

(1991) 08 AHC CK 0021
In the Allahabad High Court
Case No : C.M.W.P. No. 13165 of 1990

Vikas Industrial Gases

APPELLANT

Vs

Regional P.F. Commissioner

RESPONDENT

Date of Decision : 07-08-1991

Acts Referred:

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

Citation : (1995) 3 LLJ 191 : (1992) 1 UPLBEC 25

Hon'ble Judges : S.K. Dhaon, J;K. Narayan, J

Bench : Division Bench

Advocate : S.N. Verma and Tarun Verma, for the Appellant; Rakesh Tewari, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Dhaon, J.—The interpretation of Clause (d) of Sub-section (1) or Section 16 as amended by Section 21 of the Employees Provident Fund and Miscellaneous Provisions (Amendment) Act, 1988 (hereinafter referred to as the Amending Act) is the subject matter of this petition.

2. The petitioner a company incorporated under the Indian Companies Act, 1956 went into commercial production on 15th March, 1984. It employed a maximum number of 34 workmen with effect from the said date. The petitioner company was engaged in an industry which was specified in Schedule-1 to the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act) and it employed more than 20 persons. Therefore, ordinarily the Act was applicable to it. However, in view of the provisions as contained in Clause (b), of Sub-section (1) of Section 16 of the Act, as they then stood, the provisions of the Act were not applicable to it for the time being.

3. Section 16 of the Act, as relevant on 15th March, 1984, read:

"(1) This Act shall not apply.

(a)

(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".

Section 21 of the Amending Act, as relevant, reads:

"In Section 16 of the Principal Act--(i) in Sub-section (1), for Clause (b), the following clause shall be substituted namely:

.....

(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".

4. The contention raised on behalf of the petitioner is that the amended Section 16, which came into existence with effect from 1st August, 1988, does not have any retrospective operation and will have no application to it. Consequently, the Act remained inapplicable to the petitioner for a period of five years from 15th March, 1984, that is, till 14th March, 1989.

5. The crucial words in Clause (d), as introduced by the Amending Act, are "is or has been set up". These words have not been used for the first time by the Amending Act. They were also used by Parliament in Clause (b) of Sub-section (1) of Section 16 of the Act. In *R. Ramakrishna Rao Vs. State of Kerala*, it was held that the language of Section 16(1)(b) is very precise. The last 13 words of the Clause "from the date on which the establishment is, or has been, set up", show both cases where the establishment is new and 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 establishment the words "is set up" would have been sufficient. The construction sought to be placed would render the words "has been" otiose.

6. In the *State of Punjab v. Satpal and Anr.*, 1970-2-LLJ 64 the controversy was whether for applying Clause (b) of Subsection (1) of Section 16 of the Act, the period of infancy was to be calculated from 9th November, 1957, when the establishment first began or from 13th November, 1982, when the employment of 20 or more workmen first commenced. Relying upon the decision given in *R. Ramakrishna Rao* 's case (supra) and an earlier decision of the Supreme Court in *Lakshmi Rattan Engineering Works v. Regional Provident Fund Commissioner, Punjab* 1966 (12) FLR 229 (SC) it was held that the period of infancy must be calculated from the first date on which the establishment came into existence and not from the moment of time when the figure of 20 or more is first reached. It is thus evident that when the Amending Act was introduced, the Supreme Court has already taken the view that the expression "has been" in Section 16(1) (b) was referable to the transactions prior to the enactment. There is, therefore,

a strong presumption that Parliament while using these very words in the Amending Act intended that they will govern the establishments which came into existence prior to the enforcement of the Amending Act. If Parliament intended to depart from the meaning ascribed to the said words by the Supreme Court surely it could have indicated its intention by using different language.

7. In *Secretary, Regional Transport Authority, Bangalore and Another Vs. D.P. Sharma and Others*, it is observed:

"In our opinion, whether the expression "has been" occurring in a provision of a statute denotes transaction prior to the enactment of the statute in question or a transaction after the coming into force of the statute will depend upon the intention of the legislature to be gathered from the provision in which the said expression occurs or from the other provisions of the statute."

