

(2018) 10 BOM CK 0088
In the Bombay High Court
Case No : Writ Petition No.768 Of 2014

Indian Coffee Workers\ ' Co-Op. Society Ltd.	APPELLANT
Vs	
Secretary, Industries Energy And Labour Dpt. And Anr	RESPONDENT

Date of Decision : 17-10-2018

Acts Referred:

Income Tax Act, 1961 — Section 176(1)
Employees' State Insurance Act, 1948 — Section 2(9)(b), 87, 88, 90, 91A
Employees' State Insurance (Central) Rules 1950 — Rule 5, 51, 54
Constitution of India, 1950 — Article 14, 16, 226

Citation : (2018) 10 BOM CK 0088

Hon'ble Judges : R. M. Savant, J; Nitin W. Sambre, J

Bench : Division Bench

Advocate : S C Naidu, M S Roy, Dushyant Kumar, P M Palshikar

Final Decision : Dismissed

Judgement

R. M. SAVANT, J

1 Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this Court under Article 226 of the Constitution of India is invoked against the letter/communication dated 15/05/2013 of the

State of Maharashtra in the Industries, Energy and Labour Department by which the Petitioner is communicated that exemption cannot be granted to

the Petitioner for the period claimed for the reasons mentioned in the said letter.

3 The facts giving rise to the filing of the above Writ Petition can in brief be stated thus :
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The Petitioner is a Co-Operative Society of workers engaged in the field of catering. The workmen employed with the Petitioner Society are the

shareholders of the Society. The day-to-day affairs of the Petitioner Society are managed by the employees themselves. The Petitioner has been rendering services for about 54 years. The Petitioner has been making application for exemption every year from the application of the Employees State Insurance Act, 1948 to the State Government which is empowered to consider the said application being the appropriate Authority under the provisions of the said Act. Such applications have been made by the Petitioner in April of that particular year. The Petitioner has been granted exemptions albeit at times belatedly. It seems that for the period of 01/04/2008 to 31/03/2009 the Respondents i.e. the State Government granted exemption to the Petitioner up to 31/03/2009. For the period 01/04/2009 to 31/03/2010 the Petitioner made application for exemption in or around 01/04/2009, however, the said exemption was not granted. The Petitioner thereafter made application for exemption on 01/04/2010 for the period of 01/04/2010 to 31/03/2011, however, no favourable response was received in respect of the said application. In the interregnum the provisions relating to the grant of exemption i.e. Section 91AA came to be amended and the amended provisions postulate that exemption can be granted only prospectively.

4 In view of the fact that the Petitioner's applications for exemption for the period of 01/04/2009 to 31/03/2010 was pending and thereafter for the period of 01/04/2010 to 31/03/2011, the Petitioner made two representations to the State Government as and by way of reminder in respect of the applications made by the Petitioner for the said two periods. It seems that for the subsequent period i.e. between 01/04/2011 to 31/03/2012 the Petitioner had made application for exemption which came to be granted vide Notification dated 09/02/2012 and the Petitioner was accordingly exempted from 09/02/2012 to 08/02/2013. The Petitioner thereafter made application for exemption for the period of 06/04/2013 to 05/04/2014 which exemption also came to be granted.

5 In so far as period of 01/04/2009 to 08/02/2012 is concerned, as indicated above, the Petitioner was denied the exemption, and the impugned letter discloses that the said applications for exemption made by the Petitioner were rejected on the ground that the exemption could not be granted retrospectively in view of the amendment to Section 91AA of the said Act.

However, prior thereto by letter dated 29/03/2010 the State Government has informed the President of the Petitioner Society that the exemption cannot be granted to the Petitioner as the facilities given by the ESIC are superior than the facilities provided by the Petitioner. It seems that the said letter resulted in the Petitioner approaching the higher authority in the State Government i.e. the Hon'ble Minister for Labour. The Joint Director of the ESIC addressed a letter dated 07/02/2011 to the State Government, in paragraph 3 thereof the Joint Director referred to the communication dated 29/03/2010 of the State Government and stated that the said Department of the State Government had rightly rejected the application of the Petitioner for grant of exemption during the said period i.e. 01/04/2009 to 31/03/2010. In the said letter a reference is made to the amended Section 91AA and it is stated that all exemptions can be granted with prospective effect only and not with retrospective effect as was the case earlier. The Petitioner thereafter has received the impugned communication dated 15/05/2013. In the said communication it is mentioned that as per the directions of the Hon'ble Minister the file was referred to the Law and Judiciary Department of the Government of Maharashtra for it's opinion. The said communication further referred to the amendment which has been carried out to Section 91AA of the said Act whereby the said word "retrospectively" has been substituted by the word "prospectively". It is lastly stated that in view of the said amendment it would not be proper to grant exemption with retrospective effect as the same would be against law. As indicated above it is the said communication dated 15/05/2013 which is taken exception to by way of the above Writ Petition.

