(2006) 06 KL CK 0055

High Court Of Kerala

Case No: Writ Petition (C) No. 12259 of 2006

Raveendran Nambiar		APPELLANT
	Vs	
Prabhakaran		RESPONDENT

Date of Decision: June 20, 2006

Acts Referred:

- Constitution of India, 1950 - Article 301
- Factories Act, 1948 - Section 6, 85(1), 85(2)
- Motor Vehicles Act, 1939 - Section 2(18)
- Payment of Gratuity Act, 1972 - Section 14, 2

Citation: (2006) 110 FLR 742 : (2006) 3 ILR (Ker) 231 : (2006) 3 KLT 234 : (2006) 3 LLJ 331

Hon'ble Judges: S. Siri Jagan, J

Bench: Single Bench

Advocate: Anil Sivaraman, for the Appellant; P.M. Pareeth and Harikrishnan Ravindran and Viju Abraham, Government Pleader, for the Respondent

Final Decision: Dismissed

Judgement

S. Siri Jagan, J.

Exts. P5 and P6 orders are under challenge in this Writ Petition. Ext. P5 is an order passed u/s 85(1) of the Factories Act making all sections of the Factories Act, 1948 except Section 6(i)(a), (aa)(b) and (c) applicable to manufacturing process in crushing of animal bone including bone meals and other manure industries as a result of which, irrespective of the number of persons working, places engaged in those manufacturing processes shall be deemed to be a factory for the purposes of the Factories Act and the owner shall be deemed to be the occupier and any person working therein a worker. Ext. P6 is the order passed by the appellate authority under the Payment of Gratuity Act, 1972 by which the appellate authority reversed Ext. P1 order of the District Labour Officer, Kannur and directing the petitioner herein, who is the employer to the 1st respondent-employee to pay gratuity under

the Payment of Gratuity Act by virtue of Ext.P5 despite the fact that petitioner employed only less than ten persons in his establishment. The facts are not in dispute in this Writ Petition.

2. The petitioner-employer does not employ sufficient employees to come within the purview of Payment of Gratuity Act or the Factories Act. However, by virtue of the deeming provision contained in Section 85(2) of the Factories Act, the petitioner was held to be a factory and therefore liable to pay gratuity to its workmen. The contention of the petitioner is that since the definition of ''factory'' in the Factories Act is a definition by incorporation in Section 2(g) of the Payment of Gratuity Act, 1972, the Payment of Gratuity Act can be made applicable to only those factories, which come within the definition of ''factory'' in the Factories Act as on the date of coming into force of Payment of Gratuity Act in 1972 and not thereafter The petitioner submits that at the time of coming into force of the Payment of Gratuity Act, 1972, petitioner''s establishment was not a factory and, therefore, the Payment of Gratuity Act cannot be made applicable to the petitioner''s establishment. Petitioner points out that Ext. P5 notification was issued only on 18-10-1993. As such, on the date of coming into force of the Payment of Gratuity Act in 1972, the petitioner''s establishment was not a factory or a deemed factory as defined under the Factories Act, and, therefore, the said Act cannot be held to be applicable to the petitioner''s establishment. Petitioner also specifically refers to Section 14 of the Payment of Gratuity Act by which Payment of Gratuity Act overrides all other enactments, instrument or contract having effect by virtue of any enactment other than the Payment of Gratuity Act meaning thereby that unless the Payment of Gratuity Act is suitably amended to rope in the petitioner''s establishment, despite Ext. P5 that Act cannot be held to be applicable to the petitioner''s establishment. Petitioner, therefore, contends that Ext. P6 order by which the petitioner was directed to pay gratuity to the 1st respondent is illegal and unsustainable.

3. I have heard the learned Counsel for the petitioner, and the learned Counsel for the 1st respondent as also the learned Government Pleader appearing for the 3rd respondent-appellate authority under the Payment of Gratuity Act.

