

(1998) 11 BOM CK 0097
In the Bombay High Court
Case No : Writ Petition No. 562 of 1993

Magic Wash Industries (P) Ltd. and Others	APPELLANT
Vs	
Asst. Provident Fund Commissioner and Others	RESPONDENT

Date of Decision : 26-11-1998

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16(1)

Citation : (1999) 82 FLR 772 : (1999) 2 LLJ 792

Hon'ble Judges : R.K. Batta, J;J.A. Patti, J

Bench : Division Bench

Advocate : M.S. Usgaokar and S.S. Usgaokar, for the Appellant; G.V. Tamba, C.G.S.C., for the Respondent

Final Decision : Allowed

Judgement

R.K. Batta, J.—Petitioner 1 is registered as a Small Scale Industrial Unit with the Directorate of Industries and Mines, Government of Goa. The manufacturing process of the petitioner commenced from May 26, 1986. Petitioner 1 was entitled to infancy period u/s 16(1) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter called the Act,) for five years in terms of Section 16(1)(b) as applicable at the relevant time. Section 16 was amended by the Employees' Provident Funds and Miscellaneous Provisions (Amendment) Act, 1988 (hereinafter referred to as the Amendment Act) and in terms of Section 16(d) as amended, the infancy period has been reduced to three years. According to the petitioners even in spite of the said amended Act they are entitled to infancy period benefit of five years. However, by letter dated February 26, 1992 the office of the Provident Fund Commissioner informed petitioner 1 that it has been brought within the purview of the Act with effect from June, 1989, that is to say, after the expiry of three years infancy period. By the said letter the petitioners were required to implement the provisions of the Employees' Provident Funds Scheme with effect from June 1, 1989. Family Pension Scheme with effect from February 1, 1992 and Deposit Linked Insurance

Scheme with effect from June 1, 1989 if not already done. The said letter further directed the petitioners to deposit the contribution of the eligible employees for all the past months, namely from June 1, 1989 to January 31, 1992, into their respective accounts within 30 days from the date of receipt of the letter. Thereafter respondent 1 issued show-cause notice, dated July 7, 1992, directing petitioner 1 to show cause why the amounts of provident fund, family pension and deposit linked insurance fund with administrative charges due from petitioner 1 should not be recovered as arrears of land revenue u/s 8 of the said Act. In fact, petitioner 1 vide letters, dated April 9, 1992, August 13, 1992, February 8, 1993 and August 10, 1993, requested respondent 1 to allow it to pay the amounts in installments. This, according to the petitioners was done under a mistake of law which the petitioners otherwise were not liable to pay. According to the petitioners, the infancy period expired on May 31, 1992 and from then onwards, the petitioners have been making the payments as required under the Act. Respondent 1 passed order, dated September 21, 1993, holding that the amount of Rs. 87,173.25 was due from petitioner 1 towards provident fund, insurance fund and administrative charges for the period from June to December 1991. The petitioners stated that they have already paid all dues from June 1991, onwards and they are not liable to pay the dues claimed by respondent 1 from June, 1989 to May 1991.

2. The petitioners have challenged the said impugned order, dated September 21, 1993 on various grounds, including that the infancy period applicable to the petitioners is five years and the same cannot be said to have been curtailed vide the amended provision Section 16(1)(d) of the Act which is applicable to only to newly set up establishments. It is also contended by the petitioners that the benefit granted under unamended Section 16(1)(b) has not been taken away or abolished by the amended Section 16(1)(d) and the vested rights which had accrued under the unamended Section 16(1)(b) are not affected unless the same are expressly taken away by the amended provision.

3. On the other hand, the case of the respondents is that the amended provisions of Section 16(1)(d) are applicable not only to the newly set up establishments, but also to those which were in existence and, as such, the amended provision restricts the infancy period even in respect of the existing establishments to three years. It is also pointed out that during inquiry u/s 7-A of the Act, the petitioners never disputed the applicability of the Act, but the matter was contested on merits.

