

(1964) 03 MAD CK 0013

In the Madras High Court

Case No : Writ Petition No's. 225 and 226 of 1962 and Criminal R.C. No. 306 etc. of 1962 (Cr. R.P. No. 304 etc. of 1962)

Devi Press

APPELLANT

Vs

Regional Provident Fund Commissioner, Madras and Another

RESPONDENT

Date of Decision : 09-03-1964

Acts Referred:

Companies Act, 1956 — Section 484

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

Citation : AIR 1965 Mad 462 : (1965) ILR (Mad) 99 : (1965) 1 LLJ 294 : (1965) 78 LW 167

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Judgement

(1) In the above two writ petitions. Devi Press is the petitioner. It is a registered partnership consisting of two partners which commenced business

form 25-1-1957. Earlier, there was company known as the Devi Press Ltd., which went into voluntary liquidation. As a result of the winding up

and closure of Devi Press Ltd., a dispute arose between the workers and the management. That was settled on 23-1-1957. According to the

settlement it was agreed that all the workers except those in the binding department would be re-employed by the new management, Devi Press,

as fresh entrants. It was also agreed that such of the workers as were discharged on account of the closure should be paid ten days' basis wages

for each year of service plus one month's basic wage as ex gratia payment.

(2) Thereafter, the registered firm commenced business. It acquired for the purpose of its business the machinery of Devi Press Ltd., which had

been wound up. In 1959, the Provident Fund Commissioner called upon the

petitioner firm to comply with the requirements of the Provident Fund Scheme. His contention was that the firm had completed three years by the 31st July 1956. The petitioner pointed out that the firm came into existence, only in January 1957, and that the provisions of the Employees' Provident Funds Act would apply only after years of its life had been completed. This claim of the petitioner was rejected, the respondent holding that the liquidation of the former company would not have the effect of postponing the applicability of the Act and that the Act would apply with effect from 1st August 1956. He also contended that as the petitioner firm had taken over the machinery of the former company and was also housed in the same premises as the old company the exemption contemplated by S. 16(1) of the Act would not apply. The Provident Fund Commissioner also threatened to prosecute the petitioner and to take steps to recover the arrears of provident fund as arrears of land revenue. Subsequently, the Provident Fund Commissioner initiated prosecutions of the partners and the partners were also convicted under para 76(a) of the Employees' Provident Fund Scheme.

(3) In the writ petitions, the first of which is for certiorari to quash the demand notices issued in respect of the alleged arrears, and the second for the issue of a writ of prohibition to restrain the respondent from collecting the contributions and other incidental charges for the period of 3 years commencing from the 25th January 1957, the contention advanced by the petitioner is that the petitioner firm is entitled to the exemption from the Act. The contributions on and after 1960 have been paid by the petitioner. It is also alleged that whatever be the position with regard to the contributions, the Provident Fund Commissioner has no authority to demand the payment of incidental administration charges for the period January 1957 to January 1960, for, in the absence of any contribution, no administrative charges could possibly be undertaken by the Regional Provident Fund Commissioner. It is urged that the old company had gone into liquidation and that the firm did not take over the previous company as a running concern. By mutual agreement, the service of all the employees ceased and they became new employees in the service of the firm. The mere fact that it purchased the machinery of the old firm could not make the petitioner firm a successor of Devi Press Ltd.

(4) In each of the several criminal revision cases, the two partners are the petitioner. Their failure to comply with the demand of the Regional

Provident Fund Commissioner resulted in the prosecution and separate cases were launched in respect of different periods, but the point involved

is identical. Even before the Criminal Court, the petitioners claimed that they were entitled to the exemption u/s 16(1) of the Act, which contention

was, however, rejected, and the convictions followed.

(5) In the counter affidavit filed on behalf of the Regional Provident Fund Commissioner; it is stated that the provisions of the Employees'

Provident Funds Act 1952, were applied to the printing industry with effect from 31-7-1956. On the petitioners claiming that the old company had

gone into voluntary liquidation and they had purchased the press and the new firm had come into existence only on 25-1-1957, the department

purported to shift the date of commencement of the applicability of the provisions of the Act to 25-1-1957, that is the date of the formation of the

partnership. It is claimed that the petitioner firm is not entitled to the infancy protection contemplated by section 16(1)(b) of the Act, for the reason

that the protection would not be available whenever there was a change of ownership, which, according to the respondent, is all that took place in

the present instance.

