(2013) 10 KL CK 0045

In the High Court Of Kerala

Case No : Writ Petition (C) No. 4300 of 2010

Lourdes Hospital (M/s.) APPELLANT

Vs

Dr. Abraham Mathew and Another RESPONDENT

Date of Decision : 04-10-2013

Acts Referred:

Citation : (2014) 140 FLR 893 : (2013) 4 KHC 347 : (2013) 4 KLT 402

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : Bechu Kurian Thomas, for the Appellant; T. Ramaprasad Unni, Senior Government Pleader, C.S. Ajith Prakash, P.A. Saleem, T.D. Salim and Paul C. Thomas, for the Respondent

Judgement

K. Vinod Chandran, J.—The petitioner is a hospital in whose employment the 1st respondent remained from 03/07/1968 to 31/12/2005. Admittedly the petitioner was superannuated on 31/12/2005 and he was paid gratuity of Rupees Two Lakhs. Alleging that the quantum of gratuity was far lesser than that prescribed under the Payment of Gratuity Act, 1972 (hereinafter referred to as "Gratuity Act"), the 1st respondent was before the Controlling Authority, which passed Ext. P3 order, computing the gratuity payable as per the Gratuity Act at Rs. 3,50,000/- and directing payment of the balance amount of Rs. 1,50,000/- with 10% interest from 22/03/2006; being the date of filing of the claim. The proceedings thereafter are not very relevant Suffice it to say that the said order was affirmed, evidenced by Ext. P8 appellate order. The factum of employment in the hospital is not disputed. The dispute is only with respect to whether the petitioner is an establishment covered under the Gratuity Act.

2. The contention urged by the learned counsel for the petitioner is that the Gratuity Act makes it applicable to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, by Section 1(3)(b). Hence, necessarily there being an enactment with respect to the shops and establishments for the State of Kerala,

being the Kerala Shops and Commercial Establishments Act 1960 (hereinafter referred to as "the Shops Act"), one has to look at the definition of "commercial establishment" in the said enactment to understand as to which establishments are covered under the Gratuity Act. The first contention raised by the petitioner is that the petitioner admittedly being a charitable institution, would not come under the definition of "commercial establishment". In any event, looking at the words employed in the definition of "commercial establishment", or more specifically the categories of establishments referred to therein and the class of employment, definitely a "hospital" was not intended to be covered under the said enactment. That being so, it is the contention that the definition in the Gratuity Act being by way of "reference" as distinguished from "incorporation"; only those establishments covered under the Shops Act could be brought under the establishments to which the Gratuity Act applies.

3. To advance his contention with respect to legislation by reference, the learned counsel places reliance on Bajaya Vs. Gopikabai and Another, , U.P. Avas Evam Vikas Parishad Vs. Jainul Islam and Another, and Nagpur Improvement Trust Vs. Vasantrao and Others and Jaswantibai and Others, The learned counsel relies on the decision of the Supreme Court in Dr. Devendra M. Surti Vs. The State of Gujarat, and V. Sasidharan Vs. Peter and Karunakar and Others, to contend that "hospital" is not covered under the definition of "commercial establishment" in the Shops Act. The learned counsel also relies on the decision in Sasidharan Vs. Peter and Karunakaran from which arose the decision of the Supreme Court in V. Sasidharan (supra). The learned counsel placed before me a notification of the State Government issued u/s 5 of the Shops Act, bearing No. S.R.O. 978/2005 dated 19/10/2005, published in the Gazette dated 29/10/2005, which reads as under

S.R.O. No. 978/2005.--In exercise of the powers conferred by Section 5 of the Kerala Shops and Commercial Establishments Act, 1960 (Act 34 of 1960) the Government of Kerala being satisfied that public interest so requires, hereby exempt the following establishments, from the provisions of the said Act for a period of two years from the date of publication of this notification in the Gazette namely:--

1. Doctors consulting rooms.

2. Dispensaries attached to Doctor''s consulting rooms.

3. Nursing Homes, Hospitals and other allies institutions for the treatment or care of the sick, the infirm the destitute or the mentally unfit.

It is the contention of the petitioner that in any event at the time of superannuation of the 1st respondent, the said exemption was in force and that disentitles the respondent from approaching the Controlling Authority under the Gratuity Act.

4. The learned counsel for the 1st respondent, however, would contend that the

Gratuity Act is a welfare legislation intended at giving compensation to the employees on termination of the employment based on minimum qualifying service and such welfare legislation ought to be interpreted widely and liberally with the purpose intended by the Legislature, regulating the interpretative exercise. The learned counsel would contend that; the fact that an exemption notification was issued, that too for two years starting from 29/10/2005, indicates that the hospitals were covered under the Shops Act The entitlement for gratuity, according to the learned counsel for the 1st respondent, cannot be denied on a mere exemption being granted to hospitals, that too limited for a particular period when the major chunk of the claim is related to the period when there was no exemption. The learned counsel would also rely on a Division Bench decision of this Court reported in Noorul Islam Educational Trust v. Asst. Labour Officer 2008 (1) KHC 123 : 2008 (1) KLT 473 : ILR 2008 (1) Ker. 97.

