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Court : Kolkata

Decided On : Jan-08-2002

Reported in : [2002(94)FLR721],(2002)IILLJ517Cal

Judge : D.K. Seth, J.

Acts : Employees' Provident Funds and Miscellaneous Provisions Act, 1952 - Sections 7A, 16, 19A, 20, 21 and 22

Appeal No. : C.R. No. 4691(W)/1980

Appellant : De. Labochem (India) Pvt. Ltd.

Respondent : Regional Provident Fund Commissioner and ors.

Advocate for Def. : Anil Kumar Gupta, Adv.

Advocate for Pet/Ap. : Arunabha Ghosh and ;Saumya Mazumdar, Advs.

Disposition : Petition dismissed

Judgement :

D.K. Seth, J.

Facts:

1. In the present case, a notice was issued on February 2, 1980 which is Annexure 'G' to this petition, asking the petitioner to participate in a proceedings under Section 7-A of Employees' Provident Funds and Miscellaneous Provisions Act, 1952, (1952 Act). By a letter dated February 19, 1980, being Annexure 'H' to the petition, the petitioners intimated the authority under Section 7-A of the said Act, being the Regional Provident Fund Commissioner (RPFC), that a proceedings under Section 19-A of the 1952 Act, as it stood prior to its amendment in 1988, was pending before the Central Provident Fund Commissioner (CPFC), with regard to the applicability of the Act and the infancy period as well as the question of number of employees employed in the establishment. Therefore, the 7-A proceedings should be stayed. On March 6, 1980, the petitioner submitted its objection contained in annexure 'I' in the said proceedings under Section 7-A and it pointed out its grounds of objection. Few of the grounds related to the objection that the RPFC was not competent to proceed with the proceedings under Section 7-A in respect of the matters which are covered under Section 19-A and should have been referred to CPFC. Therefore, the proceeding should await the decision of the proceeding under Section 19-A. On the ground that the RPFC had been attempting to proceed under Section 7-A, this writ petition was moved and an interim order was obtained staying of the 7A proceedings. However, there was no stay with regard to the proceedings under Section 19-A. It is contended by the learned Counsel for the petitioner that uptill now the proceedings under Section 19-A has not yet been disposed of or decided. In the circumstances, the notice contained in Annexure 'G' of the proceeding under

Section 7-A, should be quashed. The learned Counsel for the petitioner had relied on a decision reported in 1974 (28) FLR 248 (Tip Top Dry Cleaners & Dyers v. Union of India and Anr.) to which reference would be made at a later stage.

2. Mr. Anil Kumar Gupta, Learned Counsel for the respondents, on the other hand points out that in 1988 there has been an amendment by which Section 19-A has since been deleted and Section 7-A has also been amended. By reason of such amendment, RPFC is also competent to decide the dispute, which was to be decided under Section 19-A, in the proceedings under Section 7-A and as such, this writ petition has become infructuous.

Now the proceedings can be proceeded with before the RPFC, where all these points can be raised and agitated and be decided. Therefore, nothing remains to be decided in this writ petition.

3. I have heard the respective Learned Counsel for both the parties at length.

The Question

4. Before the amendment, the 1952 Act provided in Section 1 sub-Section (3) that subject to provisions of Section 16 it may apply to the establishment employing 20 or more persons. Section 16 provided that the provisions of the Act will not be applicable to an establishment employing 50 or more persons for a period of three years from the date on which the establishment was or had been set up. It will not apply for a period of five years where the establishment employs 20 or more but less than 50 persons, calculated from the date on which the establishment was or had been set up. In paragraph 2 of the writ petition, the petitioner has alleged that it had employed 32 employees till 1979 after having been established in 1974. Thus, according to the petitioner, it is entitled to five years exemption in terms of Section 16(1)(b) of the 1952 Act. As such the provisions of the Act would not be applicable till 1979. It is further contended on behalf of the petitioner that the RPFC attempted to include the casual employees who were employed for less than 60 days, as regular employees in order to allow exemption for a period of three years on the ground that the number of employed persons including the casual employees would exceed 50. According to him, the casual employees could not be included as regular employees, unless they are employed far a period over 60 days. The petitioner contended that these casual employees were- never employed for a period of over 60 days. Mr. Ghosh had also pointed out that so far as the question of applicability, as has been pointed out in the objection and the letters, were covered under Section 19-A, which provided that the doubt or dispute in respect of the matters prescribed in Clause (iv) of Section 19-A are to be decided by the Central Government. Accordingly such reference was made. But it was not decided, even till today.

