
(1997) 03 AP CK 0076

In the Andhra Pradesh High Court

Case No : Writ Petition No. 8228 of 1990

Fibrefab Consultants and Engineers Ltd.

APPELLANT

Vs

Regional Provident Fund Commissioner, Hyderabad

RESPONDENT

Date of Decision : 17-03-1997

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 16, 16(1), 7

Citation : (1997) 3 ALD 762 : (1997) 4 ALT 80

Hon'ble Judges : G. Bikshapathi, J

Bench : Single Bench

Judgement

1. The proceedings issued by the respondent in Reference No. AP/6358/Enf.I/Z-XIV/90/313, dated May 7, 1990 are assailed in this writ petition. In fact the entire matter rests on the interpretation of Section 16(1)(b) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952.

2. To trace out certain essential facts : The petitioner is a Company incorporated under Companies Act in November 1974. It is engaged in fabrication of fibre glass products among other products. The employees were engaged for carrying on the production activity. The unit had been running under heavy losses and therefore the establishment was irrevocably closed down with effect from December 22, 1987, after complying with the formalities under the Industrial Disputes Act. All the workmen employees were paid compensation under Law and all the dues including the Provident Fund account was also settled. While so, one Mr. Ved Prakash came forward to associate with the Company for day to day running of the unit at Balanagar. After settling the terms and conditions, an Agreement was entered into between Mr. Ved Prakash and the petitioner company in July, 1987 providing for running the unit by Mr. Ved Prakash. However, from August 1988 after a lapse of nearly 11 months, the unit started running with new establishment under the supervision and control of Mr. Ved Prakash. All the employees were recruited afresh on new terms and conditions, however two employees of the petitioner company were continued. While the

establishment was being run, the Provident Fund Inspector visited the premises and called upon the petitioner to contribute to the provident Fund Scheme of the employees. In this connection there appears to have taken some discussions between the management and the authorities. Thereafter proceedings were initiated u/s 7 of the Act and an enquiry was conducted. The authority-1st Respondent herein passed orders on May 7, 1990 holding that the petitioner is not entitled for infancy protection u/s 16(1)(b) of the Act and against the said order, the present writ petition has been filed.

3. It is the contention of the learned Counsel for the petitioner that the manufacturing unit was completely closed down and all the workmen working in that unit were paid the compensation and their accounts were settled. Even the Provident Fund amounts of the said employees were also settled by the authorities. After a lapse of nearly 8 months, the unit was started afresh by employing new hands and with new conditions of service. Therefore, it has to be treated as a fresh enterprise and it is entitled for infancy protection. The learned Counsel also submits that the authority failed to appreciate the judgment in Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, . It is further contended by the learned Counsel that the decision of the Supreme Court in The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, was not overruled in Sayaji Mills" case (supra). Therefore, the authority proceeded with the matter under a complete misconception. Hence, he submits that the petitioner is entitled for infancy protection u/s 16(1)(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "Act").

4. On the other hand, the learned Standing Counsel for respondent submits that the criteria for determining whether it is a new establishment or running establishment has to be determined from the facts available before the authority. He also submits that mere change of managements would not per se, amount to change of establishments. Therefore, in spite of change of management the unit continued to produce the goods. The unit was covered by the provisions of the Act and it is liable to pay the contribution and not entitled to invoke infancy protection u/s 16(1)(b) of the Act. He relies on the judgment of this Court in The Regional Provident Fund Commissioner, A. P. v. M/s. Sri Mahavir Talkies, Tirupati, W. A. No. 578/89, dated August 16, 1990, and Ceat Tyres of India Ltd. v. The Regional Provident Fund Commissioner of A. P., W.P. No. 3459/1987, dated March 5, 1992 as confirmed by the Division Bench in Writ Appeal No. 634/1992, dated February 24, 1997.

5. The issue that arises for consideration is whether the petitioner is entitled for infancy protection u/s 16(1)(b) of the Act ?

6. For proper appreciation of the case, it is necessary to extract the relevant statutory provisions of the Act namely Section 16(1)(b) as follows :

"(1) This Act shall not apply to

(a)

(b) any other establishment, established whether before or after the commencement of this Act, unless three years have elapsed from its establishment."