6 The learned counsel appearing for the Petitioner Shri S C Naidu would submit that though Section 91AA has been amended the period of 01/04/2009 to 31/03/2010 being the period prior to the amendment coming into force which was on 01/04/2008 the amendment could not be applied. It was also the submission of the learned counsel for the Petitioner that the amendment to Section 91AA cannot be operated retrospectively to take away the vested right of the Petitioner to seek exemption, as also the vested right of the employees to seek benefits from the Petitioner. The learned counsel in support of the said contentions sought to place reliance on the judgment of the Apex Court reported in AIR 1977 SC 552 in the matter of

Govinddas and others v/s. The Income Tax Officer and another; AIR 1987 SC 1676 in the matter of P D Aggarwal and others v/s. State of U.P. and

others; and AIR 2006 SC 2767 in the matter of Employees' State Insurance Corporation & ors. V/s. Jardine Henderson Staff Association and Ors.

The learned counsel would also contend that the communication dated 15/05/2013 having been issued in supersession of the letter dated 29/03/2010

the factum of rejection having been conveyed to the Petitioner by letter dated 29/03/2010 on the ground that the facilities provided by the ESIC are

superior than the facilities provided by the Petitioner would be of no avail.

7 Per contra, the learned counsel appearing for the Respondent No.2 Shri P M Palshikar and the learned AGP Shri Dushyant Kumar would support

the impugned communication dated 15/05/2013. Both the learned counsel for the Respondent No.2 and the learned AGP would contend that in the

teeth of the amended Section 91A it is not possible to grant exemption to the Petitioner with retrospective effect for the period 01/04/2009 to

31/03/2010.

8 We have heard the learned counsel for the parties at some length. We have bestowed our anxious consideration to the rival contentions. The issue

which falls for our consideration is whether the Petitioner could be granted exemption for the period 01/04/2009 till 09/02/2012 having regard to the

amended Section 91A . In so far as Section 91A is concerned, the same reads thus :A?

91A. Exemptions to be either prospective or retrospective A A Any notification granting exemption under section 87, section 88, section 90 or

section 91 may be issued so as to take effect [prospectively] on such date as may be specified therein?

A reading of Section 91A therefore discloses that any exemption under sections 87, 88, 90 and 91 may be issued so as to take effect prospectively

i.e. on such date as may be specified. It is required to be borne in mind that the Petitioner is seeking exemption for the period 01/04/2009 to

09/02/2012. In so far as the period 01/04/2009 to 31/03/2010 is concerned, it is required to be noted that by letter dated 29/03/2010 the Petitioner was

communicated that the exemption could not be granted to the Petitioner as the facilities given by the ESIC are superior than than the facilities provided

by the Petitioner. Hence the rejection of the Petitioner's applications for the said

period was on the ground that the facilities given by the ESIC are superior than the facilities provided by the Petitioner.

9 The Petitioner it seems thereafter carried the matter to the higher authority i.e. the Hon'ble Minister in the Labour Department of the Government of

Maharashtra. It seems that before the Hon'ble Minister, the ESIC through its Joint Director made its submission in the form of the letter dated

07/02/2011 which was addressed to the Secretary, Labour Department, Government of Maharashtra. The said letter makes a reference to the

background of the Petitioner making applications for exemption however, what is significant to note in the context of the controversy which is raised in

the above Writ Petition is the fact that the Joint Director has referred to the letter dated 29/03/2010 of the State Government and has opined that the

rejection of the Petitioner's application for grant of exemption was correct. The Joint Director as indicated above has thereafter referred to the

amended provisions of Section 91AA and has mentioned in the said letter that all exemptions could now be granted with prospective effect and not

with retrospective effect. The said letter at the highest can be said to be an input for the Hon'ble Minister since the Petitioner had taken the issue in

respect of exemption to him. In the letter dated 15/05/2013 of the Government of Maharashtra the fact that the issue was referred to the Law and

