REGIONAL PROVIDENT FUND COMMISSIONER, ANDHRA PRADESH

v.

SHRI T. S. HARIHARAN

April 1, 1971

[J. M. SHELAT, I. D. DUA AND V. BHARGAVA, JJ.]

Employees' Provident Fund Act, 1957, s. 1(3)(a) & (b)—Employment of more than 20 persons—Casual labour whether to be included for determining number of employees—Minimum period of employment whether can be laid down.

The respondent ran a hotel. Due to failure of water supply he had to employ some persons to bring water from the tank for a short period. The Provident Fund Commissioner sought to enforce the provisions of the Employees' Provident Funds Act, 1957 and the Provident Fund Scheme, 1952, against him. The respondent thereupon filed a writ petition in the High Court. It was held by the High Court that employment of more than twenty persons for a short period did not bring an establishment within the proviso of s. 1(3) (a) & (b) of the Act. It was also held that only those employees should be taken into consideration who were in employment for the full period of one year. While thus laying down the legal position the High Court left it to the authorities under the Act to apply the law to the facts of each case and dismissed the respondent's petition. The Provident Fund Commissioner appealed to this Court for further clarification.

HELD: Considering the language of s. 1(3)(b) in the light of the provisions of s. 16 and s. 1(5) as well as the general scheme and object of the Act it would appear that employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business prosperity or its financial capacity or stability from which it can reasonably be concluded that the establishment can in the normal way bear the burden of the contribution towards the provident fund under the Act, would not be covered by the definition. The word 'employment' must therefore be construed as employment in the regular course of business of the establishment, such employment obviously would not include employment of a few persons for a short period on account of some passing necessecity or some temporary emergency beyond the control of the company. The High Court was right in holding so. But it went wrong in holding that the sub-section contemplated the required number of persons to work in the establishment continuously for one year. It was difficult to impute to the Legislature an intention to exclude from the application of the Act an establishment which regularly employs for its general business the required number of persons for a major part of the year, say for 360 days every year, merely because the employment of the required number does not extend to full one year. Therefore the question must be determined in each case on its own peculiar facts. [313C-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1128 of 1967.

A Appeal from the judgment and order dated September 1, 1964 of the Andhra Pradesh High Court in Writ Petition No. 907 of 1963.

L. M. Singhvi and *S. P. Nayar*, for the appellant.

B The respondent did not appear.

The Judgment of the Court was delivered by

Dua, J.—The appellant in this appeal by certificate granted by the Andhra Pradesh High Court on February 25, 1965 under Art. 133 (1) (b) of the Constitution is the Regional Provident Fund Com-
C missioner, Andhra Pradesh. A large number of writ petitions by various parties were filed in the High Court praying for writs in the nature of mandamus directing the appellant to forbear from enforcing or taking other proceedings under the provisions of the Employees' Provident Funds Act, 1957 (hereinafter called the Act) and the Provident Fund Scheme, 1952. With the exception of
D perhaps one writ petition, all the rest, including W. P. 907 of 1963 presented by T. S. Hariharan, Proprietor, New Cochin Cafe, Ongole, respondent in this Court were dismissed. Certificates under Article 133 (1) (b) of the Constitution were secured by the appellant in almost all the cases but the present is the only appeal which now survives, all the rest having been dismissed for non-
E prosecution.

The writ petition of the respondent was dismissed which means that the final order made by the High Court was in favour of the appellant. The only grievance raised by the appellant's learned counsel in this Court was that the High Court had in the course of its judgment expressed the view that Clause (a) and
F (b) of sub-section (3) of Section 1 of the Act do not cover casual labour and since this expression of opinion which he considers to be legally erroneous would be binding on the appellant in administering the Act, it was necessary to have the correct legal position enunciated by this Court. According to the appellant's learned counsel the following passages in the judgment of the High Court
G clearly bring out the arguments both for and against the legal position convassed by him :—

> "We have next to consider whether clauses (a) and (b) of Section 1(3) are wide enough to cover casual labour. It is maintained by the learned Government Pleader that requirement as to the numerical strength is satisfied if
H twenty persons are engaged in connection with the work of an establishment even for a day or a fraction thereof. This argument is sought to be reinforced by the unreported judgment of a Division Bench of the Madras High