5. The petitioner''s contention that the exemption notification, in any event, was applicable for two years starting from 29/10/2005 and hence on the retirement of the 1st respondent, which happened when the exemption notification was in force; he would be disentitled from approaching the authority under the Act is untenable on the face of it. The petitioner would contend that payment of gratuity is a right or claim arising to an employee on the date of superannuation and since the exemption notification was in force at the time of superannuation of the 1st respondent, the 1st respondent could not have invoked the provisions of the Gratuity Act. On a reading of Section 4 of the Gratuity Act, gratuity is an amount payable to an employee on the termination of his employment on condition of his having rendered minimum qualifying service of five years. Hence, the minute an employee completes the minimum qualifying service in an establishment, he becomes entitled to the claim for gratuity; the payment of which stands deferred to the date of termination. The events at which an employee can be deemed to be terminated is also clear from Section 4, viz., (a) on his superannuation; (b) on his retirement or resignation; (c) on the death or disablement due to accident or disease. In such circumstances, it cannot be said that the exemption notification, that too for a restricted period of two years, would deny the claim of gratuity to the petitioner for the service he had rendered earlier to the coming into force of the exemption notification.

6. For considering the question whether the application of the Gratuity Act, as discernible from Section 1(3)(b), is a legislation by reference or by incorporation, the Supreme Court decisions cited by the petitioner are relevant. In Bajaya (supra) legislation by referential incorporation was held to be falling into two categories and the consequence therefore were detailed in paragraph 26, as extracted hereunder:

26. Broadly speaking, legislation by referential incorporation falls in two categories: First, where a Statute by specific reference incorporates the provisions of another Statute as of the time of adoption. Second, where a Statute incorporates by general reference the law concerning a particular subject, as a

genus. In the case of the former, the subsequent amendments made in the referred Statute cannot automatically be read into the adopting Statute. In the case of latter category, it may be presumed that the legislative intent was to include all the subsequent amendments also made from time to time in the generic law on the subject adopted by general reference. This principle of construction of a reference has been neatly summed up by Sutherland, thus:

A Statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference Statute was enacted (Vide Sutherland''s Statutory Construction. Third Edition, Article 5208, p. 5208).

Corpus Juris Secundum also enunciates the same principle in these terms:

... Where the reference in an adopting Statute is to the law generally which governs the particular subject, and not to any specific Statute or part thereof,... the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time, at least as far as the changes are consistent with the purpose of the adopting Statute.

Nagpur Improvement Trust (supra) and U.P. Avas Evam Vikas Parishad (supra) were also in the same lines. Hence, when a subsequent legislation makes a reference to the earlier legislation, so as to make the provisions of the earlier legislation applicable to the later legislation, it could be categorised as a referential legislation or a legislation by incorporation. When a referential legislation is made, any amendments made to the earlier legislation, after the enactment of the later legislation, would also be applicable to the later legislation. However, if the legislation is by way of incorporation, then necessarily the later legislation and the incorporation made therein would be unaffected by any amendment to or even a repeal of the earlier legislation.

7. The Hon''ble Supreme Court in the above cited decisions and numerous decisions on similar lines has consistently quoted with approval the principle laid down in The State of Madhya Pradesh Vs. M.V. Narasimhan, to distinguish between a referential legislation and legislation by incorporation. Paragraph 16 of the said decision is extracted hereunder:

16. On a consideration of these authorities, therefore, it seems that the following proposition emerges:

Where a subsequent Act incorporates provisions of a previous Act then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases:

(a) where the subsequent Act and the previous Act are supplemental to each other;

(b) where the two Acts are in pari materia;

(c) where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and

(d) where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act.

8. Looking at the application of the Gratuity Act, it specifically refers to "every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State". Undisputedly, the law relating to the shops and establishments in the State is the Shops Act. The subsequent Act herein, is the Gratuity Act and the earlier Act, is the Shops Act; which has been referred to in the Gratuity Act. The Shops Act has been brought in by the State Legislature to consolidate and amend the law relating to the regulation of conditions of work and employment in the shops and commercial establishments within the State. The Gratuity Act is a Central legislation, which is aimed at providing gratuity to employees engaged inter alia in shops and other establishments. The two Acts are not supplemental to each other; nor are they in pari materia.

9. What was intended by Gratuity Act is to bring in every shop or establishment, coming within any law for the time being in force, in relation to such shops and establishments; under the ambit of the Gratuity Act. Hence, all shops and commercial establishments which were covered under the Shops Act at the time of introduction of the Gratuity Act would continue to be so covered under the Gratuity Act irrespective of any amendment, repeal or exemptions brought under the Shops Act.

