

CIVIL MISCELLANEOUS

Before D. Falshaw C. J., and A. N. Grover, J.

M/s. KAPURBHIMBAR UNION, —Petitioner.

versus
before

THE REGIONAL PROVIDENT FUND COMMISSIONER, AND
ANOTHER, —Respondents.

Civil Writ No. 297 of 1964.

*Employees' Provident Funds Act (XIX of 1952) — S s. 6 and 8
Provident Fund Commissioner — Whether entitled to recover em-
ployers' contribution and administration charges in respect of the
period prior to discovery that certain establishment is covered by the
Act and in respect of employees who have left service prior to such
discovery.*

1964

Sep.,

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Held, that the liability to contribute to the provident fund under the Employees Provident Fund Act, 1952, commenced from 1st November, 1952. Under Chapter V of the scheme (paragraphs 29 to 33), the employer and the eligible employees had to make contribution to the fund from the 1st November, 1952. This contribution had to be made initially by the employer on his own behalf as also on behalf of the employees, the share of the employees being realisable from out of their wages. An employer is, nevertheless, liable to contribute to the provident fund employers' contribution as well as employees' contribution together with administration charges in respect of the period prior to the discovery by the Provident Fund Commissioner that the employer was covered by the Act but that he had not paid the contribution under the Act. The employer is also liable to make contributions in respect of the employees who were qualified to be the members of the provident fund on 1st November, 1952, but had left service before the discovery as it was the duty of the employer to require those employees who fulfilled the conditions mentioned in paragraph 26 of the Provident Fund Scheme to become members of the fund and pay their contributions even during the pre-discovery period. If the employer defaulted in his duty, he is liable to make the contributions under the Act.

Petition under Article 226 of the Constitution of India, praying that a writ of mandamus, or any other appropriate writ, orders or directions be issued quashing the order requiring the deposit of Employee's share of Provident Fund contribution for the period from 1st January, 1961 to 31st to May, 1963 as conveyed in the letter, dated 18th May, 1963.

D. C. GUPTA AND J. V. GUPTA, ADVOCATES, for the Petitioner.

C. D. DEWAN, DEPUTY ADVOCATE-GENERAL AND S. S. DEWAN, ADVOCATES, for the Respondents.

ORDER

Grover, J.

GROVER, J.—This judgment shall dispose of Civil Writ No. 297 of 1964 and five connected petitions (Civil Writs Nos. 304 of 1964, 305 of 1964, 306 of 1964, 375 of 1964 and 460 of 1964) in which a common question of law is involved.

It is necessary to state the facts in the first petition only. The petitioner is a partnership concern carrying on business of manufacturing machine tools and is registered under the Factories Act since 1958. By a letter dated 14th June, 1962, the Regional Provident Fund Commissioner (to be referred to as the Commissioner) appointed under the Employees' Provident Funds Act, 1952 (hereinafter called the Act), called for some information in a *pro forma* which was annexed to the letter with a view to examine whether the petitioner concern fell within the purview of the Act because by means of a Government of India notification dated 7th March 1962, the Act and the scheme framed thereunder had been made applicable to every trading and commercial establishment employing 20 or more persons. This information was furnished along with the communication dated 18th June, 1962. It was stated in the *pro forma* (copy Annexure "B/1") that the number of all categories of employees employed as on 30th April, 1962, was 15. On 18th May, 1963, the Commissioner wrote to the petitioner saying that according to the enquiries made by the Department the petitioner concern was engaged in industry as specified in schedule I of the Act, as amended and it employed 20 persons as on 31st December, 1960, and had also completed 5 years of establishment as provided under section 16(b) of the Act. As such it was covered by the provisions of the Act and the scheme framed thereunder with effect from 1st January, 1961. He further proceeded to say—