5. Section 1(3) makes the provision of this Act applicable to the establishment of the petitioner subject to Section 16, which exempted its application for a period of five years, if the contention made in paragraph 2 of the writ petition is taken to be admitted. But in case it is found that the casual employees were regular employees and could be added to the work-force and it exceeded 50 in number altogether, in that event, exemption would be for a period of three years, as was sought to be made out by the RPFC in the proceedings under Section 7-A. This question is a question of fact, which can be decided, in an appropriate proceeding where the facts can be gone into. While exercising writ jurisdiction, the High Court is not empowered to enter into determination of disputed question of facts, which required determination on evidence. Admittedly, these questions with regard to exemption as well as the number of employees, which fall within the category of the. applicability of the Act, were covered under Section 19-A as it stood prior to its amendment. As such they are referable to the Central Government. Accordingly, it was so referred to. Such reference was pending. As such, there was sufficient ground for the petitioner to contend that the Section 7-A proceedings could not be proceeded with, until the question covered under Section 19-A was decided.

The Amendment:

6. But the question is to be examined having regard to the subsequent amendment brought about in the Act

itself by Act 33 of 1988 with effect from August 1, 1988. Section 19-A was substituted by Sections 20, 21 and 22 and Section 7-A which was inserted after Section 7 by the Act 28 of 1963 with effect from November 30, 1963, was substituted by Act 33 of 1988 with effect from August 1, 1988. Having regard to the amendment brought about by Act 33 of 1988, it appears that the disputes with regard to which reference was to be made to the Central Government under Section 19-A, were no more the subject matter of the substituted Section 20, 21 and 22 replacing Section 19-A, but were included in Section 7-A substituting 7-A as it stood prior to August 1, 1988. Now the question is to be examined having regard to the existing law. The effect of amendment and re-enactment or substitution has to be looked into having regard to the principle of interpretation as well as the provisions contained in Section 6 of the General Clauses Act, 1897.

Method of Interpretation of Amended Provisions:

7. Section 6 of the General Clauses Act, 1897 deals with the effect of repeal of any Central Act or Regulation. Clause (b) of Section 6 of 1897 Act provides that by reason of repeal, the previous operation of any enactment so repealed and any action duly done or suffered thereunder, shall not be affected. Clause (c) prescribes that it will also not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment. Similarly, Clause (d) provides for saving of penalty, forfeiture punishment incurred in respect of any offence committed under any enactment so repealed. Thus, despite the repeal the liability accrued would not disappear. A repealing or amending Act is in the nature of legislative scavenger. Its sole object is to get rid of certain quantity of obsolete matter (Mohindra Singh v. Harbhajan Karu). The normal effect of repealing a statute is to obliterate it from the statute book completely, as if it had never been passed; it must be considered as a Law that never existed. Section 6 of 1897 Act provides an exception to this Rule (Jagannath Dara Patre v. Hemaji Hiraman Bakde, : AIR1958Bom507). It is also to be understood that the repeal of an Act means revocation or i abrogation of the Act. Section 6 of the General Clauses Act applies even in the case of a partial repeal or repeal of part of an Act (Ekambarappa v. Excess Profits Tax Officer; : [1967]65ITR656(SC)). Whenever, there is a repeal of an enactment, consequence laid down in Section 6 of the General Clauses Act will follow, unless, as the Section itself saves or a different intention appears. In the case of simple repeal, there is scarcely any room for expression of a contrary intention. But when the repeal is followed by a fresh legislation on the same subject, we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicated a different intention. It cannot be said as a broad proposition, that Section 6 of the General Clauses Act is not applicable whenever there is a repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also, unless the new legislation manifests an intention incompatible with or contrary to the provision of the repealed Section. Such incompatibility will have to be ascertained from a consideration of all the relevant provisions of the new Law; mere absence of a saving clause is not by itself material (Munsi Lal Bani Ram Jain Glass Works v. S.P. Singh 1971 (2) SCC 307). The line of inquiry would be, not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them. We cannot, however, subscribe to the broad proposition that Section 6 of General Clauses Act is ruled out when there is a repeal of enactment followed by a fresh legislation. Section 6 would be applicable in such cases also, unless the new legislation manifests an intention incompatible with or contrary to the provisions of the Section. Such incompatibility would have to be ascertained from the consideration of the relevant provisions of the new Law (State of Punjab v. Mohar Singh AIR 1955 SC 84, 88; Indira Sohan Lal v. Custodian Evacuee Property : [1955]2SCR1117).

