

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.472 OF 2010**

Manipal Goa Cancer & General
Hospital,
Dona Paula Goa.
Represented herein by its
Authorized representative
Shri Pramod Alagharu,
Major of age, Head of
Operations, having office at
Manipal Hospital, Goa
Dr. E. Borges Road,
Dona Paula, Goa. .. Petitioner

Vs

The Assistant Provident Fund
Commissioner,
Having office at Bhavishya Nidhi
Bhawan, 24, Patto Plaza,
Panaji- Goa 403 001. .. Respondent

Mr. A. D. Bhole and Ms. S. Bhole, Advocates for the petitioner.

Mr. C. A. Ferreira, Advocate for the respondent.

Coram :- M. S. SONAK, J.

Reserved on :- 12th April, 2017

Pronounced on :- 27th April, 2017

JUDGMENT :-

Heard Mr. Bhole for the petitioner and Mr. C. A.
Ferreira for the respondents.

2. The petitioner challenges the following orders in this petition :-

a) The order dated 18/06/2007, made by the Assistant Provident Fund Commissioner under Section 7A of the Employees Provident Funds and Miscellaneous Act, 1952 (said Act), requiring the petitioner to make contributions towards provident fund and insurance for the period 01/1994 to 12/1996, thereby denying the petitioner the benefit of "infancy" under Section 16(1)(b) of the said Act as it then was, in force;

b) Order dated 06/04/2010 made by the Employees Provident Fund Appellate Authority, dismissing the appeal against the aforesaid order dated 18/06/2007.

3. The case of the petitioner, as articulated by its learned Counsel Mr. A. D. Bhobe is that the society by name Goa Cancer Society registered under the Society Registration Act on 23/10/1969, established a Hospital in or about the year 1969 at Dona Paula, Goa. In 1989, on account of financial losses, the Hospital was closed down. The Management of the Goa Cancer Society approached the Medical Relief Society of South Canara Manipal to enable them to recommence the said Hospital. The Memorandum of Understanding dated 12/02/1992 was entered into between Goa Cancer Society and Medical Relief Society. As a

part of rehabilitation scheme formulated in the Memorandum of Understanding, Manipal Goa Cancer Hospital Trust was constituted on 03/03/1992. The board of trustees were to comprise of 3 members from Goa Cancer Society and 5 members from the Medical Relief Society in order to establish, run or take over the management of the Hospital and to undertake similar other activities. These submissions of Mr. Bhobe are reflected in the averments made in paragraphs 2 and 3 of the petition.

4. The petitioner has also pleaded that the Goa Cancer Society, vide Deed of Confirmation dated 20/07/1992, handed over the assets of the Hospital along with liabilities to the Trust as aforesaid. It is the case of the petitioner that the Hospital was thus started as a new hospital in the name and style of Manipal Goa Cancer and General Hospital, which was formally inaugurated on 25/01/1994.

5. The petitioner has also pleaded that the Hospital was completely managed by the Trust, though at the initial stage, the Kasturba Hospital, Manipal, a unit of Medical Relief Society extended its expertise by sending qualified staff and medical experts to Goa. Medical Relief Society also advanced amounts by way of loan to enable the Trust to meet the financial needs of

operating the Hospital with the understanding that the said loans were to be refunded as and when sufficient surplus funds are generated in the said Hospital.

6. The petitioner has pleaded that on 03/05/2000, a Memorandum of Understanding was entered into between Trust and Manipal Academy of Higher Education (MAHE), whereby MAHE took over the management and administration of the Hospital. It is the case of the petitioner that on completion of initial three years i.e. for the period between 01/1994 and 12/1996, the benefit of infancy protection as provided under Section 16(1)(b) of the said Act was extended to the Hospital, thereby accepting the position that the Hospital was a new and infant establishment, having no functional integrality with the earlier management and administration.

7. It is the case of the petitioner that some time in 1997, an enquiry was ordered under Section 7A of the said Act to determine whether the petitioner had been correctly granted a benefit of infancy. After considering the response of the petitioner, the respondent, by an order dated 28/11/2000, dropped such enquiry, thereby expressing satisfaction that the petitioner was rightly granted the benefit of infancy protection.

8. On 25/09/2001, however, the respondent issued another notice to the petitioner proposing to hold an enquiry as to why the petitioner should not be made to make contributions under the provisions of the said Act for the initial period of three years or why the petitioner should not be denied the benefit of infancy protection. The petitioner filed its reply on 02/11/2001, placing on record the true and correct facts. The same was accepted by the authorities and the proceedings were ordered to be dropped.

9. Along with the petition, only the petitioner's reply dated 02/11/2001 has been produced. However, no order has been produced dropping the proceedings in pursuance of the notice dated 25/09/2001. The respondent does not accept any such case of dropping of enquiry.

