Om Sai Hotels And Restaurants, A ... vs The Regional Provident Fund ... on 30 September, 2003

Equivalent citations: (2004) ILLJ 895 Bom, 2004 (2) MhLj 547

Bench: R Khandeparkar

Om Sai Hotels And Restaurants, A Partnership Firm Duly Registered Under The Provisions Of The Indian Partnership Act vs The Regional Provident Fund Commissioner (I) And Union Of India (Uoi), Through Secretary, Ministry Of Labour on 30/9/2003

JUDGMENT

R.M.S. Khandeparkar, J.

1. Heard the learned Advocates for the parties. Perused the records.

2. The Petitioner challenge's the order dated 2nd May, 2000 passed by the Regional Provident Fund Commissioner (I) for Maharashtra and Goa whereby the Authority has denied the infancy period to the petitioner's establishment on two counts, firstly, that applying the amended provision of Section 16(1) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, hereinafter called as "the said Act", and secondly, that the identity of the petitioner's Undertaking cannot be dissected from that of M/s. Copper Chimney, which was already covered under the provisions of the said Act.

3. The few facts relevant for the decision are that the petitioner is a partnership firm duly registered under the provisions of the Indian Partnership Act and engaged in the business of running a hotel in the premises at Saki Naka, Andheri, Mumbai. On completion of the said premises, the petitioner entered into an Agreement with another partnership firm by name M/s. Copper Chimney for rendering expert services in management and administration of the hotel business of the petitioner. Under the Agreement dated 5th June, 1995 entered into between the petitioner and the said M/s. Copper Chimney, who were paid with a sum of Rs. 4 lakhs by way of non-refundable royalty and were further assured of payment of commission at the rate of 3 per cent of the gross sales with effect from 1st April, 1996 onwards, and accordingly the business was started from 6th September, 1995. In terms of the Notification dated 16th May, 1961 issued by the Government of India, which came into force from 30th June, 1961, the hotels and restaurants were covered under the provisions of the said Act. However, in terms of the provisions contained in Section 16(1)(d) read with Section 1(3)(iv) of the said Act, as was in force at the relevant time, the petitioner was

entitled for three years infancy period, and therefore, was, entitled for exemption from the applicability of the provisions of the said Act from 6th September, 1995 till 30th September, 1998. On or about 22nd September, 1997, Section 16(1)(d) of the said Act was deleted with effect from 11th September, 1997, and, as a result thereof, the infancy period prescribed for exemption of the establishment from applicability of the said Act was done away with. The petitioner thereupon suo motu applied for allotment of Code number under the said Act by its application dated 20th October, 1997. However, in response to the said application and consequent to the visit of the Enforcement Officer to the establishment of the petitioner, under a letter dated 7th October, 1998 by the respondents, the petitioner was informed that the petitioner's establishment was covered by the provisions of the said Act with effect from 6th September, 1995. Objections to the same by its letter dated 21st October, 1998, it was brought to the notice of the respondents that since the petitioner had started its business prior to the amendment to Section 16(1)(d) of the said Act, it was entitled to enjoy the infancy period for three years. Further, a detail representation was also made in that regard on 12th August, 1999, After hearing the petitioner, however, the respondents rejected the contention of the petitioner and by the impugned order held that the petitioner's establishment is required to be clubbed with M/s. Copper Chimney and as such was held to be covered by the provisions of the said Act with effect from 6th September, 1995. Hence, the present Writ Petition.

4. The learned Advocate for the petitioner placing reliance in the decisions in the matter of Isha Steel Treatment, Bombay v. Association of Engg. Workers, Bombay & Anr., reported 1987 I CLR 232, in Associated Polymers Ltd. v. Union of India and Ors., reported in 1997 II CLR 294, and inMagic Wash Industries (P) Ltd. and Ors. v. Asstt. Provident Fund Commissioner and Ors., reported in 1999 II CLR 426, submitted that neither the respondents-authorities could find functional integrality on the basis of the materials placed on record or pursuant to the inspection of the premises by the Enforcement Officer, between the petitioner's establishment and M/s. Copper Chimney in relation to the business of the petitioner in the premises in question nor the authorities applied their mind to the materials placed on record while arriving at the finding about the clubbing of the establishment of the petitioner with that of M/s. Copper Chimney. He has further submitted that the respondents failed to take cognizance of the undisputed facts on record established by documentary evidence which "disclose the absence of inter-dependency, financial participation, functional integrality, exchange of man-power, common control and common ownership between the petitioner and the M/s. Copper Chimney, and having passed the impugned order ignoring all these aspects and directing clubbing of the petitioner's establishment with M/s. Copper Chimney, the respondents-authorities have clearly acted arbitrarily and in contravention of the provisions of law, and therefore the impugned order cannot be sustained.