In the Provident Fund Inspector's case (supra), a Printing Press was established in 1946 and which was sold in 1961. The new owner was prosecuted for not making payments under the Act. It was the case of the new owner that the work was stopped on sale and re-started after a break of three months. The machinery in the press was also altered, the persons employed previously were not continued in service and fresh employees appointment took place amongst whom six were the previous employees. The compensation was also paid to the workmen of the previous employer at the time of sale by the previous owner. Prior to purchase, there were only 9 workmen, but after the purchase the force was increased to 20. Out of them, six persons were re-employed. It was not a going concern nor was there any production as on the date of the sale, and that it was started afresh by the new owner after the purchase by the new owner. There was no continuity of the old establishment. Under these circumstances, the Supreme Court held that old establishment was completely closed when the transfer of ownership took place and entirely a new establishment was established three months later and therefore the benefit of non applicability of the Act u/s 16(1)(b) for a period of three years was available to the new owner. In Sayaji Mills case (supra), it was held that :

"where the stoppage of production in a factory was brought about temporarily due to the order of the High Court in winding up proceedings in respect of the company owning the factory, for sale of assets of the company and it was the same old factory which recommenced production after its sale and a substantial number of workmen and staff who were working under the former management had been employed by the purchaser company, 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 u/s 16(1) (b) for a fresh period of three years".

7. The only question that arises for consideration is whether the petitioner is entitled for infancy protection u/s 16(1)(b) of the Act. Section 16(1)(b) as it was at the relevant time reads thus :

"This Act does not apply to (a)

(a)

(b) Any other establishment established whether before or after the commencement of this Act, unless three years have elapsed from its establishment".

8. The learned Counsel for the petitioner submits that the facts in Lakshmi

Rattan Engineering Works v. Regional Provident Fund Commissioner, Punjab 1966 I LLJ 741 are quite distinct and different and the case on hand cannot be compared with that case. I have perused the judgment of the Supreme Court. It was admitted case that the running factory was purchased by another person. Therefore, the Supreme Court considering the clause in the agreement, held that the Appellant took over a running factory and therefore there was a mere change of ownership and hence the date of establishment must remain the date of its first establishment. In those circumstances, it was held that the first establishment of the factory should be taken the base for reckoning three years exemption period. It was further held that three years period should count from the date when the first factory was established and the fact of change of the ownership was immaterial, so long as the establishment continued to work all along. Therefore, it was made clear that if an ownership of a running factory is changed, it cannot be said that it is a new establishment for the purpose of claiming the benefit u/s 16(1)(b) of the Act. In N.S.S. Co-operative Society's case (supra), referring to Lakshmi Rattan Engineering Works' case (supra), the Supreme Court said at p. 697 :

"The first of these decisions is Lakshmi Rattan Engineering Works v. Regional Provident Fund Commissioner, Punjab (supra), in which this Court held that a change in location of an establishment or a change in the line of business would not have the effect that a new establishment has been set up provided there was continuity of working. That case cannot apply to the facts as found by us in the present case where there was no continuity of the business and there were the additional factors of termination of services of the workmen and new establishment being set up by fresh recruitment of workmen, in addition to alteration in machinery in the Press."

"When reliance was sought to be taken of the decisions in Jamnadas Agarwalla and Another Vs. The Regional Provident Fund, Commissioner, West Bengal and Others, : and Bharat Board Mills Ltd. v. Regional Provident Fund Commissioner 1958 I LLJ 285 and the learned single Judge of the Madras High Court in Devi Press Vs. Regional Provident Fund Commissioner, Madras and Another, : the Supreme Court held that the facts are different by stating that the principle applied to the facts of N.S.S. Co-operative Society's case (supra) would lead to the conclusion that the N.S.S. Co-operative Society was set up as a new establishment and the provisions of Section 16(1)(b) have to be applied on the basis that the new establishment was set up in June, or July, 1961, so that there was no liability to pay the Provident Fund Contribution and to file various returns under the Act".

9. Thus, it is crystal clear from the judgments referred to above that if a going concern is taken over or purchased by another person, it cannot be treated as a new establishment. Even in Sayaji Mills Ltd.'s case (supra), the Supreme Court held that the Act being a beneficent statute and Section 16 of the Act being a clause granting exemption to the employer from the liability to make

contributions, Section 16 should receive a strict construction. While referring to Lakshmi Rattan Engineering Works" case (Supra), the Supreme Court distinguished the facts of that case and held at para 11 as follows :

"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 have 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 u/s 16(1) (b) of the Act for a fresh period of three years".

While considering the case of N.S.S. Co-operative Society (Supra), the Supreme Court observed as follows :

"The defence of the accused, in that case was that the Co-operative Society of which he was the Secretary had acquired the press in question in March, 1961 and had established a new press subsequently and hence the Act was not applicable to the press as the period of three years prescribed by Section 16(1) (b) of the Act had not expired. The evidence in that case showed that after the purchase, a new owner had come in the place of the former owner, the work of the press was stopped on the date of its sale and was started again after a break of three months, the machinery in the press was also altered and the persons employed previously were not continued in service. While a fresh recruitment of workmen had taken place, out of those workmen only six happened to be the former employees and compensation had been paid to the workmen at the time of the sale by the former owner. On these facts it was held that a new establishment had come into existence. In the case before us, it is seen that about 70 per cent of the former workmen had been employed by the appellant and there was no change of machinery. Further this is a case where the interruption of work had taken place owing to the order in the winding up proceedings. It is relevant to state here that this Court in the course of its judgment in the above case did not over-rule the decision of the Calcutta High Court in Bharat Board Mills Ltd. (supra) but only distinguished it. The facts of that case more or less corresponded to the facts of the case before us. It is true that this Court in the above decision approved the decision of the Madras High Court in *Vithaldas Jagannathdas v. Regional Provident Fund Commissioner*,