4. The short question which is required to be determined in this petition is whether the amended provision Section 16(1)(d) curtails the infancy period of the already existing establishments which enjoyed five years infancy period under the unamended provision Section 16(1)(d) of the Act

5. Learned senior counsel, Sri M.S. Usgaokar, urged before us substantially the grounds taken in the petition and his contention is that the expression, "newly set up," which has been introduced for the first time in the amended provision

Section 16(1)(d) has to be harmoniously construed with the latter part thereunder, namely "is, or has been set up". This expression, "newly set up" according to him, is significant and in view of the same the rulings of the Apex Court which have interpreted the unamended provision Section 16(1)(d) wherein the expression "newly set up" did not exist, would not be helpful in interpreting the amended provision Section 16(1)(d). In this connection he has placed" before us a number of judgments of the Apex Court, namely in the case of R. Ramakrishna Rao Vs. State of Kerala, State of Punjab Vs. Satpal and Another, and The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, . On the question of interpretation of statutes and the taking away of vested rights, he has drawn our attention to the judgments of the Apex Court in Jayantilal Amrathlal Vs. The Union of India (UOI), and Govind Das and Others Vs. The Income Tax Officer and Another, . He therefore submits that the vested rights or the concession which had been granted under the unamended provision Section 16(1)(d) of the Act has not been taken away by the Legislature and no such intention of taking away such rights or concessions can be deduced from the amended provision Section 16(1)(d) of the Act.

6. On the other hand, the learned Central Government Standing Counsel, Sri G.V. Tamba, after placing reliance on the judgment of the Allahabad High Court in the case of Vikas Industrial Gases Ltd. v. Regional Provident Fund Commissioner 1992 (64) FLR 28 has urged that a similar question had come up before the Division Bench of the Allahabad High Court, wherein it is held that after the coming into force of the amended provision Section 16(1)(d), the infancy period even in respect of already existing establishments, shall be only three years and the Act applies to such establishments. He therefore submits that respondent 1 had rightly made the provisions of the amended Section 16(1)(d) applicable to the petitioners and the petition is liable to be rejected.

7. In order to appreciate the controversy we shall first enumerate the relevant provisions under the Act, which existed from time-to-time. Section 16 of the Act as it stood when the said Act was passed is as under:

" 16. Act not to apply to factories belonging to Government or local authority and also to infant factories. - This Act shall not apply to-

- (a) any factory belonging to the Government or a local authority; and
- (b) any other factory established whether before or after the commencement of this Act unless three years have elapsed from its establishment."

Section 16 was amended by the Employees' Provident Funds (Amendment) Act, 1958 and Sub-section (1) of Section 16 of the Principal Act was substituted as under:

"(1) This Act shall not apply to any establishment until the expiry of three years 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."

Section 16(1) was once again amended by the Employees' Provident Funds (Amendment) Act, 1960 and Sub-section (1) of Section 16 was substituted as under:

"(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 fifty persons and working without the aid of power; or

(b) to any other establishment employing fifty or more persons or twenty or more but less than fifty 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."

Section 16 was further amended by the Employees' Provident Funds and Miscellaneous Provisions (Amendment) Act, 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 the 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 establishment 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 a 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."

8. The infancy period under the said Act as originally passed was three years from the date of establishment irrespective of whether the establishment was set up before or after the commencement of the Act. The Employees' Provident Funds (Amendment) Act, 1958, provided that the infancy period shall be three

years from the date on which the establishment is, or has been, set up. This infancy period was changed under the Employees' Provident Funds (Amendment) Act, 1960, by which the infancy period in respect of establishments employing fifty or more persons was maintained as three years, but in case of establishments which employed twenty or more persons, but less than fifty, the infancy period was increased to five years. Petitioner 1 claims the infancy period under this provision and its contention is that his infancy period benefit has not been curtailed by the Employees' Provident Funds and Miscellaneous Provisions (Amendment) Act, 1988, in respect of existing establishments which were enjoying the said benefit under the unamended provision. By the Employees' Provident Funds and Miscellaneous Provisions (Amendment) Act, 1988, the infancy period has been reduced to three years even in cases where establishments employ twenty to fifty persons.