5. The learned Advocate for the respondents, on the other hand, has submitted that it was the petitioner itself who had approached the establishment immediately after the amendment to Section 16(1)(d) of the

said Act for allotment of Code number, having realised about the applicability of the said Act to the establishment, and therefore, it does not lie in the mouth of the petitioner to claim infancy protection even after the amendment to the Section 16 of the said Act. It was also sought to be contended that before passing of the impugned order, the petitioner had never claimed any right for continuation of the infancy period beyond 11th September, 1997 and the plea in that regard has been raised only in the Writ Petition. He has further submitted that the authority by taking into consideration the documentary evidence in the form of Agreement between the parties has arrived at the findings about the functional integrality, though the same expression might not have been used in the impugned order, but for all purposes the authority, on detail analysis of the arrangement between the parties, has held that there is a sufficient control by M/s. Copper Chimney over the business of the petitioner in the premises in question and that therefore no fault can be found with the impugned order directing the clubbing of both the establishments for the purpose of holding that the petitioner's establishment was covered by the provisions of the said Act from the date of commencement of the business in the said premises in question. According to the learned Advocate for the respondents, there is no case made out for interference in the said impugned order.

6. The first point which arises for consideration is whether the respondent-authority was justified in holding that the identity of the petitioner cannot be dissected from that of M/s. Copper Chimney and on that count the petitioner's establishment is covered by the provisions of the said Act with effect from 6th September, 1995, and whether the finding, in that, regard, is borne out from the records. Apparently, the said finding is based purely on the basis of the clauses of the Agreement between the petitioner and the M/s. Copper Chimney and it does not relate to any other material on record or even to the investigation carried out by the Enforcement Officer of the respondents prior to arriving at the same finding. As rightly submitted by the learned Advocate for the petitioner, the impugned order nowhere discloses analysis of any other material on record to ascertain the issue regarding the financial participation or exchange of man-power or inter-dependency of both the establishments viz. that of the petitioner and M/s. Copper Chimney in relation to the business of restaurant conducted by the petitioner in the premises in question. The impugned order merely relates to the two of the clauses of the Agreement, viz. Clause Nos. 6 and 7, between the parties to arrive at the said finding. Clause (6) of the Agreement provides that though M/s. Copper Chimney is known as a speciality Indian Restaurant considering the customers and market demands, M/s. Copper Chimney is free to introduce different types of Cuisines like Chinese, continental etc, for the betterment, and Clause (7) provides that the maintenance of discipline among the staff and maintenance of the quality and the standard of food to be served to the customers and smooth running of the business shall be supervised by and it shall be the responsibility of the M/s. Copper Chimney. Undisputedly, the services of the M/s. Copper Chimney were sought to be availed by the petitioner, the former being known to have expertise in the field of running restaurants. The said fact was neither disputed nor found to be incorrect either in the course of investigation or on the basis of the materials on

record. Bearing in mind the said fact, entrusting the job of ensuring the customers of restaurant the benefit of different types of cuisines as well as the better quality of service and standard of food, and for that purpose having engaged the services of M/s. Copper Chimney, it can, by no stretch of imagination, be held to be surrendering full control of restaurant to M/s. Copper Chimney and for the same reason, there was no case made out to hold that there was functional integrality between the two establishments in relation to the business of the restaurant in the premises in question. Merely because, the petitioner had agreed for certain percentage of gross sales as commission as also requiring the supervision by M/s. Copper Chimney in the matter of assuring discipline among the staff members from the point of view of maintenance of the quality of service as well as the standard of food to the customers, the same cannot be a justification to hold that the identity of the petitioner cannot be dissected from M/s. Copper Chimney. On the contrary, the fact that M/s. Copper Chimney had been paid a sum of Rs. 4 lakhs as non-refundable royalty and 3% of the gross sales as commission for the services to be rendered by M/s. Copper Chimney in the matter of running of restaurant of the petitioner discloses that there was absolutely no functional integrality between the two establishments, hence the findings arrived at by the authority that the identity of the two establishments cannot be dissected from each other is contrary to the materials on record, and, as rightly submitted by the learned Advocate for the petitioner, it discloses non-application of mind by the authority to the relevant materials on record. It is also pertinent to note that the officer of the respondent itself who had visited the premises of the petitioner had arrived at a finding that there was no functional integrality between the two establishments and there was no inter-dependency for deciding the issue of clubbing and yet, totally ignoring the said report of the officer of the respondent itself, the respondent-authority has jumped to the conclusion regarding the issue pertaining to the clubbing of the establishments and therefore the impugned order cannot be sustained and is liable to set aside.