4. The main plank on which the petitioner rests his contention is the decision of the Supreme Court in Bolani Ores Ltd., as also subsequent decisions which are Mahindra and Mahindra Ltd. Vs. Union of India (UOI) and Another, and The State of Madhya Pradesh Vs. M.V. Narasimhan, . In Bolani Ores case, the definition of motor vehicle in Section 2(18) of the Motor Vehicles Act, 1939 was adopted by the Bihar and Orissa Motor Vehicles Taxation Act, 1930. Later, the definition of motor vehicle in the Motor Vehicles Act was amended. The question was, for the purpose of Bihar and Orissa Motor Vehicles Taxation Act, whether the unamended definition or the amended definition would be applicable. Counsel for the petitioner takes me through paragraph 29 of the said judgment, which reads thus:

29. The question then remains as to whether these vehicles though registrable under the Act are motor vehicles for the purpose of the Taxation Act. It has already been pointed out that before the amendment vehicles used solely upon the premises of the owner, though they may be mechanically propelled vehicles adapted for use upon roads were excluded from the definition of ''motor vehicle''. If this definition which excludes them is the one which is incorporated by reference u/s 2(c) of the Taxation Act; then no tax is leviable on these vehicles under the Taxation Act Shri. Tarkunde for the State of Orissa contends that the definition of ''motor vehicle'' in Section 2(c) of the Taxation Act is not a definition by incorporation but only a definition by reference," and as such the meaning of ''motor vehicle'' for the purpose of Section 2(c) of the Taxation Act would be the same as defined from time to time u/s 2(18) of the Act in ascertaining the intention of the Legislature in adopting the method of merely referring to the definition of ''motor vehicle'' under the Act for the purpose of the Taxation Act, we have to keep in mind its purpose and intendment as also that of the Motor Vehicles Act. We have already stated what these purposes are and having regard to them the registration of a motor vehicle does not automatically make it liable for taxation under the Taxation Act. The Taxation Act is a regulatory measure imposing compensatory taxes for the purpose of raising revenue to meet the expenditure for making roads, maintaining them and for facilitating the movement and regulation of traffic. The validity of the taxing power under Entry 57 List II of the Seventh Schedule read with Article 301 of the Constitution depends upon the regulatory and compensatory nature of the taxes. It is not the purpose of the Taxation Act to levy taxes on vehicles which do not use the roads or in any way form part of flow of traffic on the roads which is required to be regulated. The regulations under the Motor Vehicles Act for registration and prohibition of certain categories of vehicles being driven by persons who have no driving licence, even though those vehicles are not plying on the roads, are designed to ensure the safety of passengers and goods etc. etc. and for that purpose it is enacted to keep control and check on the vehicles. Legislative power under Entry 35 of list III (Concurrent List) does not bar such a provision. But Entry 57 of List II is subject to the limitations referred to above, namely, that the power of taxation thereunder cannot exceed the compensatory nature which must have some nexus with the vehicles using the roads, viz. public roads. If the vehicles do not use roads, notwithstanding that they are registered under the Act, they cannot be taxed. This very concept is embodied in the provisions of Section 7 of the Taxation Act as also the relevant sections in the Taxation Acts of other States, namely, that where a motor vehicle is not using the roads and it is declared that it will not use the roads for any quarter or quarters of a year or for any particular year or years, no tax is leviable thereon and if any tax has been paid for any quarter during which it is not proposed to use the motor vehicle on the road, the tax for that quarter is refundable. If this be the purpose and object of the Taxation Act, when the motor vehicle is defined u/s 2(c) of the Taxation Act as having the same meaning as in the Motor Vehicles Act, 1939, then the intention of the Legislature could not have been

anything but to incorporate only the definition in the Motor Vehicles Act as then existing, namely, in 1943, as if that definition was bodily written into Section 2(c) of the Taxation Act. If the subsequent Orissa Motor Vehicles Taxation (Amendment) Act, 1943, incorporating the definition of ''motor vehicle'' referred to the definition of ''motor vehicle'' under the Act as then existing, the effect of this legislative method would, in our view, amount to an incorporation by reference of the provisions of Section 2(18) of the Act in Section 2(c) of the Taxation Act. Any subsequent amendment in the Act or a total repeal of the Act under a fresh legislation on that topic would not affect the definition of ''motor vehicle'' in Section 2(c) of the Taxation Act. This is a well-accepted interpretation both in this country as well as in England which has to a large extent influenced our law. This view is further reinforced by the use of the word ''has'' in the expression "has the same meaning as in the Motor Vehicles act, 1939" in Section 2(c) of the Taxation Act, which would perhaps further justify the assumption that the Legislature had intended to incorporate the definition under the Act as it then existed and not as it may exist from time to tune. This method of drafting which adopts incorporation by reference to another Act whatever may have been its historical justification in England in this country does not exhibit an activistic draftsmanship which would have adopted the method of providing its own definition. Where two Acts are complimentary or interconnected, legislation by reference may be an easier method because a definition given in the one Act may be made to do as the definition in the other Act both of which being enacted by the same Legislature. At any rate, Lord Esher, M.R. dealing with legislation by incorporation In Re Wood''s Estate (1886) 31 ShD 607 said at p. 615:

If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have these clauses in the later Act, you have no occasion to refer to the former Act at all.