9. A comparison of various amendments enumerated above would show that in the amendments, the last thirteen words are same i.e., ",..... from the date on which the establishment is, or has been, set up. "However, it is pertinent to note that in 1988 Amendment expression "newly set up," has been added after the words, "to any other establishment". The judgments of the Apex Court to which our attention has been drawn have interpreted the unamended Section 16(1)(d), wherein the expression, "newly set up" did not figure. In the case of R. Ramakrishnan Rao v. State of Kerala (supra), the facts are:

10. The appellant was running Ananda, Bhavan Boarding and Lodging from December 6, 1949. The appellant started another establishment by name Hotel Brinda on January 15, 1959. He had a third establishment under the name Ananda Bhavan which was started on September 15, 1948, but was sold by him in April, 1962. The Provident Fund Inspector filed a complaint against the appellant on December 16, 1962, alleging contravention of Paras 36 (2)(a), and 36 (2)(b) and 38 of the Employees' Provident Fund Scheme, 1952. The appellant therein was convicted under Paras 76(c) and 76(e) of the Employees' Provident Fund Scheme, 1952 read with Section 14 of the Employees' Provident Funds Act, 1952, for having failed to submit returns, statements and other documents required by the Scheme in respect of three quarters, namely July to September, 1961. October to December 1961 and January to March 1962. The appellants were fined Rs. 25 on each count and revision against the said order was dismissed by the High Court. The appellant approached the Apex Court by filing special leave petition. The appellant claimed exemption for five years on the ground that Hotel Brinda, Palghat, had been started on January 15, 1959 and he was entitled to exemption for five years under the Act. His further defence was that the three establishments, one of which he had sold, formed different units and twenty persons were not employed in any one of those places and even if all establishments were taken together as a single establishment, the figure of twenty employees was only after Hotel Brinda, Palghat, was started in January 1959. These contentions of the appellant were rejected by the Apex Court and it was observed as under:

"The language of Section 16(1)(b) is very precise. The last thirteen words of the clause from the date on which the establishment is or has been set up, show both cases where the establishment is old. The word "is" shows that a new establishment is meant and the words "has been" show that the establishment existed before the number is reached. If it was intended to apply the clause to new establishments the words "is set up" would have been sufficient construction sought to be placed would render the words "has been" otiose. Further the scheme of Para 26 quoted earlier relates, to a period of service and this qualifying period may be in the past as well as in future. The intention behind Section 16 read with para. 26 quite clearly shows that the period is intended to give a breathing time to new establishment. That reason does not hold when the establishment is already old and well founded. The use of the participle is therefore immaterial. Whether a present perfect tense or a participle be used the meaning is the same. Clause (b) of Section 1(3) which uses the participle and Clause (a) of the same section which employs the present perfect tense both merely describe the establishments and convey no different meanings. The conclusion of the High Court was thus right. The appeals fail and will be dismissed."

In this case when Hotel Brinda was opened in 1959, the infancy period was three years under the 1958 Amendment. However, by the 1960 Amendment, infancy period was increased to five years in case of establishments employing more than 50 workers and as such the appellant claimed five years infancy period with effect from January 15, 1959. the claim was rejected by the Apex Court on the ground that the intention behind Section 16 read with Para 26 indicated that breathing time was meant for new establishments and the same could not be extended when the establishment is old and well-founded.

11. The case before us is reverse. Petitioner 1/establishment commenced from May 26, 1986 and the infancy period applicable is five years under the 1960 Amendment. Moreover, in 1988 Amendment the infancy period is reduced to three years. The question, therefore, before us is whether the 1988 Amendment shall have the effect of curtailing infancy period of five years to three years.

12. The Apex Court in State of Punjab Vs. Satpal and Another, had reiterated the law laid down by the Apex Court in its previous judgment in Ramakrishan Rao case (supra), and the following observations of the Apex Court may be quoted:

"The period of infancy mentioned in Section 16(1)(b) of the Employees' Provident Funds Act, 1952 should be calculated from the first day of the establishment of the factory and not from the moment of time when the figure of employment of 20 or more workmen is first reached. The word "is" in the subsection clearly indicates a newly started business and the words "has been" a business which has been in existence before".

13. Thus, in these judgments, the Apex Court had dealt with the unamended provision Section 16(1)(b) of the Act, wherein the expression, "newly set up" did

not exist. In our opinion, the most significant change which was, made by the Amendment Act, 1988, is the introduction of the words, "newly set up" and the unamended provisions of Section 16(1)(d) have to be interpreted taking the said significant change into consideration. It may be pointed out that the Apex Court had in the judgments which we have already quoted, categorically stated that the word, "is" in the unamended Sub-section (1)(b) of Section 16 of the Act clearly indicated a newly started business and the words, "has been," a business which had" been in existence before. Even in spite of this interpretation of the Apex Court the Legislature deemed it fit to introduce the words, "newly set up" in the amended provision Section 16(1)(d). Accordingly, the expression, "newly set up"" has to be harmoniously construed with the expression, "or has been set up" occurring in the latter part of the amended provision Section 16(1)(d). At this stage, we would like to refer to the judgments of the Apex Court upon which reliance has been placed, relating to the interpretation of statutes.