(6) It will accordingly be seen that the question that has to be examined in the present case is whether the exemption under S. 16 is available to the

petitioner.

(7) Devi Press Ltd, was a public limited company. It went into liquidation in January 1957, the two partners of the present petitioner partnership

were the managing agents. According to the admitted facts, these two persons purchased the machinery of Devi Press Ltd., and formed a

partnership to carry on the business of printing. It is not also in dispute that whatever claims the workers of Devi Press Ltd., had against the defunct

management were settled amicably and most of the workers were re-entertained as new employees under the partnership. It is stated further that

prior to the commencement of the proceedings by the Provident Fund Commissioner, there was no provident fund account for any of the

employees of the firm. That is not a very significant fact, because these presses were brought within the scope of the Act only with effect from 1-8-

1956 and Devi Press Ltd., went into voluntary liquidation in January 1957. After the petitioners purchased the machinery, they got the factory

licence transferred to their name and obtained lease of the premises also. It is also (not?) in dispute that the entirety of the machinery of Devi Press

Ltd., was purchased by these petitioners. Though the petitioners could have obtained a separate factory licence for the licence in respect of the

premises where the factory is situated and (sic) is not personal to the owner or the lessees of the premises, what was actually done was to obtain a

transfer of the licence in the name of Devil Press Ltd., to the name of the new partnership. On behalf of the petitioner, a copy of the proceedings of

the meeting of the shareholders of the defunct company has been produced. the resolution passed at the meeting was that Devi Press Ltd., should

be wound up voluntarily as a members voluntary liquidation under S 484(b) of the Companies Act. A liquidator was also appointed for the

purpose of such winding up. This resolution was passed on 20-7-1956, apparently a few days before the notification of the Government of India

bringing the printing industry, within the scope of the Employees' Provident Funds Act. It was in the course of these winding up proceedings that

the machinery and the types and furniture were sold to the petitioners, who were the managing agents. The agreement of sale of the machinery

covers the moveable properties, the printing presses and the accessories. There was also a stipulation that the vendor, that is the liquidator should

transfer the licences for the working of the press, viz., the Corporation licence and the factor licence, in favour of the vendees. The vendor also

agreed to assist the vendees to get the lease of the premises from the owners thereof. The schedule shows that the entirety of the printing

machinery and the accessories together with the types and furniture was agreed to be conveyed to the purchasers.

(8) Section 16 of the Employees Provident Funds Act, as it stood during the relevant period (it has been amended by Act 46 of 1940) reads thus:

16 (1): This Act shall not apply to--(b) Any other establishment before or after the commencement of this Act, unless, three years have elapsed from its establishment".

The Explanation to this section reads:

For the removal of doubts, it is hereby declared that the date of the

establishment shall not be deemed to have been changed merely by reason of a change of the premises of the establishment"".

The word ""establishment"" has not been defined in the Act. But other definitions which make use of this expression give sufficient indication of what

it meant. In the present case again there is no dispute that the petitioner's establishment is a factory. The question for examination is accordingly

whether, in the instant case, the date of the establishment of the petitioner concern has to be taken as the 25th January 1957, that is, the date on

which the partnership started to function and operate the printing press, or whether, by reason of the incidents set out earlier, the partnership is in

fact a continuation of the old company. If the former view should prevail, then the petitioner firm is entitled to the exemption till January 1960, while

it is held that the petitioner firm is only a continuation of the old company, the firm would not be entitled to the exemption, for it is common ground

that Devi Press Ltd., had completed 3 years of its existence even by 25-1-1957.