"Keeping, however; in view the fact that your factory/establishment has been discovered for coverage under Employees' Provident Funds Act, 1952 at a later stage, you are allowed, as a special case, to deposit only the employer's share of Provident Fund contributions and adm. charges at the rate of 3 per cent on both employees' and employer's shares of contributions for the pre-discovery period, i.e., 1st January,

1961 to 31st May, 1963. As far as arrears of M/s. Kapur-
 bhimbar Union.
 contributions of employees' share for the said v.
 period are concerned, these may be left to the The Regional
 workers concerned to pay the same if they so Provident Fund
 desire. The Employees' Provident Fund Commissioner
 Scheme, 1952 should, however, be applied in and another
 full from 1st June, 1963 in your factory/
 establishment." Grover, J.

The attention of the petitioner was also invited to the consequences of the nature of criminal prosecution and levying of damages, etc., and other charges which would follow in case the Provident Fund contributions and administration charges were not deposited within a certain time. It is clear from Annexure "D" that the Commissioner informed the petitioner about the Code number allotted to it and that it had been covered under the Act with effect from 1st January, 1961. On 27th May, 1963 the petitioner wrote to the Commissioner saying that under the law it was not liable to pay contributions to the fund retrospectively for the pre-discovery period and referred to certain judgments of the Madras and the Calcutta Courts on the point. On 8th August, 1963, the Commissioner sent a reply saying that since the Punjab High Court had held that the employer of a factory was liable to report compliance from the date from which the Act became applicable to the factory, the petitioner had been rightly directed to deposit the Provident Fund dues and submit the relevant returns from 1st January, 1961 to date. The petitioner approached the Government of India by means of a representation, but he was informed that his case was not covered by section 19-A of the Act.

Mr. Dalip Chand Gupta, who represents the petitioner in five of the petitions, contends that respondent No. 1 had no jurisdiction to demand contributions for what is called the pre-discovery period, i.e., the period prior to the date when the Employees' Provident Funds Scheme, 1952 (to be referred to as the scheme) came to be enforced by the Commissioner in its entirety. For instance, in Kapurbhimbar Union's case, the facts of which have been set out, the scheme was sought to be applied in full with effect from 1st June, 1963, although for the period 1st January, 1961 to 31st May, 1963 a demand was made to deposit the contribution in the fund of the employer's share only on the

M/s. Kapur-
bhimbar Union.
v.
The Regional
Provident Fund
Commissioner
and another

Grover, J.

ground that the aforesaid concern was covered by the Act with effect from 1st January, 1961. It is pointed out that a number of employees for the relevant period had left service and thus the direction given by the Commissioner is impossible of performance. In the return filed in that case, this position is controverted and it is stated that according to the enquiries made, as many as 21 employees left the service of the employer on different dates, but they had qualified for membership to the fund, i.e., they had served the concern for more than 240 days before the date of coverage, namely, 1st January, 1961. A list of these employees along with the dates from which they qualified and the dates till which they were entitled to recover the amount as also the present addresses as supplied by the petitioner has been attached as Annexure "R/3" to the return.

It would have been necessary to refer to all the relevant provisions of the Act and the scheme if the matter had been *res integra* but in a previous Bench decision of this Court in *Prem Narain Aggarwal v. Union of India* (Letters Patent Appeal No. 2-D of 1956) decided on 13th February, 1957, it was held that the liability to contribute to the fund commenced from 1st November, 1952. Under Chapter V of the scheme (paragraphs 29 to 33), the employer and the eligible employees had to make contribution to the fund from the 1st November, 1952. This contribution had to be made initially by the employer on his own behalf as also on behalf of the employees, the share of the employees being realisable from out of their wages. In that case also the Commissioner had called upon the employers to deposit only their share from November, 1952 and the order was sustained on the ground that the employers were under an obligation to contribute to the fund with effect from the date the scheme came into force under the Act. The Bench affirmed the view expressed by my Lord Falshaw J., (as he then was) against whose judgment the appeal had been brought under clause 10 of the Letters Patent which was disposed of by it. In a later case also in *Haji Nadir Ali Khan v. The Union of India* (1), my Lord Falshaw J. upheld the order made by the Commissioner calling upon the employers in 1955 to deposit the contribution due as from 1st November, 1952.

in respect of the employees, who had completed one year's service with the employers by that date. Naturally the Bench decision was followed.

