(2011) 11 AHC CK 0484

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 990 of 1992

Sahu Stone Crushing Industries — APPELLANT

Vs

Divisional Level Committee and Another — RESPONDENT

Date of Decision : 24-11-2011

Acts Referred:

Factories Act, 1948 — Section 2(m), 6, 6(1), 6(1)(a), 7

Citation : (2012) 52 VST 212

Hon'ble Judges : Sunil Ambwani, J;Manoj Misra, J

Bench : Division Bench

Advocate : Rakesh Kumar, for the Appellant; A.K. Tripathi, for the Respondent

Final Decision : Allowed

Judgement

1. We have heard Shri Rakesh Kumar, learned counsel for the petitioner and Shri A.K. Tripathi, standing counsel appears for the State-respondents. By this writ petition the petitioner, as a newly established industrial unit applied for exemption of sales tax on graded basis, with effect from the date of start of production with effect from the date of first sale of its production on December 3, 1986. The competent authority on being satisfied granted the recognition certificate u/s 4A of the U.P. Trade Tax Act for exemption from payment of sales tax for the period December 3, 1986 to December 2, 1993 (for seven years).

2. One of the conditions for grant of exemption certificate was the requirement to obtain registration under the Factories Act, 1948. In paras 2, 3 and 4 of the writ petition it is stated as follows:

2. That the petitioner has established a new unit for the manufacturing of stone grits. The production has been started on January 31, 1986 and the first sale was made on December 3, 1986.

3. That inasmuch as the number of workers were less than 10, at the time of starting of the production, the petitioner could not apply for registration under the Factories Act inasmuch as in view of section 2(m) of the Indian Factories Act,

the registration under the Factories Act is only required, in case the number of workers are more than 10. In case the number of workers in the factory are less than 10, neither there is any obligation to get the registration under the Factories Act nor, the authorities under the Indian Factories Act are granting registration.

4. That when number of workers exceeded more than 10, the petitioner applied for registration under the Factories Act on November 24, 1988 and accordingly the registration under the Factories Act has been granted with effect from November 24, 1988.

3. The Divisional Level Committee empowered to consider and recommend for exemption, in its meeting dated March 26, 1992 considering the condition of registration under the Factories Act to be a mandatory condition, and reduced the period of exemption from the date of registration of the unit, as such, i.e., December 3, 1986 to December 2, 1993. Aggrieved the petitioner filed the writ petition with the following prayers:

(i) to issue a writ, order or direction, directing respondent No. 1 to modify the eligibility certificate granting effective exemption from the date of first sale.

(ii) to issue a writ, order or direction, quashing the assessment orders for the assessment years 1986-87 and 1987-88.

(iii) to issue a writ, order or direction, staying the recovery proceedings for the assessment years 1986-87 and 1987-88 and the assessment proceedings for the year 1988-89.

(iv) to issue a writ, order or direction which this honourable court may deem fit and proper in the circumstances of the case; and

(v) to award the cost of the petition to the petitioner.

4. The writ petition was heard and allowed by the Division Bench of this court on November 11, 1993 (Sahu Stone Crushing Industries v. Divisional Level Committee [1995] 98 STC 66 (All)). The court followed the reasoning given in the judgment in Kuchchal Industries, Saharanpur v. Divisional Level Committee, Meerut [1990] UPTC 481 (All), in which it was held that the requirement of registration under the Factories Act, 1948 is only directory and not mandatory. The purpose of requirement of registration is only to ensure that there is a genuine new unit, and hence the conditions could not be insisted upon. The authority may consider other materials, to demonstrate that a genuine new unit has been set up. The requirement of registration under the Factories Act for exemption is directory and not mandatory.

5. The State of U.P. challenged the judgment in Supreme Court. The Civil Appeal No. 4769 of 1996 filed by Divisional Level Committee and Another Vs. Sahu Stone Crushing Industries, was decided on March 21st, 1996. The Supreme Court did not agree with the reasoning and the conclusions drawn by the High Court and held as follows (pages 363 and 364 in 114 (STC):

...On the first question the High Court observes: ''prima facie, it seems to us that there is a discrimination between those persons to whom registration under the Factories Act is granted quickly and those to whom it is granted with considerable delay''. According to the High Court, while the former may enjoy the full period of exemption effective from the date of registration, the latter will be denied the full period and would be entitled to the benefit for the curtailed period only. At the same time, it held that it was not necessary to declare the provision to be ultra vires the Constitution because the reading down of clause (c) would be that it is directory and not mandatory in character. We are afraid that the Division Bench failed to visualise that even if the word ''shall'' in clause (c) of sub-section (5) of section 4A is read as ''may'' the discretion would be with the authorities to grant or refuse the benefit taking the relevant date as the date of registration. That would permit the authorities to act in an arbitrary manner where in a certain situation they may grant the benefit to an unregistered unit and in others they may refuse. We do not see any reason why the word ''shall'' should not be given the meaning it ordinarily carries because we do not think that there is any discrimination of the type envisaged by the High Court. Even if the provision was taken to be directory and if the State refused to grant the benefit for the period during which the unit was unregistered on the assumption that the High Court''s view is correct, one cannot say that the discretion was wrongly used.