(9) Mr. R. Narayanan, learned counsel for the petitioner, has referred to Subbarama Chetti v. Mirza Zewer Ali AIR 1960 Mys. 14. In that case, a

partnership firm to which the Act was applicable went into dissolution. One of the partners started business in the old premises with assets falling to

his share and employed less than 20 new workers. The previous partnership had employed more than 50 persons and the Act did apply to it. On

the dissolution of the firm, the Provident Fund Commissioner had disbursed the provident fund accumulations to all the employees of the firm.

When one of the partners re-started the business employing not less than 20 persons, the Regional Provident Fund Commissioner took

proceedings against the partner for failure to submit returns with effect from 1-1-1957, and also for having failed to remit the contributions and

administration charges. The question which the court was called upon to consider was whether the petitioner was a new factory entitled to the

exemption under S. 16. The matter came before the High Court by way of a criminal revision petition against the conviction of the petitioner in the

criminal court. The learned Judge took the view that there was no suggestion that the dissolution of the partnership was an attempt to defeat the

claims of the workers and that the workers had at no time lodged any complaint of that description. There was no ulterior motive in the dissolution

of the partnership. The contention advanced on behalf of the Provident Fund Commissioner that he liability to pay the employee's share of the

provident fund attached to the machinery and whichever person used that machinery became subject to that liability was rejected by the learned

Judge, who further observed:

It is further urged by the learned counsel for the respondent that if one of the partners of the old firm starts a new business, as in this case, with a

part of the machinery that fell to his share, it should be presumed that the new factory is part or the sub-division of the old factory and therefore, is

liable to contribute towards the provident fund of the employees, irrespective of the fact that the numbers of employees in the new firm started by

him in less than 50. If the legislature really intended that such consequences should follow, a provision to that effect should have been made in the

enactment.....

Though the observation in this case appear to lend support to the petitioner's contention, it will be seen that the question proceeded on the

determination of the facts and upon a clear finding that a dissolution of the original partnership was not a device intended to defeat the claims of the

workers.

(10) Regional Provident Fund Commissioner, Punjab and Another Vs. Lakshmi Ratten Engineering Works, Ltd., deals with a case of change of

ownership. The decision in that case was that mere change of ownership does not make any difference to the applicability of S. 16 and that what is

exempted is only a satisfactory which has not been established for more than 3 years. In that case three companies had purchased three factories

from the Government. On a demand being made upon them for payment of the provident fund contribution, they contended that the date of

establishment of the factory should be taken to be the date on which the companies had purchased those factories. This contention was repelled.

The learned Judges pointed out that the factories in question were established long ago, although by Government, and the protection could be

granted only to elapsed since the establishment. A like view has been taken by the Calcutta High Court in Jamnadas v. R. P. F. Commissioner,

West Bengal, AIR 963 Cal 513. This part of the head note will be sufficient:

The fact that a new company or concern subsequently takes over or acquires the

factory does not shift the date of establishment of the factory to the date of its taking over or acquisition, nor does the fact matter that the factory had ceased to produce goods for a certain time before acquisition and resumed production under a new name as a result of the acquisition.

In a decision of this court in *M.K. Krishnamurthy, Ex-proprietor, Photo Litho Press, Madras 1 Vs. Industrial Tribunal, Madras and Another*, the question had to be considered whether the sale of a business by one management to another company or management would not by itself constitute discontinuance of the business. This arose in the context of a dispute under the Industrial Disputes Act. The learned Judges observe that the mere identity of the business carried on by the mere identity of the business carried on by the new management would not be the sole criterion to decide that there was no discontinuance of the business, but that the question whether the closure of the business was a temporary discontinuance or whether it was a genuine closure would ultimately depend upon a number of factors which would have to be taken into account by the Tribunals. Though this case does not deal directly with the point in issue, it indicates that even for the purpose of discovering whether the partnership firm does in fact represent a new establishment brought into existence all the surrounding circumstances should be had regard to.

(11) Mr. R. Narayanan, learned counsel for the petitioner, has referred to in the matter, of, *In Re: Mahalaxmi Cotton Mills Ltd. (in liquidation)*, . In that case the liquidator had been directed to carry on the factory engaged in the industry and to sell it as a going concern. The question arose whether the liquidator was liable as an employer and occupier within the meaning of the Employees' Provident Funds Act. The distinction between a case where a liquidator was asked to wind up a factory and close it down and a case where a liquidator was directed to carry on the business of the factory was pointed out in this judgment. In the former case it was held that he would not be liable to contribution, whereas in the latter case, his liability could not be questioned.