10. On 23/11/2005, the respondent once again proposed to initiate an enquiry under Section 7A of the said Act. The petitioner filed its responses dated 16/06/2006 and 25/08/2006. It is the case of the petitioner that by an order dated 18/06/2007, the respondent was pleased to hold that the petitioner was not entitled to the benefit of infancy protection and the petitioner was

called upon to make contribution of Rs.2,33,370/- Aggrieved, the petitioner instituted the appeal before the Appellate Authority, which has, vide order dated 06/04/2010, dismissed the appeal.

11. The petitioner aggrieved by the orders dated 18/06/2007 and 06/04/2010, have instituted the present petition.

12. Mr. Ashwin Bhobe, the learned Counsel for the petitioner has made the following submissions in support of the petition :-

a) Since the enquiry under Section 7A of the said Act in relation to grant of benefit of infancy protection to the petitioner was initiated and dropped on at least two occasions prior to making of the impugned order, the enquiry and making of the impugned order was an exercise without jurisdiction. The respondent is not authorised to make repeated enquiries, despite satisfaction that the petitioner was correctly granted the benefit of infancy protection. For this reason, it was submitted that the impugned orders, which are in excess of jurisdiction, are liable to be set aside.

b) With prejudice, Mr. Bhobe submits that the respondent in his order dated 18/06/2007 has proceeded on the basis that the petitioner is not entitled to a benefit of infancy protection because

the petitioner is nothing but a branch/ unit of the Medical Relief Society, Canara, which in turn, can never be regarded as infant unit. On the other hand, the Appellate Authority, in its order dated 06/04/2010, has virtually abandoned the reasoning adopted by the respondent, but held against the petitioner on the ground that the Hospital unit was not some new unit, but only there was a change in the management and, therefore, there is no question of award of the benefit of infancy protection.

d) Mr. Bhobe submits that both the reasons contradict one and another. The respondent is not at all clear about its own case. In the bargain, Mr. Bhobe submits that there is failure of natural justice as well as failure of effective opportunity to institute an appeal, accompanied by great prejudice.

e) Mr. Bhobe submits that the apart from the contradiction as aforesaid both the respondent and Appellate Authority are completely wrong in the reasonings adopted by them. He submits that there is absolutely no material on record to hold that the petitioner is only a unit of Medical Relief Society. So also, there is absolutely no material to hold that the unit is nothing but a continuation of old unit under the new management. Mr. Bhobe submits that both the authorities have not adverted to the aspect of "functional integrality", without which there was no justification to deny to the petitioner the benefit of infancy

protection, which was already granted to it.

f) Mr. Bhobe submits that in the absence of any supervisory official or managerial control between the two units, mere common ownership thereof is never sufficient to infer that the unit established later, was not a new establishment, but was a part and parcel of the earlier one. He relies upon the decision in the case of ***Regional Provident Fund Commissioner and another Vs. Dharamsi Morarji Chemical Co. Ltd.***; (1998)2 SCC 446, to submit that the reasoning in the respondent's order dated 18/06/2007 is completely flawed.

g) Mr. Bhobe submits that both the authorities have not adverted to test of functional integrality and relied upon the decision of this Court in the case of ***Kadamba Sub-Urban Transport Corporation Ltd. Vs. Assistant Provident Fund Commissioner***; 1999 (Suppl.1) Bombay Case Reporters 539, to submit that mere commonality on certain aspects and even mere common ownership of two units, is not sufficient to deny the benefit of infancy protection.

13. Mr. C. A. Ferreira, the learned Counsel for the respondents submits that there is no basis to contend that the earlier enquiries resulted in the record of any satisfaction in favour of the petitioner as regards the benefit of infancy

protection, which, the petitioner, incorrectly availed for itself. He submits that the order dated 28/11/2000 makes this position quite clear. Mr. Ferreira further submits that on the basis of averments in the petition as well as the material produced on record by the petitioner, it is quite clear that the petitioner had wrongfully claimed the benefit of infancy protection. He submits that this is only a case of change of management and in such a situation, applying the law laid down by the Supreme Court in the case of **Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner;** 1984 (Suppl.) SCC 610, there is no question of the petitioner claiming or availing the benefit under Section 16(1)(b) of the said Act as it then was. He further submits that the petitioner has itself admitted that they had approached to the Medical Relief Society and in pursuance of MOU with the Medical Relief Society, the old Hospital was revived to be run and operated by a Trust comprising mainly of persons nominated by Medical Relief Society as its trustees. In this case, it is quite clear that the petitioner was nothing but a Branch or a unit of the Medical Relief Society and, therefore, it is not entitled to the benefit of infancy protection on the basis that it is a new and independent unit. Reliance was placed upon the decision of the Hon'ble Supreme Court in the case of **L.N. Gadodia and Sons Vs. Regional Provident Fund Commissioner;** (2011)13 SCC 517, to submit that it was the duty

of the petitioner to place on record and prove that there was any functional integrality between the two units. Mr. Ferreira submits that there is really no contradiction between the orders made by the respondent and the Appellate Authority. The Appellate Authority has approved the decision of the respondent. The discussion in the order of the Appellate Authority on the aspect of change of management or ownership, was basically in the context of the submissions made by the petitioner and in answer to such submissions. Mr. Ferreira submits that full and effective opportunity was offered to the petitioners and there is absolutely no case of violation of natural justice. For all these reasons, Mr. Ferreira submits that this Court may not interfere with the concurrent findings recorded by the two authorities for the purpose of denying to the petitioner the benefit of infancy protection.