However, Mr. Puri, the learned counsel for the respondent, pointed out that the High Court had missed the real thrust of the challenge although it has made a mention of it in the judgment. The High Court points out that it was averred in paragraph 3 of the writ petition that where the number of workers in a new unit is less than ten at the time it goes into production, such a unit would not be required to be registered under the Factories Act since u/s 2(m) thereof, only those factories in which the number of workers are ten or more can be registered. His submission was that if the benefit is relatable to the date of the registration then such new units would be totally out of the exemption purview and that is the reason why, according to him, clause (c) of sub-section (5) of section 4A was ultra vires. That question has not been squarely dealt with by the High Court. It is, therefore, necessary to remit the matter to the High Court for a fresh consideration. In the result, the appeal is allowed. The impugned order of the High Court is set aside and the matter is remitted to the High Court for disposing of the question based on the language of section 2(m) of the Factories Act and the argument that clause (c) of sub-section (5) of section 4A is ultra vires because it discriminates between new units which are registrable under the Factories Act and those that are not registrable thereunder. The High Court will reconsider the mater at an early date. No order as to costs.

Sd/-CJI

Sd/- (S.P. Bharucha) J.

Sd/- (Faizan Uddin) J.

New Delhi

March 21, 1996.

6. The question as to whether the condition of the registration under the Factories Act is a mandatory for grant of exemption to the new industrial unit has become final.

7. In this writ petition we are required to consider a limited question as to where the number of workers in new units are less than 10 at the time, when it goes to production, such unit would not be required to be registered under the Factories Act as u/s 2(m), only those factories in which number of workers are 10 or more can be registered.

8. In this case it is not denied that number of workers at the time, when the unit went into production was less than 10 and thus the industrial unit of the petitioner did not fall within the definition of factory u/s 2(m) of the Factories Act. Section 2(m) with Explanation is quoted as below:

2(m) ''factory'' means any premises including the precincts thereof-

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,--

but does not include a mine subject to the operation of (the Mines Act, 1952 (35 of 1952)) or (a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place).

Explanation I.--For computing the number of workers for the purposes of this clause all the workers in (different groups and relays) in a day shall be taken into account;

Explanation II.--For the purposes of this clause, the mere fact that an electronic data processing unit or a computer unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;)

9. Section 6(1) of the Factories Act provides for approval, licensing and registration of factories in accordance with the Rules to be made by the State Government. Section 6(1)(a) of the Factories Act, 1948, requires submission of plans, of any class or description of factories of the Chief Inspector or the State Government. Sub-section (aa) requires the previous permission in writing of the State Government or the Chief Inspector to be obtained for the site on which the factory is to be situated and for the construction or extension of any factory or class or description of factories. Sub-section (d) requires the registration and

licensing of factories or any class or description of factories, and prescribing the fees payable for such registration and licensing and for the renewal of licences. Sub-section (2) of section 6 provides as follows:

6. (2) If on an application for permission referred to in clause (aa) of sub-section (1) accompanied by the plans and specifications required by the Rules made under clause (b) of that sub-section, sent to the State Government or Chief Inspector by registered post, no order is communicated to the applicant within three months from the date on which it is so sent, the permission applied for in the said application shall be deemed to have been granted.

10. Rule 6 of the U.P. Factories Rules, 1950 provided for mode of application for registration and licensing. The second proviso to rule 6 provides for restriction on the occupier to obtain a licence or renewal thereof before he begins to occupy or condition to use the premises as factory. Rule 6 is quoted as below:

6. Mode of application.--The occupier of every factory shall submit to the Chief Inspector an application together with form No. 4, prescribed u/s 7, in triplicate for registration of the factory and grant of a licence, at least fifteen days before he begins to occupy, or use, the premises as a factory:

Provided that, the occupier of a place, to which the provisions of the Act are made applicable by a notification u/s 85, shall submit such application within thirty days of the date of such notification:

Provided further that the occupier shall, before he begins or continues to use any premises as a factory, obtain a licence or renewal thereof, in accordance with the provisions of these Rules.

