

**HIGH COURT OF JAMMU AND KASHMIR AND LADAKH
AT JAMMU**

WP(C) No. 2493/2023

Reserved on: 09.04.2025

Pronounced on: 24 .04.2025.

Jammu Cooperative House Building Society
Apna Vihar Kunjwani Jammu

..... Petitioner (s)

Through :- Mr. Rahul Pant Sr. Advocate with
Mr. Dhruv Pant Advocate

V/s

UT of Jammu and Kashmir and others

.....Respondent(s)

Through :- Mr Rajesh Kumar Thappa AAG.

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 The petitioner, through the medium of present petition, has challenged order No.Addl.PFC/J/10 of 2023 dated 25.07.2023, whereby the claim of the petitioner for its de-coverage under the Jammu and Kashmir Employees' Provident Funds and Miscellaneous Provisions Act, 1961 (hereinafter referred to as the "Act of 1961") has been rejected.

2 According to the petitioner, it is a cooperative society registered under the Jammu and Kashmir Cooperative Societies Act since the year 1975. Initially, the petitioner-Society was registered under the Jammu and Kashmir Cooperative Societies Act, 1960, and was subsequently deemed to have been registered under the Jammu and Kashmir Cooperative Societies Act, 1989. It has been submitted that the petitioner-Society initially had four employees, but subsequently, only two employees were left and, as on date, there is only one

employee. It has been submitted that, despite being a cooperative society, the petitioner-Society contributed towards the provident fund of its employees, even though the number of employees was well below five, as is mandated under the Act of 1961 for coverage under the said Act. It has been further submitted that, in terms of Section 18 of the Act of 1961, all Cooperative Societies have been excluded from the purview of the Act. In view of this, the petitioner-Society is stated to have approached respondent No.3 with a request for its exemption from the provisions of the Act. However, vide communication dated 22.07.2014, respondent No.3 refused to exempt the petitioner-society from the provisions of the Act of 1961.

3 The petitioner is stated to have challenged the aforesaid action of respondent No.3 by way of a writ petition bearing OWP No. 1208/2014. The said writ petition came to be disposed of by this Court in terms of order dated 05.04.2023, whereby the respondents were directed to consider the claim of the petitioner-society after going into all aspects of the matter strictly in conformity with the provisions of the Act of 1961, particularly Section 18 thereof. The respondents, in compliance with the judgment of this Court dated 05.04.2023, considered the claim of the petitioner-society afresh and has rejected the same in terms of the impugned order dated 25.07.2023.

4 The petitioner has challenged the impugned order passed by respondent No.03 on the ground that the same suffers from non-application of mind, inasmuch as it relies upon an inspection note made in the year 1992, according to which, the petitioner-society had employed eight employees which is against the record. It has been contended that the petitioner being a society registered under J&K Cooperative Societies Act, is excluded from the purview of the Act of 1961 in terms of Section 18 thereof. It has been further

contended that at no stage, the petitioner-society has employed more than four persons, as such, it could not have been brought within the purview of the Act of 1961.

5 The respondents have contested the writ petition by filing a reply thereto. In their reply, it has been submitted that the petitioner-society was voluntarily brought under the provisions of the Act of 1961 by way of depositing provident fund contributions in favour of three employees, and was accordingly allotted Code No. JK/J-844. It has been contended that, in terms of Subsection (5) of Section 1 of the Act of 1961, an establishment to which the said Act applies will continue to be governed by the said Act notwithstanding the fact that number of persons employed therein may fall below five. Thus, according to the respondents, once the petitioner-society was registered with the respondents under the provisions of the Act of 1961, its de-coverage is impermissible in law. The respondents, while admitting that Section 18 of the Act of 1961 excludes the coverage of Cooperative Societies, have taken a stand that because the petitioner-society had voluntarily registered itself with the office of respondent No.3 and it was allotted a provident fund code number, as such, its registration cannot be withdrawn at its asking. It has also been claimed by the respondents that when the inspection of the petitioner-society was conducted in the year 1992, eight employees were found working over-there. A copy of inspection note has been placed on record by the respondents.

6 I have heard learned counsel for the parties and perused record of the case produced by learned counsel for the respondents.

7 So far as the material facts relating to the case at hand are concerned, the same are not in dispute. The only dispute that has been raised by the respondents is that when the inspection of the petitioner-society was

conducted in the year 1992, eight employees were found working which is being denied by the petitioner. The record produced by the respondents contains an inspection note dated 11.05.1992 in which list of eight employees is given. The record further reveals that the petitioner-society has been submitting returns to the respondents right from the year 1992 onwards and has been depositing contributions of provident fund in respect of its employees. However, the number of employees has, at no stage, exceeded four.

8 There is nothing on record to suggest that the respondents have ever disputed the number of employees reflected in the returns submitted by the petitioner-society from the year 1992 up-to the year 2014, the last return filed by the petitioner-society with the respondents. If at all, the petitioner had employed eight employees as is depicted in the inspection note 11.05.1992, then the respondents should have made an order against the petitioner-society calling upon it to deposit contributions in respect of those employees whose names were not found in the returns. No such order is available on the record produced by the learned counsel for the respondents, meaning thereby that respondents have accepted that the number of employees engaged by the petitioner-society ranged between two to four, during all these years, in respect of whom the petitioner-society has been depositing contributions in accordance with the provisions of the Act of 1961.

