(1997) 07 KAR CK 0105

In the Karnataka High Court

Case No : Writ Petition No. 12011 of 1989

M/s. Bhandari Forgings, Bangalore APPELLANT

Vs

The Regional Provident Fund Commissioner, Bangalore RESPONDENT

Date of Decision : 01-07-1997

Acts Referred:

Constitution of India, 1950 — Article 226

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

Citation : (2000) 4 KarLJ 173

Hon'ble Judges : G. Patri Basavana Goud, J

Bench : Single Bench

Advocate : Sri S.N. Murthy, for the Appellant; Sri Harikrishna S. Holla, Central Government Standing Counsel, for the Respondent

Judgement

1. Section 16(1)(d) of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (''Act'' for short) exempts a newly set up establishment from the provisions of the said Act for a particular period initially, which is called protection during the infancy period. The question that arises in this case is as to when can an establishment be said to have been set up for the purposes of the said Section 16(1)(d).

2. The petitioner herein is M/s. Bhandari Forgings and it is submitted that it is essentially a manufacturing concern, manufacturing non-ferrous and ferrous castings i.e., forgings. The petitioner sought the protection of the infancy period u/s 16(1)(d) of the Act on the ground that it is set up in September 1982. Under Annexure-D, however, the respondent-Regional Provident Fund Commissioner held that it must be taken as having been set up not in September 1982, but, in March 1982. Petitioner seeks quashing of the said Annexure-D in this writ petition under Article 226 of the Constitution.

3. The petitioner did sell certain raw materials in March 1982 to its sister concern. Therefore, respondent takes March 1982 as the material date for the purposes of commencing of infancy protection period u/s 16(1)(d). The actual

production i.e., by way of production or manufacturing of forgings however commenced only in September 1982. The contention of Sri Harikrishna S. Holla, the learned Counsel for the respondent, is that even sale of raw materials is one of the activities covered by the relevant Schedule and as such, when the petitioner sold the raw materials in March 1982, for all purposes, it has commenced its activities from March 1982 and that, therefore, the infancy period must be taken as having commenced in March 1982 and the establishment must be taken as having been set up in March 1982 within the meaning of Section 16(1)(d). Sri Harikrishna S. Holla for the respondent therefore urges that the respondent was right in concluding under Annexure-D that the establishment must be taken as having been set up in March 1982. The learned Counsel for the petitioner Sri Somashekar however urges that the petitioner is established solely for the purposes of manufacturing forgings, that sale of raw materials is no part of its activity. Sri Somashekar explains that the raw materials came to be sold in March 1982 by the petitioner to its sister concern solely for the reason that, for want of electricity supply, the petitioner could not undertake its main activity of manufacturing forgings and, as such, it was compelled to sell whatever raw materials it had to its sister concern, and that this sale alone cannot be held against the petitioner to conclude that the petitioner-establishment was set up in March 1982. Sri Somashekar refers to Annexure-A, a letter from the Karnataka State Small Industrial Development Corporation, to the effect that instalments towards hire purchase in respect of the shed concerned had not been paid till May 1983. Sri Somashekar refers to Annexure-B, dated 23-4-1982 from the Executive Engineer of the KEB to show that even as in April 1982, the petitioner-establishment had not been supplied with electricity. He than refers to Annexure-C, dated 24-4-1982 from the petitioner to the Executive Engineer, KEB requesting for 25 KVAR Capacitor. It is thus sought to be urged on behalf of the petitioner that even as late as in April 1982, there was no electricity supply to the petitioner and as such, because of the petitioner''s inability to commence manufacturing process, it had to sell the raw materials to its sister concern.

4. As to when the establishment can be said to have been set up within the meaning of Section 16(1)(d) of the Act, there is no definition of "set up" in the Act. Therefore, to understand as to when an establishment can be said to have been set up, we have to look to the purpose for which the establishment concerned is sought to be set up. If the purpose is one of sales of the articles, then it can be said to have been set up on the date the first sale is made. If the purpose is one of manufacturing an item, it can be said to have been set up on the date the first item is manufactured. If it is a combined activity of sale of articles as also of manufacturing of any particular item, then, even though item is not yet manufactured, nevertheless, if any article is sold, from the date of sale itself the establishment can be said to have been set up. Setting up of an establishment in the sense that the necessary infrastructure like putting up shed, giving electricity connection, fixing machinery etc., will take its own time. The said time cannot be taken as a relevant period for extending infancy protection u/

s 16(1)(d). The infancy protection u/s 16(1)(d) would commence from the day its main activity would commence. The reason is that, for a particular period initially, establishment should not be burdened with various obligations under the Act, If the time spent in putting up the infrastructure like building a shed, fixing the machinery and taking the electricity connection, are by themselves held to be covered during the infancy period, then, very purpose of affording the protection would lose its significance. Therefore, it is to be understood that such period spent in arranging the necessary infrastructure, before the main activity is commenced, should not be held to be included in the infancy protection period. That means that, after the entire infrastructure is put in place, it is only when the first item comes out towards commercial activity of the establishment concerned, can the establishment be said to have been set up for the infancy protection period to commence within the meaning of Section 16(1)(d) of the Act. It is in this background that the facts of the present case are to be examined.

5. As said earlier, sale of raw materials is no part of the commercial activity of the petitioner-establishment. Its one and the only concern is that of manufacturing forgings and then sell them. If raw materials are sold by the petitioner, the reason why such sale took place has been amply borne out from the records. Such sale of raw materials to the sister concern was not done by way of a commercial activity in the ordinary course of the business of the petitioner-concern. The said sale had to take place for the reason that, as late as in April 1982, even the electricity supply had not been made as is evident from Annexure-B and C. When there was not even electricity supply to the petitioner-establishment, it is difficult to say that the establishment had already been set up in March 1982. In the circumstances, merely because raw materials came to be sold by the petitioner to its sister concern, it cannot be held that the establishment came to be set up in March 1982. It is obvious that the petitioner had purchased raw materials for its manufacturing process, but, that the said raw materials could not be utilised for that process because of non-supply of electricity even as late as in April 1982, and it was for that reason that the said raw materials were disposed of to the sister concern. The actual production started only in September 1982. Therefore, the establishment can be said to have been set up only in September 1982 within the meaning of Section 16(1)(d) of the Act. The respondent, therefore, committed an error in concluding to the contrary under Annexure-D.

6. The writ petition is allowed and Annexure-D is quashed.

7. Sri Harikrishna Holla, learned Counsel is permitted to file his Vakalat for the respondent.