Court in Writ Appeal No. 193 (183 ?) of 1962. It is true that this ruling vouchers the proposition advanced by the learned Government Pleader. The learned Judges there observed :

> "It is admitted on behalf of the applicant that fifty people worked at least for one day in each year. This, in our opinion, will be sufficient to bring the case within the purview of section 1(3) of the Act. The Act is an ameliorative measure extended to benefit the permanent workers of an establishment. What is necessary for those permanent workers to get the benefit is that there should be fifty workers in that factory. In our view, it would be sufficient if that condition is satisfied at least for one day."

With great respect, we are unable to subscribe to the rule stated therein. It is true that this legislative measure is an ameliorative one. All the same, it cannot be overlooked that benefits are intended to be conferred on workmen in establishments that are in a position to employ twenty or more persons. It may be incidentally mentioned here that originally, i.e., prior to the Amendment Act, 46 of 1960 the number of employees in the establishment that would be brought within the scope of Section 1(3) was fixed at fifty.

We find it difficult to agree with the view that twenty or more persons can be said to be employed or that an establishment employs twenty or more persons merely because on one day or two days the services of twenty or more persons were engaged for a particular purpose. To accept this contention would be to unduly enlarge the content of the Section. To attract the applicability of Section 1 (3) the number of persons should come upto minimum of twenty. The underlying idea seems to be that the establishment should have twenty persons on its muster rolls and working regularly.

Could it be asserted that a factory gives employment to twenty persons merely because twenty persons are engaged by that factory on a particular day for some special job. In our opinion, the answer must be in the negative. The sub-section contemplates the required number of people working continuously in the factory or other establishment in a year.

The other passage occurs a little lower down in that judgment :—

> "Section 19-A also seems to strengthen our view. A doubt as to the number of persons employed in an establishment could arise only if the employment of twenty persons in the establishment were a normal feature. A legitimate doubt cannot be said to arise if the condition as to the number is satisfied if twenty persons work in the establishment even for a day or two. It is not necessary for us to labour this point any further as we feel that the provisions of the Act are inapplicable to establishments which do not employ twenty or more persons to work therein for a period of one year. It follows that 'casual labour' falls outside the scope of section 1(3). The fact that the casual labour is engaged by or through a contractor does not make any different for the decision of the question, the only criterion being whether they were casual labourers or not.
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> On this discussion, it follows that the establishments whose employees do not come upto twenty, excluding casual labourers, do not fall within the purview of Section 1(3) and so the provisions of the Scheme cannot be applied to them. The respondents will, therefore, examine this question in the light of these observations and decide whether the Scheme should be applied to any of these establishments excluding casual labour."

The appellant's learned counsel had at one stage of his arguments stated that his client was anxious merely to steer clear of the observations made by the High Court that "the provisions of the Act are inapplicable to establishments which do not employ 20 or more persons to work therein for a period of one year." But while citing certain decided cases he did appear to canvas for the wide proposition that employment of a person for however short a period would be employment for the purpose of determining the number of persons employed as contemplated by Section 1 (3) (a) and (b) of the Act. He relied on the Bench decision of the Madras High Court reported as *Messrs East India Industries (Madras)* v. *Regional P. F. Commissioner*[1] (this decision was also cited in the High Court as an unreported judgment) and pressed us to uphold the reasoning adopted therein.

The question requiring our determination is a very short one. As there is no representation on behalf of the respondent in this Court and, therefore, we do not have the benefit of the respondent's point of view we propose to confine ourselves strictly to the

(1) [1964] 1 L. L. J. 441

limited question of the scope of clauses (a) and (b) of sub-section (3) of Section 1 and this judgment is not intended to be considered as expressing any opinion on other controversial aspects. Before considering the relevant provisions of the Act it may be pointed out that according to the respondent's writ petition presented in the High Court in August, 1963, the New Cochin Cafe (treated as a hotel) was started in Ongole town on November 20, 1956 and the respondent usually employed only 18 or 19 persons. In 1961 there was total failure of rains in the Ongole region and that town was particularly hard hit. The respondent had to employ two or three persons on contract basis for supplying water to the hotel. Those persons were engaged from June to September, 1961. The appellant has not questioned the correctness of these assertions for the purpose of this appeal. Let us now examine the relevant provisions of the Act.