Mr. Gupta says that in *Aluminium Corporation of India, Ltd. v. Regional Provident Fund Commissioner* (2), P. B. Mukharji, J. has expressed the view that neither section 6 of the Act nor paragraph 29 of the scheme permits an option to employees to pay or not to pay their contribution. Those provisions insist that the employees' contribution shall be equal to the employer's contribution. An order, therefore, exempting the employees to pay their contribution is inconsistent with the provisions of the Act and it would be entirely against the purpose and objects of the Act to apply a scheme retrospectively. In that case the company which had been called upon to make the contribution under the Act had formulated its own provident fund scheme which had been in operation since 1944. The learned Calcutta Judge felt that it would be contrary to the purposes of the Act to apply a scheme retrospectively to a company for a period within which time some of the employees had already left and presumably left by taking their provident fund accumulations. The Government, by asking the employer to replenish and refund even those moneys, was doing something illegal. The position, therefore, in that case was different and although the trend of the reasoning of the learned Judge appears to support the argument of Mr. Gupta, the Calcutta decision cannot be taken to be an authority for the view that the Commissioner could not call upon the employers in the present cases to deposit contribution with regard to the period called the pre-discovery period. The Calcutta decision was followed by a learned Single Judge of the Madras Court in *K. R. Subbaier v. The Regional Provident Fund Commissioner* (3). According to Jagadisan J., the gist of the provisions of the Act relating to payment of contribution towards provident fund by the employer is such as to make them operative only from the point of time when the authorities hold that a particular unit is within the ambit of the Act and make a consequential demand in terms of the Act and the scheme. A demand for a back period is not merely illogical and

M/s. Kapur-
bhimbar Union.
v.

The Regional
Provident Fund
Commissioner
and another

Grover, J.

(2) A.I.R. 1958 Cal. 570.

(3) A.I.R. 1963 Mad. 112.

M/s. Kapur-
bhimbar Union.

v.

The Regional
Provident Fund
Commissioner
and another

Grever, J.

oppressive but plainly inconsistent with the terms of the enactments which are manifestly prospective in their operation. The learned Judge in that case appears to have been influenced to a certain extent by the fact that the Commissioner had made a demand for contribution and for management expenses for a period of 5 years. Another learned Single Judge; Srinivasan, J.; of that Court in *Shri Andal and Company v. Regional Provident Fund Commissioner* (Writ Petition No. 205 of 1962) decided on 26th June, 1964, dissented from the view of Jagadisan J., and observed:—

“Reading the Act and the scheme as a whole, it is clear that the scheme comes into force at once and affects every industry at least from the date on which the scheme was framed. Paragraph 26 of the scheme provides that every employee other than an excluded employee shall be entitled and required to become a member of the fund from the beginning of the month following that in which this paragraph comes into force in such factory or other establishment. The further requirement is that by that date the employee should have completed one year's continuous service. The statute, therefore, makes it compulsory upon the employee to become a member of the fund, and read along with the other provisions which lay an obligation upon the employer to make the relevant contribution, the underlying intent is that the scheme comes into force immediately.”

He was unable to agree that there existed any provision which postponed the application of the Act and the scheme to the stage of demand being made by the authorities concerned. In *M/s. N. K. Industries (Private) Ltd. v. Regional Provident Fund Commissioner* (4) Jagdish Sahai J., after referring to section 5 of the Act and paragraphs 29, 30 and 32 of the scheme, said that there was a duty cast on the employer to contribute both the shares, i.e., his share as also that of the employee and merely because no demand for contribution was made for about 3 years, the demand

(4) A.I.R. 1958 All. 474.

could not be deemed to have been waived by the Commissioner. Thus, there is hardly any other authoritative pronouncement in which a view contrary to the one expressed by the Bench of this Court in *Prem Narain Aggarwal's case* (L.P.A. 2-D of 1956) has been taken. We have not been, therefore, persuaded that there is any strong reason for not following the previous decision.