8. In this case, it was not a question of repeal. It is a question of amendment. While Section 19-A was substituted by Sections 20, 21 and 22, Section 7-A was also simultaneously substituted. The purpose with which we are now concerned, is to flow from Section 19-A of the 1952 Act, which was completely effaced by the substitution of Section 19-A by Section 20, 21 and 22 through Act 33 of 1988. But in order to ascertain the effect of the amendment we are not to look into only within the limited scope of the substituted Sections. We are also to look into the entire scheme of the Act and find out from the provisions incorporated in the Act as to what would be the effect of such effacement. In the present case what was contemplated in Section 19-A

and which related to our present purpose, has in effect been incorporated by the substitution by the newly amended Section 7-A through Act 33 of 1988. In fact, the effect of Section 19-A has been inducted in Section 7-A. The same question which was to be referred to the Central Government under Section 19-A since effaced by Act 33 of 1988, has since been inducted in Section 7-A, bringing those questions within the scope and ambit of Section 7-A to be decided by an authority provided in the substituted Section 7-A itself. Thus, those very questions have since been saved and the liability, despite such effacement of Section 19-A, has since been continued by reason of substituted Section 7-A.

9. Section 6 of 1897 Act does not expressly deal with the effect of amendment of an Act. But there is no other Law, which lays down the effect of amendment of an Act. In order to ascertain such a situation we are to fall back on the principles of interpretation of statute. As a matter of fact, a majority of repealing Acts are those, which re-enacted the Law. In essence, there is no distinction between such re-enacted Laws and Laws, which merely profess to amend. If the amendment of the existing Law is marginal the Act professes to amend. If it is extensive, it repeals the Law and re-enacts it. Therefore, Section 6 applies to amendments, as much as it applies when an Act is repealed and another Act is re-enacted. In order to support this contention we may agree with the reasons given in Singhal Dal Mill v. Firm Sheo Prasad Jainti Prasad : AIR1958All404 followed in Nagar Maha Palika Agra v. Prabhu Dayal 1968 Allahabad W.R. 514. Under Section 6 previous operation of old enactment and the action taken thereunder always survived, unless a contrary intention is expressed or implied in the new amended provision. Where the legislation repeals a particular provision, the natural presumption is, that the repeal must have been with a particular intention. We may find support from Nasib Singh v. Bajo Ram AIR 1969 J & K 9 (F.B.).

10. The Court while interpreting the provisions of an amending Act has to apply the principles laid down in Heydon 's case (1584) 3 Co Rep 7a,p.7b;76 ER 637, which is also known as 'Purposive Construction' or 'Mischief Rule'. The Court has to consider four matters in construing such provision: (i) what was the law before making of the Act, (ii) what was the mischief for which the law did not provide, (iii) what is the remedy that the Act has provided, and (iv) what is the reason of the remedy. The rule then directs that Courts must adopt that construction which 'shall suppress the mischief and advance the remedy'. The rule was explained in the Bengal Immunity Co. v. State of Bihar : [1955]2SCR603 . In the words of S.R. DAS, C.J. 'It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon case was decided.' Heydon's case was followed in various decisions of the Apex Court vide Dr. Baliram Wanian Hiray v. Mr. Justice B. Lentin, : [1989]176ITR1(SC) ; CFI Patiala v. Shahzada Nand & Son, : [1966]60ITR392(SC) and Goodyear India Ltd. v. State of Haryana, : [1991]188ITR402(SC) .

11. In the present case, the intention of the legislation was clear by incorporation of the situation contemplated in Section 19-A since deleted, in Section 7-A since substituted. It is apparent on the face of the amendment and as well as from the object that two different questions contemplated under Section 19-A and Section 7-A as it stood prior to Act 33 of 1988, were to be decided in two different proceedings by two different authorities, creating an ill. It was this ill which was sought to be removed by the amendment. Therefore, those questions contemplated under Section 19-A were brought within one umbrella. Under Section 7-A as substituted now provides to be decided in the same proceeding by the same authority so as to make the process more efficacious. Therefore, having regard to the principle enunciated under Section 6 of the 1897 Act and Rules of interpretation of statute it is clear and unambiguous that the process those were initiated under Section 19-A would now be dealt with under Section 7-A and would similarly be taken care of in respect of pending matters under the provisions of amended Section 7-A of the 1952 Act.