9 As per clause (a) of Subsection (3) of Section 1 of the Act of 1961, as it stood in the year 1992, the provisions of the said Act applied to every establishment which is a factory engaged in any industry specified in Schedule 1 of the Act in which five or more persons are employed at any time. Section 18 of the Act lays down that the provisions of the said Act would not apply to establishments registered under cooperative societies Act employing

less than five persons and working without the aid of power. So, in both the eventualities, because the petitioner-society had less than five employees working with it, the provisions of the Act of 1961 could not have been applied to it.

10 However, as is the admitted case of the parties, the petitioner voluntarily applied for registration under the Act, which was accordingly granted to it by the respondents. The provision regarding voluntary coverage is contained in Subsection (4) of Section 1 of the Act of 1961, which reads as under:

“(4) Notwithstanding anything contained in sub-section (3) of this section or sub-section (1) of section 18, where it appears to the 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 Government Gazette, apply the provisions of this Act to that establishment”.

11 From a perusal of the aforesaid provision, it is clear that even if an establishment has not employed five or more persons, or even if such establishment is excluded from the purview of the provisions contained in the Act of 1961, the Government may, with the agreement of the employer and the majority of the employees in relation to any establishment make the provisions of the Act applicable to such an establishment by notifying the same in the Government Gazette thereby applying the provisions of the Act to such an establishment. Thus, in cases of voluntary application of the provisions of the Act of 1961, the Government is required to issue a notification in the Government Gazette, thereby making the provisions of the Act of 1961 applicable to such an establishment.

12 Coming to the facts of the present case, admittedly, the petitioner-society has been granted voluntary coverage under the provisions of the Act of 1961. However, the respondents have not even claimed that any notification has been issued in terms of subsection (4) of Section 1 of the Act of 1961 and that such notification has been published in the Government Gazette. The record produced by the respondents also does not contain any such notification. Even in their reply, the respondents have not claimed that they have issued any notification in terms of subsection (4) of Section 1 of the Act of 1961 or that any such notification finds place in the Government Gazette. The question that arises for determination is, as to what would be its effect.

13 A bare perusal of the provisions contained in Subsection (4) of Section 1 of the Act of 1961 quoted above, would reveal that the applicability of the provisions of the Act to an establishment, which is otherwise not covered under the said Act, would become final only after a notification to this effect is published in the Official Gazette. The notification contemplated by Subsection (4) of Section 1 of the Act of 1961 is not merely a mere ministerial act, but it is an event which makes the Act applicable to an establishment where voluntary coverage is sought.

14 The effect of non-publication of such a notification in the Official Gazette has been deliberated upon by a Single Judge of the High Court of Judicature at Bombay in the case of **Tech Movers Systems (India) Pvt. Ltd. v. Regional Provident Fund Commissioner, 1995 (2) L.L.N. 938**. The Bombay High Court, while interpreting a similar provision contained in the Central Act, held that the provisions of the Act cannot be made applicable to an establishment which is otherwise not covered by taking resort to Subsection (4)

of Section 1 of the Provident Fund Act till a notification is made in the Official Gazette. The Court went on to hold that, because no such notification had been issued in the said case, as such, all the proceedings initiated under the provisions of the Provident Fund Act against the petitioner in that case are illegal and without jurisdiction. It was also held that the provisions of the Act might be applied from the date of the agreement, but the date of applicability will be relevant only after the notification is made.

15 A similar view has been taken by another Single Bench of the Bombay High Court in the case of **Harish Sakharam Savardekar vs Union of India and ors, 1991 (1) MHLJ 289**. In the said case, it has been held that mere making of an application by an employer and the majority of the employees for voluntary coverage is not enough. On the basis of the said application, a decision has to be taken by the Government which has to be promulgated in the Official Gazette. It is only when the process is completed that the Act and the Scheme under it, can be said to have become applicable to the establishment concerned and that the notification would take effect from the date it is published. It has also been held that the publication of the notification can be given retrospective effect as well.

16 From the foregoing analysis of law, it is clear that in the absence of a notification issued in terms of Subsection (4) of Section 1 of the Act of 1961 in the Official Gazette, the respondents cannot claim that the petitioner-society is covered under the provisions of the said Act. So, whatever proceedings have taken place in the present case before the respondents have no sanctity of law. In the eyes of law, there is no coverage of the petitioner- society under the provisions of the Act of 1961. Thus, while there is

no concept of de-coverage of an establishment in view of the provisions contained in Subsection (5) of Section 1 of the Act of 1961 which provides that once the provisions of the Act are made applicable to an establishment, the same would continue to be governed by the Act notwithstanding that the number of persons employed therein at any time falls below five, but, in the present case, we have a situation where the coverage of petitioner-society under the provisions of the Act of 1961 is itself *non est* in the eyes of law in the absence of any notification issued in terms of Subsection (4) of section 1 of the Act of 1961.