The observations in Clarke v. Bradlaugh (1881) 8 QBD 63 are also to the same effect. Brett, LJ. in that case had said at p. 69:

...there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third statute does not affect the second.

The petitioner submits that the said decision is squarely applicable to the case at hand in so far as the definition of ''factory'' in the Factories Act has been incorporated in the Payment of Gratuity Act and therefore only those factories which were factories as per the definition of ''factory'' as obtaining in 1972 only would be factories for the purpose of Payment of Gratuity Act. Petitioner submits that the subsequent inclusion of petitioner''s establishment as a factory under the Factories Act by notification and deeming provision u/s 85(1) cannot automatically

make the petitioner''s establishment a factory as defined under the Factories Act for the purpose of Payment of Gratuity Act without a suitable amendment in the latter Act.

5. On the other hand, the learned Counsel for the 1st respondent draws my attention to a Division Bench decision of this Court in Chathu v. District Labour Officer 2001 (1) KLT 147 by which a contention raised by an employer of a factory, which became a factory by virtue of a notification u/s 85(1) of the Factories Act, was repelled by this Court. Counsel would submit that Bolani Ores''s case may not be applicable to the present case in so far as the definition of ''factory'' in the Factories Act did not undergo any substantial change by amendment at any time after enactment of the Payment of Gratuity Act and therefore the question of the petitioner''s establishment being considered as a factory as defined in the Factories Act as on the coming into force of the Payment of Gratuity Act, does not arise at all. In any event, the petitioner is made a deemed factory not on the basis of any amendment in the definition incorporated in the Payment of Gratuity Act. Counsel further submits that assuming that the contention of the petitioner is correct, the Supreme Court itself had recognised certain exceptions to the general rule in the decision of The State of Madhya Pradesh Vs. M.V. Narasimhan, , Counsel draws my attention to paragraph 15 of the said judgment, which reads thus:
On a consideration of these authorities, therefore, it seems that the following proposition emerges:

Where a subsequent Act incorporates provisions of a previous Act then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases:

(a) where the subsequent Act and the previous Act are supplemental to each other;

(b) where the two Acts are in pan materia;

(c) where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and

(d) where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act.

On these contentions, counsel for the 1st respondent submits that the contentions of the petitioner is devoid of merits and the Writ Petition is liable to be dismissed.

6. On a consideration of the rival arguments, I am unable to accept the contentions of the learned Counsel for the petitioner. As pointed out by the learned Counsel for the 1st respondent, in this case, it was not because of any change in the definition of ''factory'' in the Factories Act after the enactment of the Payment of Gratuity Act, that the petitioner became covered under the latter Act. While the definition of

factory remained the same on account of certain amendment to the term ''manufacturing process'' in the Act, the State Government could issue a notification u/s 85(1) roping in establishments like the petitioner also as a factory. That would not in any way come within the principles laid down in Bolari Ores case or the other cases.