12. The substitution itself indicates the intention of the Legislature. Instead of two authorities, one authority was intended to decide all the questions including that of jurisdiction. The intention of the Legislature was clear and unambiguous. All these questions are to be gone into in the same proceedings. By virtue of the amendment brought about in Section 7-A, the disputes relating to applicability of the Act or the determination of the amount due, were included in Section 7-A. The questions contemplated under Section 19-A, since substituted, were also included, pursuant to its omission, within the scope and ambit of Section 7-A. The

question of number of employees or the period of exemption as also the questions with regard to the applicability or the rates and all such questions relating to applicability can be gone into in a proceedings under Section 7-A. Therefore, if the question under Section 19-A has not been determined, in that event those can now be determined in the proceedings under Section 7-A itself, for which RPFC is the appropriate authority.

13. Though, very feebly, it was sought to be contended that proceedings under Section 7-A is also required to be determined by the CPFC, but ultimately Mr. Ghosh did not emphasize on the said point. Inasmuch as Section 7-A, as substituted by Act 33 of 1988, includes RPFC to determine the dispute regarding applicability of the Act to the establishment. Thus, in the pending proceeding all the questions, which were sought to be raised under Section 19-A and referred to the Central Government, can very well now be decided in the 7-A proceedings itself. As rightly pointed out by Mr. Gupta, this writ petition, therefore, has become infructuous and is liable to be dismissed.

14. Mr. Ghosh has relied on a decision reported in Provident Fund Inspector v. T. S. Hariharan : (1971)ILLJ416SC with regard to the question of determination of the applicability of the Act where casual employees are employed. In the said decision it was held that employment means employmentin regular course of business of an establishment. Such employment will not include employment of a few persons for a short period on account of some passing necessity or some temporary emergency beyond the control of the establishment. At the same time, it was also held in the said decision that the Act does not cease to apply to an establishment, which regularly employs for its general business the required number of persons for major part of the year merely because the employment does not extend to full one year. Thus, if casual employment is given for less than 60 days repeatedly with artificial break and if such casual employees are employed for a major part of the year, in that event, the provision of the Act would very much be applicable.

15. But this is a question of fact which is to be determined on the basis of the materials that might be available before the RPFC in the proceedings under Section 7-A itself. The parties shall be at liberty to adduce such evidence in support or defence of their respective cases before the authority concerned, as they may be advised. The RPFC shall decide all these questions with regard to employment or number of employees and also the question of exemption being three years or five years having regard to the facts and circumstances of the case and the materials produced before it according to its own wisdom and discretion and in accordance with law.

16. Mr. Ghosh has also referred to a decision Tip Top Dry Cleaners & Dyers v. Union of India reported in (supra) of the Punjab & Haryana High Court. In the said decision also, similar question was gone into. This decision had relied on the decision in Nazeena Traders (P) Ltd. v. Regional Provident Fund Commissioner Hyderabad 1964 (29) FJR 277 as well as various other decisions including the decision in Regional Provident Fund Commissioner, Guntur, (supra). Following the decision of the Apex Court, the Punjab & Haryana High Court had been of the same view, as was laid down by the Apex Court.

17. In the circumstances this writ petition is dismissed as infructuous, having regard to the change in law brought about by reason of the amendments referred to above. However, while deciding the proceedings under Section 7-A, the RPFC shall go into all the questions as might be raised or has been raised by the petitioner and determine the question of applicability simultaneously and then proceed with the merits of the case and determine the amount payable after giving opportunity to the petitioner in accordance with law. It is expected that the proceedings would be concluded within a period of six months from the date of communication of this order.

18. Let it be recorded that I have not gone into the merits of the case and all questions are kept open to be agitated in the proceedings itself.

19. This interim order of stay is hereby discharged. The rule is also discharged.

20. The authority will be entitled to determine the amount payable, including the question of interest, if applicable.

21. There will be no order as to costs.

22. Urgent Xerox certified copy be supplied to the parties, if applied for, on priority basis.