17 The Bombay High Court in the case of **Tech Movers Systems (India) (Private) Ltd.**(supra) has held that, it is open to the employer and the employees to opt out of an agreement relating to voluntary application of the Provident Fund Act till such time a notification is issued and published in the Official Gazette. In this regard, it would be profitable to reproduce paragraphs (6) to (8) of the said Judgment, which read as under:

“6. From the above discussion, it is clear that the provisions of the Act cannot be applied to an establishment which is not otherwise covered by taking resort to sub-section (4) of [section 1](#) of the Provident Fund Act till a notification is made in the Official Gazette. In the instant case, no such notification had been issued on the date of the initiation of the proceedings under [section 7-A](#) of the Provident Fund Act or till the date of the passing of the impugned order determining the contribution payable under section 7-A. In fact no notification has been issued even till date. In that view of the matter, all the proceedings initiated under the [Provident Fund Act](#) against the petitioner are illegal and without jurisdiction. Such proceedings can not be sustained on the ground of reasonableness or equity or welfare of the employees as is sought to be done by the learned Counsel for the respondent in the present case. It is also clear that it is only while making the notification under sub-section (4) of [section 1](#) of the Provident Fund Act that the provisions of the Act might be applied from the

date of the agreement. But the date of applicability will be relevant only after the notification is made.

7. It is further clear from the provisions of sub-section (4) of [section 1](#) that a notification can be made only where it appears to the Central Provident Fund Commissioner that the employer and the majority of the employees have agreed that the provisions of the Act should be made applicable to the establishment in question. This appearance or satisfaction should exist on the date of making of the notification. If before notification is made, either of the parties the employer or the employees, change their mind and decide not to get the provisions of the Act applicable to the establishment, the Central Provident Fund Commissioner can not make a notification thereafter and impose the provisions of this Act on such an establishment against the wishes of the employer or the employees. I find it extremely difficult to accept the contention of the learned Counsel for the respondents that once the employer or the employees agree that the provisions of the [Provident Fund Act](#) should be made applicable to the establishment in question, it is not open to them to withdraw from that agreement and to stall the issue of notification under [section 1\(4\)](#) of the Provident Fund Act applying the provisions of the said Act to the establishment. Any such interpretation will run counter to the object, scheme and the tenor of sub-section (4) of [section 1](#) of the Provident Fund Act.

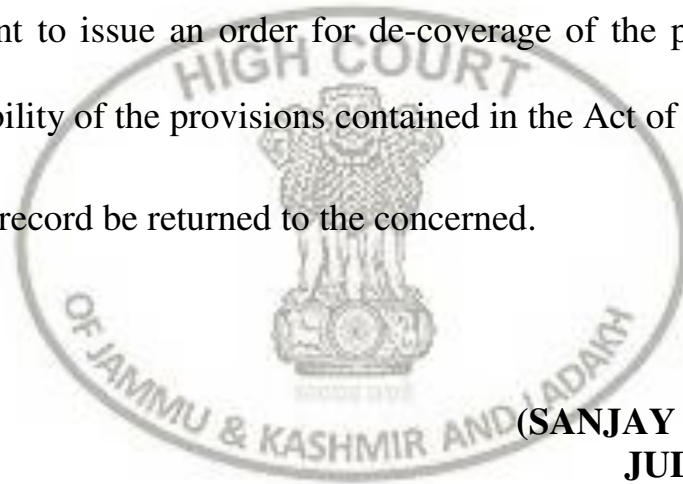
8. I am therefore of the clear opinion that till a notification is made in the Official Gazette, any of the parties can at any time opt out of the agreement to apply the provisions of the [Provident Fund Act](#) to their establishment and if they do so, it is not open thereafter to the Central Provident Fund Commissioner to issue a notification under sub-section (4) of [section 4](#) and enforce the compliance of the provisions of the [Provident Fund Act](#) against their wishes”.

18 From the foregoing analysis of law on the subject, it is clear that till such time a notification is issued by the respondents for coverage of the petitioner-society in terms of Subsection (4) of Section 1 of the Act of 1961, the proceedings regarding registration of the petitioner-society by the respondents are *non est* in the eyes of law and it is open to the petitioner to opt out of voluntary registration, because no notification in the Official Gazette has

been published so far. The respondents, as such, could not have declined the prayer of the petitioner for opting out of the registration, which is yet to take place, strictly in accordance with law. Thus, the impugned order passed by respondent No.3 is illegal and liable to be set aside.

19 For the foregoing reasons, the writ petition is allowed. The impugned order passed by respondent No.3 is set aside and a direction is issued to said respondent to issue an order for de-coverage of the petitioner-society from the applicability of the provisions contained in the Act of 1961.

The record be returned to the concerned.



(SANJAY DHAR)
JUDGE

Jammu
24 .04.2025
Sanjeev

WHETHER ORDER IS REPORTABLE: YES