11. The scheme of the Factories Act, 1948 and the U.P. Factories Rules, 1950 shows that the permission of the State Government or Chief Inspector has to be obtained for the construction or extension of the factory on the proposed site, and further, a restriction is placed on the occupier to obtain licence or renewal thereof before he begins or condition to use premises as factory.

12. In the scheme of the Act and the Rules, it cannot be said that there may any chance of delay in registration of new factory, which will defeat object of granting exemption to new unit for payment of sales tax. The restrictions are wholesome and do not provide a factory to be established or to be used unless the permission and the registration or licence is granted.

13. Before proceeding to consider the question remitted by the honourable Supreme Court, we may observe here that the judgment in Kuchchal Industries [1990] UPTC 481 appears to have been accepted by the State Government, as it is evidenced from the amendment made by the U.P. Act No. 28 of 1991 in the U.P. Sales Tax Act with effect from October 12, 1983. The Explanation to sub-section (6) of section 4A was amended, for new units and which provide in sub-clause (b)(i) to the Explanation regarding registration under the Factories Act. The amended Explanation is quoted as below:

Explanation--For the purposes of this section.--

(1) ''new unit'' during the period ending with March 31, 1990 means an industrial undertaking set-up by a dealer on or after October 1, 1982 but not later than March 31, 1990,--

(a) which is licensed or in respect whereof a letter of intent has been issued or which is registered, permanently or otherwise by the appropriate authority in accordance with any law for the time being in force relating to licensing or registration of industrial undertakings;

(b)(i) which registered under the Factories Act, 1948, or

(ii) an application for registration in respect whereof has been made under that Act, or....

14. The object of grant of exemption is to encourage setting up of new industry, and to allow them to compete with old industries in which cost of production is less as compared to the new unit. A new unit both on account of cost of establishment as well as interest on the borrowing for capital costs, requires certain exemptions, to be able to meet the handicap, and to compete with new industries. The provision for grant of eligibility certificate was introduced by Act No. 25 of 1985. The section was amended from time to time to clarify and to define new unit, which will be given exemption and also to specify the date for which such exemption is to be granted.

15. We are unable to subscribe to the arguments raised by Shri A.K. Tripathi appearing for the State that the object of the exemption was to give encouragement to industries, which have more than 10 workers and thus the requirements of obtaining registration under the Factories Act, 1948, is essential condition of grant of eligibility certificate. No such argument was raised either in the Kuchchal Industries case [1990] UPTC 481 (All) or at the time when this writ petition was argued in the year 1993. The provisions for exemption have stood test of time for last 30 years, and provide that the requirement of registration is only for the purposes of finding out, through documents, that industrial unit is a new industrial unit and to ascertain the date of production as well as the date of first sale. The State Government did not plead in the past that the exemptions are required to be given to only those industries, which have more than 10 workers. The U.P. Sales Tax Act is legislation related to trade and commerce. It is not a legislation in which requirement of more than 10 workers in industrial unit may be accepted for exemption as a labour welfare-measure.

16. Where a new unit does not employ 10 or more than 10 workers it is not factory as defined u/s 2(m) of the Factories Act, 1948, and thus does not require registration u/s 6 of the Factories Act, 1948. In such case requirement of applying for registration and getting registration and licence as pre-condition of grant of eligibility certificate is not necessary. Where the legislation by reference provides for the requirement, to be complied with in law, which is not insisted by

the Act to which reference has been made, it is not necessary to comply with that condition. The law does not insist upon something, which is not permissible or provided in the statute.

17. We are of the opinion that where a unit employs less than 10 workers at the time, when it goes into production, the unit would not be required to be registered under the Factories Act and in respect of such unit insistence of the registration under the Factories Act or the making of application as condition precedent to grant of exemption in the units would not apply. The provisions of the requirement of registration of such industrial units is directory and cannot be treated to be mandatory. There may be situation, as in the present case where industrial unit was having less than 10 workers at the time, when it goes on production, and subsequently it employs more workers increasing the number more than 10 required registration under the Act. In such case requirement of registration may be treated to be mandatory but that the date on which the registration of such unit has been registered, cannot be co-related or treated, to have cut down and reduce the period of exemption. In such case period of exemption will be applicable from the date, when the unit started into production and made its first sale.

18. In the present case it is not denied that the unit started into production and first sale was made on December 3, 1986. The District Level Committee was thus not justified in reducing the period to begin from the date, when it obtained registration, on November 24, 1988, after it had applied, on being included in the definition of factory u/s 2(m) of the Act on employing 10 or more than 10 workers. The writ petition is allowed, with declaration that the period of eligibility certificate, giving exemption to the petitioner unit will start from December 3, 1986 and not November 24, 1988. The impugned orders of Divisional Level Committee curtailing the period of exemption is set aside.