In order to ascertain the intention of the legislature we may not lose sight of the rule laid down centuries back in *Heydon's case*. The Act is a beneficial measure enacted for the purposes of institution of provident fund for employees in factories and other establishments. Provisions have been made of the better future of the industrial workers after they retire or for their dependents in case of their early death. The purpose of the Act is to institute a provident fund. The employer is required to contribute in the provident fund in the same way in which an employee is required to make the contribution. The provisions as contained in Section 16 of the Act or the Amending Act intend to give a breathing time to new establishments. Clause (b) of Sub-section (1) of Section 16, as originally enacted, provided that the Act shall not apply to any establishment, whether established before or after the commencement of the Act unless three years have elapsed from its establishment. Thus, it is evident that in 1952, when the Act saw the light of the day, Parliament has clearly intended that the Act would be applicable to factories established prior to the coming into force of the Act. The only requirement was that a period of three years should have elapsed from the date of establishment of the factory. That period may have exhausted itself even before the Act came into existence or thereafter. By the Amending Act No. 22 of 1958 Sub-section (1) of Section 16 was substituted by the words:

"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."

We find no change in the intention of the Parliament as exhibited when Sub-section (1) of Section 16 had been originally enacted. In plain words the Amending Act also provided that the Act would be applicable to any establishment having a standing of three years. It makes no distinction between an establishment which came into existence after the coming into force of the Amending Act and an establishment which was established prior to the coming into force of the Amending Act. By Act No. 46 of 1960 Clause (b) of Sub-section (1) of Section 16, as extracted above, was substituted by the words which already been extracted above. Again, Parliament manifested its intention by

using the words "is or has been" thereby indicating that the amended provision would apply to the establishments which came into existence both prior to or subsequent to the coming into force of the amended provisions as contained in the aforementioned Amending Act. Evidently the Amending Act has restored the position which was brought about by the Amending Act 22 of 1958.

8. The crucial words in Clause (d) of Sub-section (1) of Section 16, as introduced by the Amending Act, in our opinion, exhibit the intention of the Parliament that the old pattern should continue. The only effect is that there is a reduction of the breathing time. Clause (d) will apply to any establishment having a standing of three years. It is immaterial whether the period of three years expired prior to coming into force of the Amending Act or the period of three years will expire after the coming into force of the Amending Act or the period of three years will commence on the setting up of an establishment after the commencement of the Amending Act. The emphasis of the law is that an establishment will be beyond the purview of the Act for a period of three years from the date of its establishment.

9. Learned counsel has tried to explain the words "newly set". According to him these words include establishment freshly set up as well as those in prior existence but not functioning on the date of the coming into force of the amended provisions. This, in our opinion, is not a correct reading. The words referred to above merely mean that the provisions of the Act will commence to apply after the expiry of a period, of three years from the date of setting up of the establishment. The question of computing the period of three years will arise if and when an establishment is set up. And, whenever an establishment is set up it will be a newly set up establishment.

10. Sub-section (3) of Section 1 of the Act says that subject to the provisions contained in Section 16 the Act applies to the establishments enumerated in Clauses (a) and (b). But for Section 16 the Act will apply to all the establishments provided they fulfill the conditions laid down in Clauses (a) and (b). Furthermore, but for Section 16, no breathing time or a short holiday for the purpose of making a contribution to the provident fund by an employer is contemplated. When a provision in a statute is "subject to" another provision requiring some thing to be done, the first provision is conditional upon the performance of what is required by the provision referred to. Therefore, Sub-section (3) of Section 1 will continue to operate conditional upon the fulfillment of the conditions required by Section 16 as they stand on the date when Sub-section (3) of Section 1 is applied. In Sub-section (3) of Section 1 there is no promise made or could be made that there will be no alternation in the provisions of Section 16. It follows that the petitioner did not acquire any right much less a vested right merely because in Section 16 it was given a mere right to take advantage of the provisions contained therein. No right accrued in favour of the petitioner by virtue of the provisions as contained in Section 16. If that be so, the question of the breathing time of Section 16, as brought into force by the

Amending Act, being given a retrospective effect does not arise. It is trite law that it would be incorrect to call a statute retrospective "because a part of the requisites for its action is drawn from a time antecedent to its passing" (vide R.V. St. Merry Chappel Inhabitant, (1842, 12 O.B.D. 120).

11. We may dispose of the argument advanced on behalf of the petitioner on the basis of Section 6 of the General Clauses Act. We have already indicated that by the Amending Act no right of the petitioner has been impaired. No obligation too has been impaired. Merely because the petitioner got a breathing time, it did not acquire any privilege. In any view of the matter, a different intention is demonstrated by Parliament when it uses the words "is or has been". We, therefore, hold that Section 6 of the General Clauses Act has no application at all.

12. This petition has not been formally admitted. However, affidavits have been exchanged between the parties. With the consent of the learned counsel for parties, we had proceeded to hear it with a view to dispose it of finally and we are doing so.

13. The petition has no substance. It is dismissed. However, there shall be no orders as to costs.