10. It cannot also be gainsaid, looking at the scheme of both the enactments, that the amendment of Shops Act if not brought into the Gratuity Act would make the Gratuity Act unworkable. It is pertinent that the Gratuity Act confers authority on the Central Government, to bring in any other establishment under the ambit of the enactment by Section 1(3)(c). It is also evident that the Central Government has powers to exempt any establishment covered under the Gratuity Act, from the application of the Act by Section 5. Hence, the inclusion of any shop or establishment or its exclusion in the Shops Act, at a subsequent point of time from when the Gratuity Act was enacted, is immaterial in so far as the application of the Gratuity Act is concerned. There is also no warrant to assume that the amendment to the Shops Act, if not brought into the Gratuity Act, the latter would be unworkable. Obviously on the principle stated above, a notification for exemption under the Shops Act cannot apply to the Gratuity Act. The power to exempt from the provisions of the Gratuity Act is with the Central Government and the State Legislature, either by amendment or by notification issued by the executive Government, cannot grant exemption to an establishment from the provisions of the Gratuity Act. The exemption granted by

the Government, by way of notification under the Shops Act, hence, does not result in exempting an establishment under the Gratuity Act. In such circumstances, it has to be held that the law relating to shops and establishments for the time being in force was incorporated in the Gratuity Act and the legislation is by incorporation and not reference.

11. The next contention of the petitioner is that the hospital does not come under the definition of "commercial establishment" and in any event, being a charitable one; even without the exemption notification, the petitioner is not covered under the Shops Act. Dr. D.M. Surti (supra) was a case in which a doctor''s dispensary was sought to be included under the Bombay Shops and Establishments Act. The Hon''ble Supreme Court rejected the contention of the State that the same is a commercial establishment on the finding that a professional establishment of a doctor cannot come within the definition of Section 2(4) of the Act unless the activity carried on there was "commercial" in character. The Supreme Court judgment in V. Sasidharan (supra), which confirmed the Division Bench decision of this Court, dealt with the very same issue in the case of a firm of lawyers. The contention of the State in the said case was also negatived on the finding that the definition would show that the establishments, far apart from professional offices, were within the contemplation of the Legislature.

12. This Court is of the opinion that both the said decisions on facts are distinguishable from the instant case. Those were cases relating to a dispensary run by a Physician and a firm of lawyers; wherein purely professional work was carried on. The petitioner is running a hospital, which is engaged in commercial activity and has such character, when extending medical services, for a fee, which includes other activities than the professional medical attendance of a doctor. Merely because the petitioner is involved also, in charity, does not take the petitioner out of the definition of "commercial establishment" or in the instant case "shop" under the Shops Act. In fact what is stated in Dr. D.M. Surti (supra) is a direct answer to the contention of the petitioner that the petitioner is not covered under the Shops Act or under the Gratuity Act for reason of it being a charitable institution. The Supreme Court said so in paragraph 6:

It is clear that the presence of the profit motive or the investment of capital tradition associated to the notion of trade and commerce cannot be given an undue importance in construing the definition of ''Commercial establishment'' u/s 2(4) of the Act. In our opinion, the correct test of finding whether a professional activity falls within Section 2(4) of the Act is whether the activity is systematically and habitually undertaken for production or distribution of goods or for rendering material services to the community or any part of the community with the help of employees in the manner of a trade or business in such an undertaking.

Hence, despite the institution or establishment being involved in charity, it cannot, on that count alone, seek to be exempted from applicability of the Shops

Act.

13. It is also to be specifically noticed that in none of the decisions cited, the definition of "shop" was ever considered. Though "hospital" literally in common parlance would not be styled a "shop"; in deciding the coverage of the Act the definition, extracted hereunder, is to be seen:

(15) "shop" means any premises where any trade or business is carried on or where services are rendered to customers, and includes offices, store-rooms, godowns or warehouses, whether in the same premises or otherwise, used in connection with such trade or business but does not include a commercial establishment or a shop attached to a factory where the persons employed in the shop are allowed the benefits provided for workers under the Factories Act, 1948 (Central Act 63 of 1948).

Even if a hospital is said to be not failing under the definition of "commercial establishment" applying the principle of ''ejusdem generis''; the definition of "shop" would take in a hospital.

The authorities below have relied on the exemption notification to hold that such a notification would not have been made if, as the petitioner contends, hospitals were not covered by the enactment. The exemption notification is one brought out u/s 5 of the Shops Act wherein the Government specifically has been given the power to exempt permanently or for a limited period any establishment from the purview of the Act. Executive action and understanding however cannot be the guiding factor of this Court''s endeavour in discerning legislative intent. But the provisions of Section 3, Exemptions, specifically sub-section (2)(a), throws revealing light on the legislative intent. Section 3(2)(a) is extracted hereunder.

3. Exemptions.--xxxx xxxx xxxx

(2) Nothing contained in Section 10 shall apply to--

(a) hospitals and other institutions for the treatment or care of the sick, the infirm, the destitute or the mentally unfit;

If hospitals were not covered under the definition of the Shops Act, as of intention of the Legislature, then there was no purpose for the above provision which exempts hospitals from the rigour of specified opening and closing hours stipulated by Section 10 of the Shops Act.

On the strength of the reasoning above, the Writ Petition is found to be devoid of merit and is dismissed, leaving the parties to suffer their respective costs.

