants would be small, as the worker would not himself be making any contribution to the fund. Taking into account the various difficulties, financial and administrative, the most appropriate course appears to be the institution compulsorily of contributory provident funds in which both the worker and the employer would contribute. Apart from other advantages, there is the obvious one of cultivating among the workers a spirit of saving something regularly. The institution of a provident fund of this type would also encourage the stabilisation of a steady labour force in industrial centres."

10. It is a legislation for the benefit of the weaker sections of the society and the beneficial legislation is made applicable to cinema theatre if it employs five or more workers. The classification of cinema theatres as a separate class for purposes of coverage under the Provident Funds Act has also not been challenged.

11. Further no challenge has been made to any of the provisions of the Cinema Theatre Workers Act.

12. Before we deal with the submissions of learned counsel for the appellants we may notice the relevant part of provisions of the Provident Funds Act and the Scheme. S. 1(3) of the Provident Funds Act reads as follows:

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 1 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."

13. Section 5(1) and (2) provides as follows:-

"5. Employees' Provident Fund Schemes-

(1) The Central Government may, by notification in the Official Gazette, frame a Scheme to be called the Employees' Provident Fund Scheme for the establishment of provident funds under this Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply and there shall be established as soon as may be after the framing of the Scheme, a Fund in accordance with the provisions of this Act and the Scheme.

(I-A)◆.. ..... ..

(I-B)..... ..

(2) A Scheme framed under sub-sec.(1) may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in the Scheme."

14. The relevant part of S. 6 reads as follows:-

"6. Contributions and matters which may be provided for in Schemes - The contribution which shall be paid by the employer to the Fund shall be eight and one-third per cent of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employee, whether employed by him directly or by or through a contractor, and the employee's contributions shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding eight and one-third per cent of his basic wages, dearness allowance and retaining allowance, if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section."

15. Para' 1(1) and relevant parts of paras 1(3)(a) and 1(3)(b) of the Scheme read as follows.-

"1. Short title and application- (1) This Scheme may be called the Employees' Provident Funds Scheme, 1952.

(2)◆.. ..... ..

(3) (a) Subject to the provisions of Ss. 16 and 17 of the Act, this Scheme shall apply to all factories and ' other establishments to which the Act applies or is applied under sub sec. (3) or sub-sec. 4(1) of S. 1 or S. 3 thereof:

..... ..

(b). Provisions of this Scheme shall-

◆.. ..... ..

(xcviii) as respect the cinema theatres employing 5 or more workers as specified in S.24 of the Cine-Workers and Cinema Theatres Workers (Regulations of Employment) Act, 1981 (50 of 1981) be deemed to have come into force with effect from the 1 st day of October, 1984."

16. The relevant parts of paras 30 and 32 of the Scheme read as follows:-

"30. Payment of contribution-

(1) The employer shall, in the first instance, pay both the contribution payable by himself in this Scheme referred to as the employer's contribution and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member in the Scheme referred to as the member's contribution.

(2) ♦♦ .. ..... ♦♦♦♦

(3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.

Explanation-♦♦ .. ..... ♦♦♦♦

32. Recovery of a member's share or contribution--

(1) The amount of a member's contribution paid by the employer or a contractor shall, notwithstanding the provisions in this Scheme or any law for the time being in force or any contract to the contrary, be recoverable by means of deduction from the wages of the member and otherwise:

Provided that no such deduction may be made from any wage other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable:

..... ♦♦♦♦

Provided further that where no such deduction has been made on account of an accidental mistake or a clerical error, such deduction may, with the consent'in writing of the Inspector, be made from the subsequent wages.

(2) to (3) ♦♦♦♦♦♦♦♦♦♦ .. ♦♦♦♦♦♦♦♦♦♦ .. ♦♦♦♦♦♦♦♦♦♦ ..

17. A combined reading of S. 6 of the Provident Funds Act and paras 30 and 32 of the Scheme is that the contribution in the Provident Fund is to be 12 1/2% of the basic wages and dearness allowance, that is to be borne equally by the employer and the employee and that the employer is to pay the whole of it, half on his account, and the other half on account of the employee and he is to recoupe himself by deducting it from the wages of the employee.

18. A bare reading of S. 24 of the Cinema Theatre Workers Act shows that it has fulfilled the purpose of the Notification which the Central Government could have issued under S. 1(3)(b) of the Provident Funds Act read with the proviso. Therefore, no further Notification as contemplated by S. 1(3)(b) of the Provident Funds Act was necessary. S. 24 has taken the place of the Notification contemplated by S. 1(3)(b) of the Provident Funds Act read with the proviso thereto. The'refore the

Provident Funds Act became applicable to the theatres who employ five or more workers with effect from 1st October, 1984. Again in view of S. 6 of the Provident Funds Act, noticed earlier, the employers became liable to pay their contribution to the fund as soon as the Act came into force i.e. w.e.f. 1st October, 1984.

