

(2002) 09 JH CK 0007
In the Jharkhand High Court
Case No : C.W.J.C. No. 2384 of 1993 (R)

Dayal Malleables (P) Ltd. and Another	APPELLANT
Vs	
Union of India (UOI) and Another	RESPONDENT

Date of Decision : 23-09-2002

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16

Citation : (2003) 2 JCR 154

Hon'ble Judges : Vikramaditya Prasad, J

Bench : Single Bench

Advocate : A.B. Kumar, for the Appellant; P.P.N. Roy, - E.P.F., for the Respondent

Final Decision : Allowed

Judgement

Vikramaditya Prasad, J.—The most basic question in this writ petition is whether the provision of Section 16 the Employees Provident Fund

& Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act) exempts the petitioner company from the application of the provisions of

this Act. The second question is whether the assessments could have been made under the Act by the respondent No. 2, the Assistant Provident

Fund Commissioner, Ranchi, for the period 1.7.1989 to 31.1.1991 and the third question is whether the employment of more than 20 persons on

some period of a month could have brought the petitioner establishment under the mischief of the Act.

2. The petitioner is private limited company and the petitioner No. 2 is its Managing Director. The petitioner company is an industrial unit

manufacturing Malleable casting. It started its trial production in the industry on 11.6.1986 and the regular production started in the last week of

November, 1986. In the month of June, 1989, for a couple of days, 21 persons

were employed including four persons who were engaged purely on temporary basis in casual manner for a specified job of maintenance/repairing of machines. Out of those four persons, one person was engaged only one day and the details of all that were recorded in the Attendance Register and the Register had been deposited in the office of the Assistant Provident Fund Commissioner, respondent No. 2, who had not returned the same till the date of filing of the writ application. The Assistant Provident Fund Commissioner (hereinafter referred to as the Commissioner) investigated the matter relating to applicability of the provisions of the Act on or about 4.12.1990 and 11.12.1992 wherein the petitioner produced all the relevant documents including the Attendance Register. The Commissioner found that the persons employed by the petitioner-company were always less than 20, except in the month of June, 1989 for a couple of days and the said officer found month-wise employment as follows :--

Year Jan. Feb. March April May June July Aug. Sep. Oct. Nov. Dec.

1989 1½ 1½ 1½ 1½ 1½ 21 14 15 16 14 13 15

1990 16 19 19 17 17 17 17 15 15 15 19 1½

Thus, according to the petitioner, the Act does not apply to it for two reasons (1) only because of the engagement of a few casual labourers on

some days of particular month does not make the company an establishment to which the Act is applicable and (ii) the petitioner company is

exempted from the application of the Act for five years u/s 16 of the Act, but the Commissioner assessed Rs. 62.103/- against the company by

Annexure-1 and that annexure-1 is the impugned order which is sought to be quashed.

3. As no counter-affidavit has been filed by the respondents, the undisputed claim of the petitioner is that the trial production was taken by the

petitioner on 11.6.1986 and the commercial production started with effect from November, 1986, meaning thereby that the petitioner company

was established sometime in June, 1986. Even in Annexure-1, the order of the Commissioner, no light has been thrown as to on which date the

petitioner factory had been set up. Therefore, the things have to be decided on the premises that the factory in question was set up or has been set

up prior to June, 1986.

4. In June, 1986, Section 16 of the Act as amended in the year, 1960 was in force, which reads as follows :--

16(1) This Act shall not apply-

(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 50 persons and working without the aid of power; or

(b) to any other establishment employing 50 or more persons or 20 or more, but less than 50, 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.

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.

This section was further amended in the year, 1988 and Clause (b) of Sub-section (1) of Section 16 was substituted by Clauses (b), (c) and (d)

and the said amendment to Section 16 is as under :--

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are

entitled to the benefit of contributory provident fund or old age pension in accordance with any Scheme or rule framed by the Central Government

or the State Government governing such benefits; or

(c) to any other establishments set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory

provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits; or

(d) to any other establishment newly set up, until the expiry of the period of three years from the date on which such establishment is, or has been,

set up;

(ii) in Sub-section (2), after the word exempt, the words, ""whether prospectively or retrospectively"", shall be inserted"".

5. The question is whether the provisions of Section 16 as it stood in 1986 till its further amendment in the year, 1988 will apply or the amended

provisions of 1988 will apply. Clause (b) of 1960 amendment has a great impact. It provides that to establishment employing 50 or more persons

or 20 or more persons but less than 50 persons until, expiry of three years in the case of the former, meaning thereby the establishment which

employed more than 50 persons and five years in the case of latter, meaning thereby, the establishment employing 20 or more persons but less than

50 persons from the date on which the establishment is or has been set up, the Act will not apply. As stated earlier, the undisputed position is that

the factory has been set up prior to November, 1986 and had started commercial production in November, 1986, the question is whether the

establishment will be covered by the phrase establishment "is or has been set up". A similar matter was examined by a Division Bench of Bombay

High Court in the case of Magic Wash Industries Pvt. Ltd. and Anr. v. Assistant Provident Fund Commissioner, Panaji and Anr., reported in 1999

LabIC 2197 the phrases as used in 1960 amendment and phrases--newly set up in Clause (d) of Section 16 of the 1988 amendment were

examined and the Division Bench had come to a conclusion that the words, "newly set up" mean the industries which were set up during the period

when the amendment of 1988 came on the statue book and with respect to the other industries, which were already existing, 1960 amendment will

remain applicable.

6. Retrospectivity of the 1988 amendment was also examined by the said learned Division Bench and it came to a conclusion that in absence of

any express intention of the Legislature that the amendment would apply retrospectively the amendment has to be construed prospectively. I am in

agreement with their views. Thus, from the aforesaid discussion, it is clear that since the petitioner factory had already been set up prior to the

1988 amendment, which has no retrospective effect, would be covered by 1960 amendment and for such a factory the infancy/exemption period

shall be five years because even if it employed more than 20 persons but less than 50 persons and this right that has accrued to it in absence of

retrospectivity given to 1988 amendment is not liable to be withdrawn. Thus, it is held that the Act and its provisions do not apply to the

petitioner's factory from the date of its having been set up till five years.

7. As it is not clear as to from which date the factory had been set up and nothing has been brought on record even by the respondents to show

that it was set up on a particular date, so the submission of the petitioner that

the factory started trial production on 11.6.1986 is acceptable and this date is taken as the date on which the factory has been set up and from this date till 11.6.1991, the factory was exempted from the application of the Act under 1960 amendment. The Commissioner, it appears, laboured under an impression that the 1988 amendment applied in the present case, but he misconceived 1988 amendment. Consequently, the first question is answered accordingly.

8. In the event of the first question having been decided as aforesaid, the need of answering the rest of the two question does not arise. The effect

is that Annexure-1 which assesses the petitioner factory for the period 1.7.1989 to 31.1.1991 is bad as being inapplicable to the petitioner factory.

Thus, the impugned Annexure-1 being beyond jurisdiction has got to be quashed and is accordingly quashed.

9. With the aforesaid observations and directions, this writ application is allowed.