14. In *Jayantilal Amrathlal Vs. The Union of India (UOI)*, , it has been laid down as under:

"In order to see whether the rights and liabilities under the repealed law have been put to an end by the new enactment, the proper approach is not to enquire if the new enactment has by its new provisions kept alive the rights and liabilities under the repealed law but whether it has taken away those rights and liabilities. The absence of a saving clause in a new enactment preserving the rights and liabilities under the repealed law is neither material nor decisive of the question.

15. The Apex Court in *Govindas and Ors. v. Income Tax Officer and Anr. (supra)*, had laid down that:

"Now it is well settled rule of interpretation hallowed by time and sanctified by judicial decisions 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 otherwise than as regards matters of procedure. The general rule as stated by HALSBURY in Vol.36 of the LAWS OF ENGLAND (3rd Edn.) and reiterated in several decisions of this Court as well as English Courts is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are *prima facie* prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

There is no doubt that the vested rights or benefits under the legislation could be retrospectively taken away by legislation, but then the statute taking away such rights or benefits must expressly reflect its intention to that effect. The infancy period prior to the amended provision Section 16(1)(d) was five years in the case

of establishments employing 20 to 50 workers and in the event this infancy benefit was to be withdrawn, it was necessary that the intention of the Legislature should have been clearly reflected in the amended provision itself that the rights and benefits which had already accrued stood withdrawn. The amended clause 16(1)(d) came on the statute book on June 2, 1988, when it was assented by the President of India but the amended Section 16 was put into operation only with effect from August 1, 1988, which empowered the Central Government to appoint different dates for the coming into force of different provisions of the Act. Thus, though the amended Section 16(1)(d) came on the statute book on June 2, 1988, but it was brought into force on August 1, 1988, in the intervening period, the establishments would be set up, that is to say before the coming into force of Section 16(1)(d) and these establishments would come within the expression, "or has been set up" used in Section 16(1)(d) since these establishments would be treated as newly set up for the purpose of the Act. Secondly, Section 1(3) of the Act provides that subject to the provisions contained in Section 16 it applies:

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed; and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf.

This means that the Central Government is empowered to specify other establishments to which the provisions of the Act shall extend subject to the provisions contained in Section 16 of the Act. The notification of such establishments, may come after the amended provision Section 16(1)(d) to whom the benefits may be extended and such establishments" would also fall within the latter part of the expression, "or has been set up" used in Section 16(1)(d) of the Act. Section 16(1)(d) in our opinion, essentially applies to establishment newly set up after the coming into effect of the said provision on the statute book, though the enforcement of the same was effective from a later date. This is the only way in which a harmonious construction can be put to Section 16(1)(d) in view of the significant change made in the amended provision by adding "newly set up". The learned Judges of the Allahabad High Court have not attached significance to the crucial words, "newly set up" and the emphasis laid down was on the words, "is or has been set up". As we have already pointed out, this expression had occurred throughout in the provisions and the significant change which was made by the Amendment Act in Section 16(1)(d) is the expression "newly set up", which has to be given its due meaning by harmonising the same with the words, "has been set up," used in the latter part of Section 16(1)(d). We find it difficult in the circumstances, to conclude that the intention of the Legislature was to take away the benefit of infancy period which had already accrued to the existing establishments and this benefit has not been expressly taken away or by implication by the amended provision

Section 16(1)(d). In the circumstances, we are of the opinion that the infancy period benefit of the petitioner for a period of five years with effect from May 26, 1986, is not taken away by the amended provision Section 16(1)(d) of the Act; and the petitioner could continue to enjoy the said infancy benefit for a period of five years till May, 1991. Therefore, the demand made by respondent 1 for the period up to May, 1991, has to be quashed. The petitioners are complying with the provisions of the Act with effect from June, 1991.

16. For the aforesaid reasons the demand made by respondent 1 vide Exhibit E, dated September 23, 1993, is quashed in so far as it relates to the period from June, 1989 to May 1991. The writ petition succeeds to that extent and the rule is made absolute in the aforesaid terms with no order as to costs.