Madras 1966 I LLJ 240 but that does not make any difference so far as the case before us is concerned since in the Madras case there was a finding that in reality the old establishment had come to an end and there was a new establishment. In the case before us, the finding of fact of the Trial Court is to the contrary. The learned Trial Judge has held that the intention in this case was to maintain the continuity of the old factory. Hence the decision on which reliance is placed being distinguishable on facts is not of much use to the appellant".

Therefore, it is clear from the judgments of the Supreme Court that when once on fact it is found that a going concern was purchased or re-scheduled its production, the benefit of Section 16(1)(b) of the Act is not available. Though the learned Counsel for the petitioner submits that in the instant case there was transfer of management to Mr. Ved Prakash and it was restarted after closure of the unit for more than 8 months, I am not persuaded to accept that it is a new establishment. The agreement only recites that Mr. Ved Prakash was only inducted as a Director of the petitioner Company and he is entrusted with the day to day administration and supervision of the unit. It is not a sale of unit to Mr. Ved Prakash. Therefore, the ingredients set out by the Supreme Court in N.S.S. Co-operative Society's case (supra) are not present in the instant case. In regard to Sayaji Mills' case (supra), the Supreme Court observed that whether stoppage of production in a factory was brought about temporarily due to the order of the High Court in winding up proceedings, it was the same old factory which re-commenced its factory after its sale and substantial number of workmen and staff, who were working under the former management had been employed by the purchaser company, the mere investment of additional capital replacing the existil machinery before it was restarted, the diversification of the lines on production or change of ownership would not amount to new factory attracting exemption u/s 16(1)(b) of the Act.

10. The learned Counsel for respondent relies on the Division Bench decision of this Court in the Regional Provident Fund Commissioner's case (supra), dated August 16, 1990. That was a case where M/s. Sri Mahavir Talkies was covered by the provisions of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 with effect from December 1, 1961 and it failed to remit the share of the employees provident fund from March, 1964 to September, 1983 and thereafter a demand notice was issued and finally damages were assessed u/s 14B of the Act. The same was assailed on the ground that the petitioner had no opportunity to file explanation. It was also urged that it was not covered by the provisions of the Act. The learned single Judge reduced the damages. On appeal filed by the management, the Division Bench held that the Act applies not to a particular individual, who is the owner, but to the establishment. The Division Bench judgment is not applicable inasmuch as under what circumstances, Section 16(1)(b) can be invoked is not discussed in the subject matter. He also relied on the judgment of the learned single Judge in Ceat Tyres of India Ltd.'s case (supra). The facts in the said case were the Deccan Fibre Glass Limited, Hyderabad was amalgamated with the Ceat Tyres Company Limited. The learned single Judge

held that temporary cessation cannot lead to the presumption that the factory ceases to function. Section 16 of the Act, contemplates postponement of the Act only to the establishments and not to the persons concerned with the management. As can be seen that it is a case of amalgamation and there is no cessation of production or the factory was closed.

11. To ascertain the nature of transfer namely sale or otherwise, it is necessary to consider the agreement entered between the petitioner company and one Mr. Ved Prakash wherein the second party (Mr. Ved Prakash) agreed to run the business of the petitioner on certain terms and conditions. The preamble of the agreement is as follow :

"Whereas M/s. Fibrefab Consultants and Engineers Limited was promoted in the year 1975 and has been incurring heavy losses and the first party owed about Rs. 20 lakhs including interest as on May 31, 1988. And whereas the second party has agreed to run the business of the above said first party in consideration of the terms and conditions mentioned in the agreement. And whereas the first party has agreed to allow second party to run the business of the first party in consideration of the terms and conditions set-forth in this agreement".

Some of the important terms and conditions of the agreement are extracted below :

"1. The First Party agrees to nominate and elect the second party as a Director of the Company within a period of one month of this Agreement.

2. The Second Party hereby agrees to manage the day-to-day administration and look after the affairs of the unit situated at Balanagar and the Liabilities and Assets of the First Party on the effective date of this Agreement (i.e. June 30, 1988), shall be attached to this Agreement as Annexure-I.

Should, however, the Second Party desire to purchase the land and building situated at Balanagar, a separate Agreement may be entered into for that purpose with the Company. The second party can exercise this option subject to terms and conditions contained in the aforesaid separate Agreement, latest by July 16, 1988.