The Act was brought on the statute book for providing for the institution of provident fund for the employees in factories and other establishments. The basic purpose of providing for provident funds appears to be to make provision for the future of the industrial worker after his retirement or for his dependants in case of his early death. To achieve this ultimate object the Act is designed to cultivate among the workers a spirit of saving something regularly, and also to encourage stabilisation of a steady labour force in the industrial centres. This Act has since its initial enactment been amended several times to extend its scope for the benefit of industrial workers. We are, however, concerned with the Act as it stood in 1962 when notice was sent by the appellant to the respondent stating that the provisions of the Act had been made applicable to his establishment. Sections 1 (3) (a) and (b), 4 and 5 may now be reproduced :

"Section 1

(3) Subject to the provisions contained in section 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

A establishment employing such number of persons less than fifty as may be specified in the notification."

Sub-Section 4

"Notwithstanding anything contained in sub-section (3) of this section or sub-section (1) of section 16, where it appears to the Central Government, whether on an application made to it 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 it may by notification in the Official Gazette, apply the provisions of this Act to that establishment."

Sub-Section 5

"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 :

Provided that where, for a continuous period of not less than one year the number of persons employed therein has been less than fifteen, the employer in relation to such establishment may cease to give effect to the provisions of this Act and any scheme framed thereunder, with effect from the beginning of the month following the expiry of the said period of one year, but he shall, within one month of the date of such cessation, intimate, by registered post, the fact thereof to such authority as may be specified by appropriate Government in this behalf."

The original Act was applicable to establishments which were factories engaged in the six industries specified in Schedule I but as a result of persistent demands for extension of provident fund benefits to all industrial workers, the Act was amended in 1956 by Act 94 of 1956 so as to enable its extension to other establishments as well. Earlier, it may be pointed out, it was amended in 1953. It is unnecessary to give the details of the various amendments.

We now turn to the relevant definition clauses contained in Section 2. These definitions are subject to the context providing otherwise. In Clause (f) "employee" is defined to mean any person who is employed for wages in any kind of work manual or otherwise in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer and includes any person employed by or through a contractor in or in connection with the work of the establishment. Clause

(h) defines "Fund" to mean the provident fund established under a Scheme. "Member" is defined in Clause (j) to mean a member of the Fund and "Scheme" is defined in Clause (l) to mean a scheme framed under the Act. Section 5 provides for the framing of a scheme called the Employees' Provident Fund Scheme by the Central Government. Section 6 makes provision for contribution by the employer and the employee to the Fund. Section 14 provides penalties for evasion of payments under the Act or the Scheme. Section 16 which excludes from the applicability of the Act establishments belonging to Government or local authority and also infant factories, reads :

> "16. Act not to apply to establishments belonging to Government or local authority and also to infant industries.:
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> This Act shall not apply—
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> (a) to any establishment registered under the Co-operative Societies Act, 1912, or under any other law for the time being in force in any State relating to co-operative societies, employing less than fifty persons and working without the aid of powers; or
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> (b) to any other establishment employing fifty or more persons or twenty or more, but less than fifty, persons until the expiry of three years in the case of the former and five years in the case of the latter, from the date on which the establishment is, or has been, set up.
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> *Explanation.*—For the removal of doubts, it is hereby declared that an establishment shall not be deemed to be newly set up merely by reason of a change in its location.
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> (2) If the Central Government is of opinion that having regard to the financial position of any class of establishment or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt that class of establishments from the operation of this Act for such period as may be specified in the notification."

Section 17 invests in the appropriate Government power to exempt certain establishments from the operation of all or any of the provisions of any scheme. Section 19-A vests in the Central Government power to remove difficulties by making necessary provision or giving directions not inconsistent with the provisions of

A the Act. The order of the Central Government made under Section 19-A for removing doubts and difficulties is clothed with finality.