M/s. Kapur-
bhimbar Union.

v.
The Regional
Provident Fund
Commissioner
and another

Grover, J.

Mr. Gupta, has finally contended that at least so far as those employees, who had left the service were concerned, the Commissioner was not justified in calling upon the employers to make contribution to the fund in respect of them. He has called attention to the definition of the word "contribution" in section 2(c) of the Act which means a contribution payable in respect of a member under a scheme. A member is defined by section 2(j) to mean a member of the fund. Chapter IV of the scheme deals with membership of the fund. Paragraph 26 relates to classes of employees entitled and required to join the fund. Paragraph 26-B says that if any question arises whether an employee is entitled or required to become or continue as a member, or as regards the date from which he is so entitled or required to become a member, the decision thereon of the Regional Commissioner or, where a State Commissioner is appointed, of the State Commissioner shall be final. It is, however, provided that no decision shall be given unless both the employer and the employee have been heard. Chapter V deals with contributions. Paragraph 30 provides that the employers shall in the first instance pay both the contribution payable by himself and also on behalf of the member employed by him. According to paragraph 32, the amount of a member's contribution paid by the employer shall, notwithstanding the provisions of the scheme, etc., be recoverable by means of deduction from the wages of the member. Chapter VI relates to declaration, contribution cards and returns. Paragraph 33 provides for a declaration by persons already employed at the time of the institution of the fund. Paragraph 34 relates to the declaration by persons taking up employment after the fund has been established. Paragraph 35 provides for preparation of contribution cards. Mr. Gupta's submission is that of those employees, who have left service of the employers during the pre-discovery period could not be regarded to be members of the fund as all the formalities required by

M/s Kapur-
bhimbar Union.
v.
The Regional
Provident Fund
Commissioner
and another

Grover, J.

the aforesaid provisions contained in Chapter VI were never complied with. It is noteworthy that paragraph 26 lays down that every employee shall be entitled and required to become a member of the fund from the beginning of the month following that in which the scheme comes into force if on the date of such coming into force he has completed one year's continuous service or has actually worked for not less than 240 days during a period of 12 months or less in that factory or other establishment or in any other factory or other establishment to which the Act applies under the same employer or partly in one and partly in the other. In view of what has been found by the Commissioner, it was the duty of the employers in all these cases to require those employees, who fulfilled the conditions mentioned in paragraph 26 to become members of the fund even during the pre-discovery period. For the sake of illustration in the case of Messrs Kapurbhimber Union, those employees whose names according to the return are given in Annexure "R/3" were entitled to be made members of the fund and even though they may have left service prior to 1st June, 1963, it does not follow that they could be deprived of the benefits which they could derive from the membership of the fund merely because the establishment did not require them to become members during the period 1st June, 1961, to 31st May, 1963. Mr. Gupta, says that the employers are not prepared to accept that all these persons, who left service and, who according to the return fulfilled the qualifications laid down in paragraph 26, did, in fact, fulfil those qualifications, but this is a matter which will have to be decided by the Commissioner in accordance with paragraph 26-B after giving a hearing to both the employer and the employee when that stage is reached. For the present all that is to be decided is whether the order made by the Commissioner calling upon the employers to make contribution of their share towards the Provident fund for the pre-discovery period is illegal or without jurisdiction. For the reasons which have already been stated, it is not possible to accede to the contentions of Mr. Gupta.

In the result, all the petitions fail and are dismissed but in the circumstances there will be no order as to costs.

D. FALSHAW, C. J.—I agree.

B.R.T.

Falshaw, C.J.