4(a) The second Party will be responsible for the day-to-day running, management and superintendence of the First Party's Unit at Balanagar and shall have such powers as may be granted to him from time to time in accordance with the Articles of Association of the First Party including the operation of the Bank Account. Operations of the existing bank account with Andhra Bank shall be suspended and the Second Party will have a new account for his day-to-day operations.

(b) It is clearly understood that as the day-to-day running of the unit at Balanagar is to be done by the Second Party after the effective date (i.e. June 30, 1988) of the Agreement, Second Party shall alone be responsible for the recruitment/employment of such personnel/employees as may be required for

that purpose and Second Party shall arrange for payment of their respective salaries and the First Party shall not be liable for the same under any circumstances, whether with regard to their employment benefit and/or settlement of their dues if any.

6. In the event of the Second Party violating any of the provisions of this agreement or Articles of Association or any of the provisions of any law, the First Party shall be at liberty to cancel this Agreement and take possession of the First Party's assets, and the Second Party shall be liable for any loss injury or damage caused to the First Party.

7. Without prejudice to the right of the First Party to cancel the Agreement under Clause (6) and take possession of the assets, the First Party shall be at liberty to cancel the Agreement in the event of the Second Party failing to liquidate the debt due to State Bank of India, latest by December 31, 1988.

9. Should the Second Party discharge the total liability of the First Party to State Bank of India before expiry of this Agreement, he shall be at liberty to take over the Unit in entirety including all assets and liabilities at that time, subject to the Second Party fully complying with all terms and conditions stipulated in the simultaneous Agreement of Sale of the Land and Building.

10. During the period of this Agreement, the Second Party shall be responsible for compliance with the provisions of any Act, Rules and Regulations applicable to the unit at Balanagar and shall indemnify the Company for any loss, injury or liability incurred or caused during the said period".

12. From the factual matrix it is seen that one Mr. Ved Prakash is taken as Director in the Company and the petitioner Company continued to function as the original owner and that the task of supervising and managing the unit owned by the company was entrusted to one Mr. Ved Prakash on certain terms and conditions for certain period. It is not a sale by itself, but it is handing over of the management to a Director for day-to-day running of the unit, so that the Company may come out of woods. In such a situation can it be called as a total closure of the unit and re-establishment of a separate unit altogether. It is also not the case that any new machinery was added. As per the dicta of the Supreme Court, it is only when the ownership and the management of the unit is transferred to a new person and the unit starts afresh after taking over the said management, it was held to be a new management and the protection u/s 16(1) (b) of the Act applies to such management. But, in the instant case, I do not find any evidence to show that the unit was sold and another management has come into possession of the unit. It is only with a view to see that the unit does not further suffer from any losses and the management was entrusted to another person who is none-else than the Director of the Company retaining the status of the Company as it is. The assets of the company continued to vest with the petitioner and the liabilities also continued to fasten the petitioner. May be the services of the workers were terminated and some other fresh hands were

recruited after the management of the unit was entrusted to one Mr. Ved Prakash. But, it is not the case where Mr. Ved Prakash has purchased the unit and he inducted fresh hands. He was entrusted with the day-to-day administration and the management of the unit under an agreement. It is neither a lease nor a sale of the unit. Merely because, the workers were retrenched and their services were terminated and compensation was paid to the workers and the concerned authorities were informed about the situation, the Company does not cease to be a company until it is wound-up under the Companies Act. A mere change within the Company set up cannot ipso facto convert the establishment as a new establishment. The Supreme Court even went to the extent of stating that even when the management is entrusted to another company during the winding-up proceedings and even when the amalgamation takes place, the benefit u/s 16(1)(b) of the Act is not available. Therefore, the benefit of M/s. Lakshmi Rattan Engineering Work's case (supra) cannot be taken aid of as there was no sale at all in the instant case. It is also not a case of transfer of the management for any consideration and it is only an entrustment of the management to a Director for certain period. Admittedly, the petitioner unit was covered by the Act. There was no production for certain time on account of various financial difficulties. However, the production restarted after Mr. Ved Prakash was taken into management and that too as a Director of the Company. The unit does not become a new unit when a fresh Director is inducted into company and when it restarts the production in the very same name and style of the Company. Even if the new Director provides working capital for restarting the production, it does not alter the characteristic of the company. The Supreme Court made it clear that even in case of sale of running and ongoing concerns the protection is not available. It is only when the unit is closed down irrevocably and a new establishment springs up the concession of infancy protection is available.

13. It is true that the 1st Respondent erroneously stated in the order that in Sayaji Mills' case (Supra), the Supreme Court overruled the N.S.S. Co-operative Society's case (supra). But he considered all the relevant aspects with reference to the agreement and other material. Thus, I find that the impugned order does not suffer from any infirmity.

14. Accordingly, the writ petition is dismissed. No costs.