7. As is clear from the observations of the Supreme Court in paragraph 29 of Bolani Ores case, the Supreme Court came to that conclusion taking into account the intention of the legislature. The Factories Act was enacted in 1948 since provisions for the safety, health and welfare of workers in factories were generally found to be inadequate and unsatisfactory and even such workers as is provided do not extend to the large mass of workers employed in work places not covered by the Act. Payment of Gratuity Act was enacted as law to provide for a scheme for payment of gratuity to employees engaged in factories, mines, oil field, plantations, posts, railway companies, shops or other establishments. Both are beneficial legislations intended at bettering the service conditions of workers. Going by that reasoning, I am of opinion that the payment of gratuity being a beneficial legislation, it is the duty of the Court to interpret the provisions of the Payment of Gratuity Act liberally so as to give it a wider meaning instead of giving a restrictive meaning which would negate the very object of the provision. In this connection, I may refer to the decision in Madan Singh Shekhawat Vs. Union of India and Others, as also the decision of this Court in Chathu''s case referred above. The Supreme Court has, in the decision in Lalappa Lingappa and Others Vs. Laxmi Vishnu Textile Mills Ltd., held that Payment of Gratuity Act is a piece of social welfare legislation and deals with the matters of payment of gratuity which, like pension, provident fund etc., is a retiral benefit. In Chathu''s case also, the Division Bench relied on Madan Singh Shekhawat''s case. The object of incorporation of the definition of ''factory'' in the Factories Act in the Payment of Gratuity Act was for making all factories as defined under the Factories Act liable to be covered under the Payment of Gratuity Act. Keeping in mind this object of the Legislature in incorporating the definition of ''factory'' in Factories Act in the Payment of Gratuity Act, I have no hesitation to hold that the intention of the Legislature was certainly to make all factories as defined under the Factories Act at all times, factories for the purpose of Payment of Gratuity Act. A different interpretation would cause violence to the provisions of the Act in so far as for the purpose of Payment of Gratuity Act, the definition of ''factory'' would come to a stand still as on 1972, which cannot be the intention of the Legislature in enacting the Payment of Gratuity Act. This is particularly so since, although the definition of factory remained the same, by- virtue of the amendment to the definition of ''manufacturing process'' umpteen other establishments were roped within the definition of factory. The purpose of the legislature was to include factories which would become factories subsequent to the enactment of the Payment of Gratuity Act also covered under the Act. Therefore, going by the very same decision relied on by the petitioner himself, namely, Bolani Ore''s case, if the

Section is interpreted keeping in mind the purpose and object of the Payment of Gratuity Act, the intention of the Legislature could not have been anything but to include all factories as defined under the Factories Act at all times factories for the purpose of Payment of Gratuity Act.

8. Further, as pointed out by the learned Counsel for the 1st respondent, the Supreme Court did recognise certain exemptions to the rule as enumerated in paragraph 15 of Narasimhan''s case (supra). Clauses (a) and (c) of paragraph 15 of that decision would squarely come into play in this context. Payment of Gratuity Act is certainly an Act supplemental to the Factories Act going by the objects of those Acts. Further, if the interpretation I have given to the Act is not imported into the Payment of Gratuity Act, that would render the latter Act wholly unworkable and ineffectual at least in the case of very many establishments which became factories by virtue of subsequent amendment to the definition of ''manufacturing process'' in the Factories Act. Further, there would also be discrimination in so far different establishments, all of them though factories would be covered and not covered under the Payment of Gratuity Act on the basis of the dates of amendments in the Factories Act, which could never have been the intention of the legislature while enacting the Payment of Gratuity Act.

9. I need not dwell in detail into the impact of the notification u/s 85(1) of the Factories Act on the Payment of Gratuity Act since the Division Bench has done it elaborately in Chathu''s case. The Division Bench have, in paragraph 10 of Chathu''s case, held as follows:

As already mentioned above, because of the notification issued in terms of Section 85(1) of the Factories Act, 1940 and because of the deeming provision contained in Section 85(2), the establishment where the appellant was employed shall be a factory, even if that factory did not employ, at any point of time, at least 10 workers. So long it is deemed as factory and the appellant was employed in such a factory, necessarily, interpreting the provisions in the definition concerning employee as well as factory in a liberal manner as held by the Supreme Court in Madan Singh Shekhawat Vs. Union of India and Others, and Lalappa Lingappa and Ors. v. Laxmi Vishnu Textile Mills, Sholapur 1981 LLJ 308 it has to be held that the petitioner was employed in a factory.

Although, in that case, a contention was not raised based on the effect of incorporation of the definition of factory in the Factories Act in the Payment of Gratuity Act, by reference, in view of the finding entered into by me above, the Division Bench decision in Chathu''s case is squarely applicable to the present case in all respects.

10. Although the petitioner''s counsel wanted to make a point on the basis of the non-obstante clause in Section 14 of the Payment of Gratuity Act, I am satisfied that such contention essentially depends upon the sustainability of the other contention

which I have already repelled.

11. Of course, the petitioner has got a contention that since the petitioner is not engaged in any manufacturing process, the State Government could not have issued a notification like Ext. P5 in exercise of powers u/s 85(1) in respect of the petitioner''s establishment wherein no manufacturing process is employed. But, in view of the subsequent amended definition of ''manufacturing process'' in the Factories Act itself, counsel for the petitioner did not argue that point seriously.

In view of my above findings, I do not find any merit in the Writ Petition and accordingly the same is dismissed.