14. Rival contentions now fall for determination.

15. Section 16(1)(b) of the said Act, as it then was, provides that the said Act shall not apply to any factory established whether before or after the commencement of the said Act, unless three years have elapsed from its establishment. The explanation suggests that for the removal of doubts, it is hereby

declared that the date of establishment of factory shall not be deemed to have changed merely by reasons of a change of premises of the factory.

16. Mr. Bhobe's submission that the enquiries having been dropped on two occasions, after record of satisfaction that the petitioner was rightly granted benefit of infancy protection and the very initiation of the proceedings for the third time was in excess of jurisdiction, cannot be accepted in the fact and circumstances of the present case. On the first occasion, though some notice appears to have been issued to the petitioner, the same never culminated in the passing of any final order. Consequently, no such final order has even been produced on record by the petitioner. On the second occasion, the respondent made the following order on 28/11/2000 :

“During the course of inquiry it is observed that the hospital is in existence prior to 1982 and the quantum of correspondence has not been examined and the records were not inspected and report were not submitted. Therefore to the case the records of the hospital is to be inspected by ex and to submit the reports and the same will be communicated to GMS for his reply. If there will be any dispute the matter will be decided by. The present inquiry is

withdrawn as the case has to be judged a fresh taking into all aspects.”

17. From the perusal of the order dated 28/11/2000, it is clear that that the enquiry was withdrawn with liberty to examine the matter afresh by consideration of relevant aspects rather than proceeding with some summary enquiry. Therefore, it is not possible to accept Mr. Bhobe's contention that the issuance of two orders, was an exercise in excess of jurisdiction.

18. From the material placed on record by the petitioner as also from the averments made in the responses to the notices as well as in the petition, it is quite clear that the Hospital unit as such, remains the same old unit and only this is a case of change of management or to some extent, change of ownership. The petitioner has admitted that they had approached to Medical Relief Society for assistance to recommence the operation at the Hospital. This, by itself, suggests that this was not a case of establishment of some new unit, but change of management or change of ownership. The changed management also comprised of three trustees of Goa Cancer Society, which had originally established the Hospital and five trustees of the Medical Relief Society. Thereafter, by a Memorandum of Understanding, the Trust purported to transfer the management to MAHE. In these

circumstances, the respondent, upon appreciation of the material on record, has held that the Hospital was virtually functioning as a unit or branch of Medical Relief Society and consequently, could not have claimed the benefit of infancy protection. The Appellate Authority has held that even if it is assumed that the Trust or the MAHE were independent of the Medical Relief Society, even then, this was a case of mere change of management or change of ownership and by such a device, there was no question of claiming benefit of infancy protection, even though the unit by itself, was not an infant unit. There is really no error of jurisdiction or perversity in the approach of the respondent and Appellate Authority, which warrants interference under Article 227 of the Constitution of India.

19. The decisions, upon which reliance is placed by Mr. Bhobe, turn on their own facts and therefore, cannot assist the case of the petitioner. This is not a case of mere common ownership, but rather this is a case, where functional integrality, has been established between the two units. In this case, the petitioner has also failed to produce and establish the facts within its special knowledge. Accordingly, there is no reason to fault the approach of the two authorities, which have concurrently held that the petitioner was disentitled to the benefit of infancy protection.

20. It is not even the case of the petitioner that the substantial number of workmen earlier employed in the Hospital, changed after new management took over. It is not even the case of the petitioner that the earlier Hospital was shut down or dismantled and on its place, an entirely new Hospital unit was established along with the change of management. The material on record, in fact, suggests that even the previous management continued to have a considerable say in the later management. The later management was itself intrinsically connected with Medical Relief Society, which was an unit disentitled to the benefit of infancy protection of its own accord. It is the case of the petitioner that for lack of finances and other resources, the Goa Cancer Society could not effectively continue with the management and operation of the Hospital, which was required to be shut down for some time period. After the infusion of finances and loom of personnel by the Medical Relief Society, the Hospital recommenced the operations under management of Trust, which comprised three trustees of the Goa Cancer Society and five from the Medical Relief Society. The composition of management however, underwent some changes when the same was taken over by MAHE. From all such material on record, it does appear that this was a case of mere change of management or change of

ownership, after some interruption on account of lack of finances and resources. In such a situation, the benefit of infancy protection was rightly denied to the petitioner.