Judiciary Department of Government of Maharashtra has been mentioned and it is also mentioned that the exemption cannot be granted to the

Petitioner in view of the amended provisions of Section 91AA and if exemption is granted than the same would result in acting contrary to law. Hence

the letter dated 15/05/2013 which is impugned in the present Writ Petition though can be said to be last in the line of the decisions which have been

taken in respect of the applications for exemption filed by the Petitioner cannot be said to be a decision taken either by the Appellate Authority or by

the Competent Authority under the statute but can be said to be an administrative decision taken by the State Government. Hence what is required to

be noted in the instant case is that by letter dated 29/03/2010 addressed to the Petitioner, the Petitioner was already informed that the application for

exemption made by the Petitioner cannot be granted as the facilities given by the ESIC are superior than the facilities provided by the Petitioner.

10 The matter has to be looked at from one more perspective assuming that the

final rejection of the Petitioner's application, is on the ground that the application for exemption, in view of Section 91AA cannot be granted retrospectively as stated in the communication dated 18/05/2013 of the State Government. The fact remains that for the period 01/04/2009 to 09/02/2012 the application, even if considered today, would have to be considered on the touchstone of Section 91AA. In so far as the said provision is concerned, it only states that any notification granting exemption may be issued so as to take effect prospectively. There is nothing in the said provision i.e. Section 91AA which states that same applies with retrospective effect. The fact that the said provision has come into force and the Petitioner's application for the said period would undoubtedly have to be considered today, would mean that the Petitioner's applications would have to be considered having regard to Section 91AA. The question which arises is whether the Petitioner could be granted exemption with retrospective effect. The answer has to be in the negative in view of the clear language of Section 91AA which directs that any notification granting exemption would only take effect prospectively.

11 Now coming to the judgments cited on behalf of the Petitioner, In Govinddas and others' case (supra), the Apex Court was concerned with

Section 171(6) of the Income Tax Act, 1961. The said provision a radical departure was made from the old Act. By the said provision for the first time imposed joint and several liability on the members for the tax assessed on the

Hindu Undivided Family and this was was a personal liability as distinct from liability limited to the joint family property received on partition. The

Apex Court held that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a

statute so as to take away or impair an existing right or create a new obligation or impose a new liability.

In P. D. Aggarwal and others' case (supra), the Apex Court was concerned with a Rule of Seniority namely Rule 23 of the U.P. Service of Engineers

Class II Rules (Buildings and Roads Branch), 1936. There were earlier rules of 1936 as amended in 1969 and 1971 which provided seniority to be

reckoned from the date of the order of appointment in a substantive vacancy. The said Rule in so far as it took away the vested right in respect of

seniority was held to be violative of Articles 14 and 16 of the Constitution of India.

In *Jardine Henderson Staff Association's case* (supra), the Apex Court was concerned with Section 2(9)(b) and Rules 5, 51 and 54 of the Employees'

State Insurance (Central) Rules 1950. The wage limit for coverage of an employee was enhanced by the amendment. By an interim order the High

Court stayed the operation of the said enhancement. The Employer in view of the stay was prevented from making contribution, however, spent large

amount of money on employees and provided medical facilities. The High Court held the amendment as valid and directed that employers will

implement amendment prospectively with effect from 16/03/2004 though amendment came into force with effect from 01/01/1997. The Apex Court

applied the principles of *Actus Curiae Neminem Gravabit* i.e. No party shall be prejudiced for the act of Court; and held that the Employer cannot be

made liable to pay contribution for past several years.

12 In our view, the judgments (supra) cited on behalf of the Petitioner would not further the case of the Petitioner having regard to the facts involved

in the instant case. In the instant case apart from the fact that the Petitioner was informed by letter dated 29/03/2010 by the State Government that

the exemption cannot be granted for the reason that the facilities provided by the ESIC are superior than the facilities provided by the Petitioner. Even

if the communication dated 15/05/2013 is held to supersede the letter dated 29/03/2010 and the said communication is required to be set aside by this

Court and the application of the Petitioner is required to be relegated back to the authority i.e. the State Government for a *deÂnovo* consideration. In

our view, no useful purpose would be served, as the application for the Petitioner even if considered today would have to be considered on the

touchstone of Section 91AA, which clearly states that the exemption would take effect prospectively. In our view, therefore, no case for interdiction

with the communication dated 15/05/2013 in the Writ Jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed. Rule

discharged with no order as to costs.