7. I am fortified in the above conclusion in the matter by the two decisions which are relied upon by the learned advocate for the petitioner. The learned Single Judge of this Court, as he then was in Associated Polymers Ltd. v. Union of India and Ors., case (supra), has held that:-

"Therefore, I find merit in the contention of the petitioners that while interpreting the provisions of Section 16(1)(b) of the Act, if the Court finds that a new legal entity starts a business then certainly certain incentives are required to be given and we cannot look at the problem in every matter with a fixed mindset only with an idea of seeking to cover the Unit on the ground that the Act is a benevolent legislation, It gives benefit both to the workers and the employers as far as Section 16(1)(b) is concerned. This is not a case where devise is sought to be put in order to avoid or evade the provisions of the Act. I have gone through the Annual Reports of the relevant years each Report clearly indicates that a new Company was set up. That, that new Company had undertaken multifarious activities including rubber processing. That, in any event looking to the figures which are indicated in the Balance sheet, it is clear that the Petitioners

Company cannot be labelled as feeder industry to the S.D.L. and further it is a Company having different Units, it is a Company employing fresh hands with different machinery altogether and this is fully borne out by each and every Annual Report which has been scrutinized by me from 1975 to 1982. Even the Balance Sheet indicates that the subsidiary Company is a Creditor of the S.D.L. and that is because the goods have been sold from time to time as one of the activities of the Petitioners. In fact, the Balance Sheet clearly indicates that the wages are being paid to employees. Depreciation is claimed in respect of the machinery owned by the Petitioners. That, depreciation has nothing to do with the depreciation claimed by the petitioners. Depreciation claimed by S.D.L. is quite different from the depreciation claimed by the Petitioners Company which clearly shows that there was no unity of ownership. There was no unity of employment. There was no unity of management."

8. In Isha Steel Treatment v. Association of Engg. Workers's case (supra), the Apex Court has held thus:-

"It was, however, argued in this case on behalf of the workmen that since the Provident Fund accounts of the employees and the Employee's State Insurance accounts of the two units had common numbers with the authorities concerned and settlement containing similar terms (copies of which are not produced before us) had been entered into in 1974 between the management and the workmen of the two units, it should be held that the two units had functional integrality between them. We are of the view that even these factors are not sufficient to hold that the two units were or, and the same notwithstanding the fact that the nature of the business carried on in them was the same.

In Indian Cable Co. Ltd. v. Its Workmen (1962) I LLJ 409 this Court has held that he act that the balance sheet was prepared incorporating the trading results of all branches or that the employees of the various branches were treated alike for the purpose of provident fund, gratuity, bonus and for conditions of service in general could not lead to the conclusion that all the branches should be treated as one unit for purposes of Section 25-G of the Act."

9. The second point which arises for consideration is whether the petitioner is entitled to claim infancy protection for a period of three years from the date of commencement i.e. from 6th September, 1995. There is no doubt that in terms of the statutory provision which was in force at the time of commencement of the establishment of the petitioner i.e. 6th September, 1995, the petitioner was entitled to claim infancy protection for a period of three years. That was in accordance with the provision of law contained in Section 16(1)(d) of the said Act as was in force at the relevant time. It is also a matter of record that with effect from 11th September, 1997 the said provision regarding the infancy period was deleted. It is also a matter of record that on 20th October, 1997, the petitioner applied for allotment of Code number to the establishment of the petitioner. At the same time, the law on the point of availability

of the infancy period inspite of amendment brought about to the provisions of Section 16(1) of the said Act has been well settled by the decision of the Division Bench in Magic Wash Industries (P) Ltd. and Ors. v. Asstt. Provident Fund Commissioner and Ors. (supra). It has been clearly held therein that "There is no doubt that the vested rights or benefits under the legislation could be retrospectively taken away by legislation, but then the statute taken away such rights or benefits must expressly reflect its intention to that effect. The infancy period prior to the amended provision of 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 2 June, 1988, when it was assented by the President of India but the amended Section 16 was put into operation only with effect from 1st August, 1988, in terms of Section 1(2) of the Amendment Act, 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 2nd June, 1988, but it was brought into force on 1st August, 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" use in Section 16(1)(d), since these establishments would be treated as newly set up for the purpose of the Act." It was further ruled therein that "This mean's 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), 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". It was further held that "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 of Section 16(1)(d)."