21. In the case of **Sayaji Mills Ltd.** (supra), the Supreme Court has held that the said Act is a beneficial legislation and Section 16 of the Act being a provision granting exemption to the employer from the liability to make contribution, must receive strict construction. If the period of three years is elapsed from the date of establishment of an unit, the Act would become applicable provided other conditions are satisfied. The criterion for earning exemption under Section 16(1)(b) of the said Act is that the period of three years has not yet elapsed from the date of establishment of unit in question. It has no reference to the date on which the employer is liable to make contribution upon acquisition of title to the unit. The Act also does not state that any kind of stoppage of the work by unit would give rise to fresh period of exemption. The work, which has commenced in the unit may be interrupted on account of several factors including "*paucity of finance, etc.*". Such interruptions do not result in earlier unit ceasing to be a unit governed under the said Act and on its restarting, it cannot be said that new unit has been established.

22. The Supreme Court specifically approved the observations of the Bombay High Court in ***Chagganlal Textile Pvt.Ltd Vs.. P. A. Bhaskar*** (Miscellaneous Application No.289/1956, decided on 05/11/1956) in which Justice Tendolkar had observed that the Act is made applicable to factories and not to the owners thereof; or in other words, it applies to the factories irrespective who the owners from time to time may be. Certain observations from the said judgment, were specifically approved by the Hon'ble Supreme Court as laying down the law correctly. The same read thus :

*“The question is whether the order of liquidation and the consequent temporary discontinuance of business until a lease was granted to Kotak and Company has the consequence of making the factory which was established cease to be established. In my opinion the answer to this question must be in negative. **A temporary cessation of the activities of an established factory cannot lead to the result that the factory ceases to be established for the purposes of the Employees' Provident Funds Act, for if it did, the class of employers who spare no ingenuity in seeking to deprive the employees of all the benefits conferred upon them by statute would have convenient handle whereby the activities of an established factory have to be discontinued for a few months in order to deprive the employees of the***

benefits under the Employees' Provident Funds

Act. *I take it that the establishment of a factory involves that the factory has gone into production and no more... but once it goes into production, a temporary cessation of its activities, for whatever reasons that cessation takes place cannot in my opinion, take the factory out of the category of an established factory for the purposes of the Employee's Provident Fund Act."*

[Emphasis supplied]

23. In **Sayaji Mills Ltd** (supra), the Hon'ble Supreme Court at paragraph 11 has observed thus :-

"This is not a case where the old factory was reduced into scrap and a new factory was erected in its place. Nor can it be said that there was total discontinuity brought about between the old factory and the factory which was restarted after the appellant purchased it. The stoppage of production was brought about temporarily as stated earlier by the winding up order and the factory was restarted after it was sold to the appellant by the Official Liquidator. The finding of fact recorded by the trial court in this case which is affirmed by the High Court clearly establishes that it was the same old factory which recommenced production on November 12, 1955. What is of significance is that a substantial number of workmen and staff who were working under the former management had been

*employed by the appellant though it is claimed that they had entered into new contracts of employment. **Mere investment of additional capital or effecting of repairs to the existing machinery before it was restarted, the diversification of the lines of production or change of ownership would not amount to the establishment of a new factory attracting the exemption under section 16 (l) (b) of the Act for a fresh period of three years.*** ”

[Emphasis supplied]

24. This is really not a case where the petitioner can complain of violation of natural justice. Full opportunity was offered to the petitioner and full opportunity has been availed by the petitioner. In fact, even the averments from the petition are sufficient to establish that the Hospital operated by the petitioner, could not have been regarded as some new Hospital and that this was ultimately a case of old Hospital being taken over by a new management. In such circumstances, there is no case made out to disturb the concurrent findings recorded by the two authorities. There is no contradiction as such between the orders made by the respondent and the Appellate Authority. At the highest, it is possible to contend that the two authorities by adopting some dissimilar reasoning, have arrived at a proper conclusion. It is not

as if the two reasonings were not attracted to the facts and circumstances of the present case. On the basis of both the reasonings or on the basis of even each of the reasonings, it is clear that the petitioner was disentitled to the benefit of infancy protection.

25. For the aforesaid reasons, the petition fails and the rule is liable to be discharged.

26. Accordingly, rule is discharged. Interim relief, if any, stands vacated. If the amounts have been deposited by the petitioner in this Court, the respondent shall be at liberty to withdraw the same. If no amounts have been deposited, the respondent shall be at liberty to proceed with the execution of the impugned orders. In the fact and circumstances of the present case, there shall be no order as to costs.

M. S. SONAK, J.

SMA