(12) These decision give a clue to the manner in which the controversy in the present case has to be resolved. It has been pointed out that these two petitioners were the managing agents of the previous company. That business went into voluntary liquidation. The reasons for winding up that

business are not apparent from the records or even the resolution passed by the members of that company. But that the dissolution took place a week or ten days before the issue of the notification making the Act applicable to the printing industry is a patent fact. While in terms the business was not sold as a going concern to the petitioner firm, in effect that was what was done. The entirety of the machinery, its accessories and the furniture were taken over. The very factory and corporation licences were transferred in the name of the petitioner partnership. The fact that the chains of the workers vis-a-vis the old company were settled up To Whom It May Concern: the date of the winding up or that the workers were re-employed by the petitioner partnership does not in any way touch upon the question as to the date on which the establishment came into existence. In truth, the old establishment continued, although in a different name. If that is so, the date on which the establishment came into existence, is not 25-1-1957, the date of the formation of the partnership and the carrying on of the business from that date, but the date on which the old Devi Press Ltd., came to existence. It should follow that the demand in so far as the contribution from 25-1-1957 is concerned that demand was rightly made, the petitioner firm not being entitled to the protection of S. 16 of the Act.

(13) I am however of the opinion that the demand in respect of administration charges cannot be sustained. These charges are clearly intended to reimburse the department in respect of expenses of administration. But, if during the period in question, no administration was involved, I fail to see how administration expenses can be demanded. To that extent, the demand made by the Provident Fund Commissioner cannot be supported in law.

(14) In the result, the writ petitions fail. But in view of what I have stated with regard to the administration charges, the Provident Fund Commissioner will revise his demand suitably.

(15) Criminal R. C. Nos. 306, 501 and 502 of 1962 are against the convictions of the petitioners for failure to make the contribution. These revision cases are dismissed, Criminal R. C. Nos. 503 to 506 of 1962, which relate to conviction for non-payment of administration charges are allowed. Those convictions and sentences will be set aside.

(16) There will be no order as to costs in the writ petitions. (There cases having been set down for being mentioned the Court made the following

Order:)--

These petitions have been set down for being spoken to for further consideration. It has been held that the petitioner press is not entitled to the

infancy protection but that does not dispose of one other substantial argument advanced. It has been mentioned that on the closure of Devi Press

Ltd., the disputes that arose between the workers and management were resolved amicably. By an agreement, the workers received certain

compensation. Thereafter, they were re-employed by the petitioner press, as new employees. The question then arises whether the Provident

fund contribution is liable to be paid by the Management during the first year of service of these workers. Quite apart from the infancy protection

which was claimed and rejected, it is clear that under the provisions of the Act and the scheme framed under the Act, a worker becomes entitled to

the benefits of this Scheme only on his completion of 40 days of work within one year of service. That position is not disputed by the respondent.

Notwithstanding the finding that Devi Press is a continuation of the old Devi Press Ltd., the nature of the employment of the workers is clearly

altered. They can no longer be regarded as employees continuing under the same terms of employment. There has been a voluntary acceptance of

the termination of their services and they had in fact been paid such compensation in that regard as they contended they were entitled to. The

subsequent employment was therefore a fresh employment and unless the workers complete a service of 240 days in one year of the service, they

would not be entitled to the benefits of the scheme. It would follow therefore that taking the date of the application of the Act as 25-1-1957 (that is

the view taken by the department), the computation of the contributions will have to be made only in respect of the workers who continue in the

employment beyond one year from that date and who during the first year of service have worked for 240 days.

(17) It follows that as the petitioners are not liable to pay contribution during the period of the one year referred to their convictions leading to the

above criminal revision petitioners have to be, and are set aside. The Regional Provident Fund Commissioner will take the above into consideration

in revising his demand.

(18) Petition partly allowed.