The narrow question which directly arises for our consideration is whether Clause (b) of sub-Section (3) of Section 1 when
B it speaks of the establishment employing 20 or more persons means that the person so employed may be employed by the establishment for any purpose whatsoever and for however short a duration or that the employment must be for some minimum period in the establishment. The language used in the clause does not give any clear indication. We have, therefore, to construe this word
C in the light of the legislative scheme, the object and purpose of enacting this clause and the ultimate effect of adopting one or the other construction. The relevant sections of the statute have already been reproduced.

Section 16 which has already been set out in extenso seems to
D us to throw considerable light on the point raised. It may be recalled that this section excludes from the applicability of the Act establishments belonging to the Government and to local authorities and infant establishments. It is, therefore, obvious that this Act is intended to apply only where an establishment has attained sufficient financial stability and is prosperous enough to
E be able to afford regular contribution provided by the Act. Contribution by the employer is an essential part of the statutory scheme for effectuating the object of inducing the workmen to save something regularly. The establishment, therefore, must possess stable financial capacity to bear the burden of regular contribution to the Fund under the Act. In this connection it may be recalled that by virtue of Section 1 (5) an establishment to which
F the Act is applied continues to be governed by the Act notwithstanding that the number of persons employed by it at any time falls below the required number. This liability to be governed by the Act ceases only if the terms of the Proviso to Section 1(5) are complied with. The financial capacity of the establishment to bear the burden must, therefore, have some semblance of a
G reasonably long term stability. In other words, the employment of requisite number of persons must be dictated by the normal regular requirement of the establishment reflecting its financial capacity and stability. It, therefore, follows from this that the number of persons to be considered to have been employed by an establishment for the purpose of this Act has to be determined by taking
H into account the general requirements of the establishment for its regular work which should also have a commercial noxus with its general financial capacity and stability. This seems to us to be the correct approach under the statutory scheme.

To accede to the appellant's argument would lead to some startling consequences. By way of illustration, if for the purpose of extinguishing accidental fire an establishment is compelled to employ a few persons for about a couple of hours, even then, however weak and unstable its general financial capacity, the establishment would be covered by the Act and would have to contribute towards the provident fund for the benefit of its regular employees, of course, excluding those whose services were utilised for a short while for extinguishing the fire. In this illustration we are assuming that the employees would have no objection to being governed by the Act. This, in our opinion, could never have been the intention of the legislature. Similarly, we find it difficult to impute to the legislature an intention to exclude from the application of the Act an establishment which regularly employs for its general business the required number of persons for a major part of the year, say, for 360 days every year, merely because the employment of the required number does not extend to full one year. Both the extreme views, the one canvassed on behalf of the appellant and the other postulated in the observation of the High Court that the required number of persons must continuously work in the establishment for one year, do not conform to the scheme and object of the Act and are, therefore, unacceptable.

Considering the language of Section 1 (3) (b) in the light of the foregoing discussion it appears to us that employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can reasonably be concluded that the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by this definition. The word "employment" must, therefore, be construed as employment in the regular course of business of the establishment; such employment obviously would not include employment of a few persons for a short period on account of some passing necessity or some temporary emergency beyond the control of the company. This must necessarily require determination of the question in each case on its own peculiar facts. The approach pointed out by us must be kept in view when determining the question of employment in a given case.

The appellant's learned counsel argued that in the present case the respondent has to employ a few persons every year regularly from June to September for supplying water to the hotel because of failure of rains. This, according to him, would be a regular employment and the High Court was wrong in holding to the contrary. There is no finding of the High Court to this effect and

A indeed no attempt was made before us also to substantiate this bald assertion. We are, therefore, unable to accept this contention on the present record. The general approach of the High Court to the problem raised in this case seems to us to be, broadly speaking, correct; so is its final conclusion. The only observa-
B tion of the High Court which required consideration is that the sub-section in question contemplates the required number of persons to work in the establishment continuously for one year. On this point we have clarified the legal position. As the High Court has dismissed the writ petition after clarifying the points of law raised leaving it to the appropriate authority to finally decide the controversy on a consideration of all the facts and circumstances
C we do not propose to say anything more in this appeal which has been heard *ex parte*. With the aforesaid clarification of the legal position we dismiss this appeal. As there is no representation on behalf of the respondent there will be no order as to costs.

G.C. *Appeal dismissed.*