19. It is also clear from reading of S. 5 of the Provident Funds Act that before the Provident Funds Scheme can become applicable, the Central Government has to frame a Scheme and also specify the establishment to which the said Scheme shall apply. Till the impugned Notification dated 30th April, 1986 was published the Scheme was not applicable to such cinema theatres who are employing less than 20 employees and it became applicable to cinema theatres employing five or more workers only when the impugned Notification was issued under S. 5 of the Provident Funds Act. It is only by the impugned Notification that the Scheme was amended so as to be made applicable in respect of the cinema theatres employing five or more persons. Without such a Notification the Scheme would not have become applicable. The Notification on the face of it shows that the Scheme has been made applicable to the cinema theatres covered by the Notification with effect from 1st October, 1984. This could be done in view of not only the provisions of S. 5(2) of the Provident Funds Act but also in view of S. 7(1) of the Provident Funds Act. Both these provisions confer express powers of making the Scheme applicable retrospectively.

20. The question, however, is whether by making the Scheme with retrospective operation, the employer could be saddled with the liability to pay employees' contribution w.e.f. 1st October, 1984 and if not from what other date? The answer to the question turns, upon the implementation of the Scheme and in particular the giving effect to paras 30 and 32 of the Scheme. Para 30 provides that the employer shall, in the first instance, pay both the contributions payable by himself and also the contribution payable by the employees. It shall be the responsibility of the principal employer to pay both the contributions payable by himself and also in respect of the employees directly employed by him and also in respect of the employees employed by him or through a contractor. Para 32 confers upon the employer the right to recover the employees contribution that has been paid by him under para 30. That could be recovered by the employer by means of deduction from the wages of the employees who are liable to pay. First proviso to para 32(1), however, limits that liability in expressly stating that no such deduction may be made from any wage other than that which is paid in respect of the period of which the contribution is payable. It is obvious from paras 30 and 32 that the employer has to pay the contribution of the employee's share but he has a right to recover that payment by deducting the same from the wages due and payable to the employees. It is significant to note that the deduction is not from the wages payable for any period, but only from the wages for the period in respect of which the contribution is payable and no deduction could be made from any other wages payable to the employees. In other words, the payment of employees contribution by the employer with the corresponding right to deduct the same from the wages of the employees could be only for the current period during which the employer has also to pay his contribution.

In the instant case, for the period from 1st October, 1984 up to the date of the impugned Notification the employer has paid the full wages to the employees since during that period, there was no scheme applicable to his establishment. By retrospectively applying the Scheme could he be asked to pay the employees contribution for the period antecedent to the impugned notification. We think not. The Act and the Scheme neither permit any such payment nor deduction. He cannot be saddled with the liability to pay the employees' contribution for the retrospective period, since he has no right to deduct the same from the future wages payable to the employees.

21. Mr. Vikram Mahajan, learned counsel for the Central Government submitted that it may be

possible for the employers to make deduction from subsequent wages of the workmen with the consent in writing of the Inspector as required under the third proviso to para 32(1) of, the Scheme. This submission cannot be accepted since the third proviso could be taken advantage of by the employer only where no deduction has been made from the wages of the employees due to accidental mistake or clerical error when the Scheme is operative. Such deduction which has not been made by accidental mistake or clerical error could be made from the subsequent wages with the consent in writing of the Inspector concerned. The case with which we are concerned is not covered by the third proviso. It is not the case of anybody that the employer could not make deduction from the wages of the employees by accidental mistake or clerical error. The employer indeed could not have made the deduction prior to the impugned notification dated 30th April, 1986 since the Scheme was not then applicable. The Scheme has been given retrospective effect w.e.f. 1st October, 1984. The employer, therefore, cannot take the benefit of the third proviso to para 32(1) for deducting the employees contribution in their wages payable in future.

22. Reference was also made to the decisions of this Court in *M/ s. Orissa Cement Ltd. v. Union of India*, (1962) Supp (3) SCR 837: (AIR 1962 SC 1402) and in *M/ s. Lohia Machines Ltd. v. Union of India*, (1985) 2 SCR 686 : (AIR 1985 SC 421) by learned counsel for the appellants in support of his contentions. It will be noticed that the Supreme Court in *Orissa Cement Ltd.* was concerned with the validity of certain Notifications which were struck down as infringing Art. 19(1)(g) of the Constitution. The decision has no applicability to the facts of the present case. Equally, the decision in *Lohia Machines Ltd.* has also no applicability to the facts of the present case.

23. In the result and for the foregoing reasons, we allow the appeals as indicates above by setting aside the judgment of the High Court. We declare that the appellants are not liable to pay the employees contribution for the period from Ist October, 1984 to 30th April, 1986.

24. In the facts and circumstances of the case, however, we make no order as to costs.

Appeals allowed.

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