10. The law on the point in issue, therefore, is clearly established to the effect that unless the provision enforcing the amendment to Section 16(1)(d) of the said Act, either expressly or impliedly disclose the retrospective application of the amended provision of law, the benefit of infancy period which had already accrued to the existing establishments cannot be denied merely because there had been amendment to the provision related to the period of infancy in the said Act. As already seen above, Section 16(1)(d) was deleted with effect from 11th September, 1997. However, at the same time, it has nowhere been provided

that the deletion will have retrospective effect. As regards the denial of the benefits of the infancy period even the establishments which were already entitled to claim such infancy period in terms of the statutory period which was in force had commenced their operation and right in that regard had already been accrued in their favour. As has been clearly held by the Division Bench, though it is permissible for the Legislature to deny such benefits and the rights accrued in that regard by giving retrospective effect to any statute framed by the Legislature, however, in the absence of any indication in that regard disclosed in the statute, the authorities' enforcing the statute cannot by themselves give retrospective effect to such a statutory provision. An attempt was made to draw attention to the statement of objects and reasons in relation to the amendment brought about to Section 16(1)(d) by deleting the same wherein it was observed that "the provision of three years infancy period is being abolished so as to bring the factories/establishments within the scope of the Act from the date of their establishment/registration." Undoubtedly, the same is one of the important amendments which has been brought about and referred to in the statement of objects and reasons, However, the said clause is reflected in the statement of objects and reasons in relation to the proposed amendment pursuant to the suggestions received in that regard. It discloses the object behind the amendment and that is to deny any infancy period. That by itself cannot lead to a conclusion that the Legislature had intended to give effect to such period retrospectively. The attention was also sought to be drawn to the financial memorandum attached to the Bill in respect of the amendment which was moved for deletion of the provisions contained in Clause (d) of Sub-section (1) of Section 16 of the said Act, which reads that "The Central Government is contributing towards the Employees' Pension Scheme, 1995 framed under Section 6A at the rate of 1.16 per cent of the monthly wages of the employees covered under the provisions of the Act. Clause 5 of the Bill seeks to omit Clause (d) of Sub-section (1) of Section 16 so as to make the provisions of the Act applicable to the establishments from the date they are set up. The establishments which are less than three years old and which are presently excluded from the Act will have to report immediate compliance under the Act. This is likely to bring more employees within the purview of the Act. Consequently there will be a marginal recurring increase in the liability of the Central Government by way of contributing towards the Employees Pension Scheme.

As wages of the employees vary from establishment to establishment and their number is also not precisely known, it is difficult to indicate the recurring liability of the Central Government at this stage. However, the proposal does not involve any expenditure of non-recurring nature."

11. Laying stress on the sentence "establishments which are less than three years old and which are presently excluded from the Act will have to report immediate compliance under the Act," it was sought to be contended on behalf of the respondents that the amended provision has been given the retrospective effect. At the outset, it is to be noted that the sentence sought. to be relied upon is from "the financial

memorandum" attached to the Bill which was moved before the Parliament for amendment to Clause (d) of Section 16(1) of the said Act. The said observations in the financial memorandum cannot be construed as the intention of the Legislature to give a retrospective effect to the statutory provision, once the statutory provision on the face of it nowhere discloses any such provision giving retrospective effect while amending the said provision. Furthermore, it is well settled that the reference to the statement of objects and reasons cannot be made to decide the true meaning and effect of the substantive provision (Vide : Express Newspapers (Pvt.) Ltd. v. Union of India : Central Bank of India v. Their Workmen : . Besides, in the absence of ambiguity, the question of interpretation of statute and that too by reference to the statement of objects and reasons does not arise. Being so, the reference to the sentence in the financial memorandum regarding the necessity of the establishment already in function to be required to report immediate compliance of the Act cannot be construed as intention of the Legislature to give retrospective effect to the statutory provision. Besides, the decision in the Magic Wash Industries's case (supra) clearly holds that the intention of the Legislature even in case when the infancy period was reduced from five years to three years was to the effect that it was not to be implemented retrospectively. The learned Advocate for the respondents has not been able to point out any material from which a different view is necessary in relation to the amendment brought about to Section 16(1)(d) of the said Act by deleting the said Clause (d).

12. Hence, following the decision of a Division Bench in Magic Wash Industries's case (supra) and considering the scope of the amendment brought about by deletion of Clause (d) of Section 16(1) of the said Act, the petitioner is justified in contending that it would be entitled for benefit of three years infancy period starting from 5th September, 1995. Merely because the petitioner had approached the respondents under the letter dated 20th October, 1997, that would not estop the petitioner from claiming such infancy period as the said rule has no application in cases where a statutory right is created in favour of the party.

13. For the reasons stated above, therefore, the petition succeeds. The impugned order is hereby set aside and the rule is made absolute in terms of prayer Clauses (a) and (b) with no order as to costs.

14. Parties to act on the ordinary copy of this order duly authenticated by the Associate/P.S. of this Court as a true copy.