

(1990) 07 KAR CK 0034
In the Karnataka High Court
Case No : W.A. No. 1537 of 1987

Gammon India Limited

APPELLANT

Vs

Regional P.F. Commissioner

RESPONDENT

Date of Decision : 30-07-1990

Acts Referred:

Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 16, 16 (1) (b), 7 A

Citation : (1991) 62 FLR 478 : (1990) ILR (Kar) 2804 : (1991) 1 LLJ 523

Hon'ble Judges : S. Mohan, C.J.; Shivraj V. Patil, J

Bench : Division Bench

Judgement

Mohan, C.J.—The facts leading to the writ appeal are as follows :

The Mysore Chemicals and Fertilisers Ltd., (hereinafter referred to as "the Fertilisers Ltd., ") was a company carrying on the business of manufacture of chemicals and fertilisers at Balgola, Mandya District, Karnataka State. The company had its own land and building where the manufacturing process was carried on with the help of machinery, which machinery also belonged to the company 2. The company was ordered to be wound up by an order of this Court dated 14th of December, 1972. Long prior to this date, the company had stopped its manufacturing operations and discharged all the workmen. The reconstitution of the company failed. Therefore, its assets were sold by public auction held by this Court. The appellant purchased the said assets of the Fertilisers Ltd., consisting of land, building and machinery on 27th of June, 1975 for a sum of Rs. 85,00,000/-. The sale was confirmed by this Court on 11th of July, 1975. The machinery belonging to the Fertilisers Company had become old and many parts had become worn out, corroded and rusted. As a matter of fact some of them were missing. He had to replace the whole machinery and only in April 1977, it was possible for the appellant to commission it. In the bargain, he had to spend about Rs. 30,00,000/-. The appellant had to recruit anew fresh workmen to look after the manufacturing unit proposed to be undertaken. At the start of April 1977, it recruited 187 workmen apart from other administrative staff. The

number of workmen has now swollen to 287. None of the workmen employed by Fertilisers Company were recruited and only 11 of them had to be re-employed.

2. The appellant secured a new licence under the Factories Act of 1948 in his own name, namely Gammon Fer-Chems, for the manufacturing work since the licence issued in favour of Fertilisers Company would not be effective. Further the appellant had obtained a fresh licence under the Central excise and Salt Act, 1944 for manufacturing Sulphuric Acid and Superphosphate. It had also made fresh deposits for securing new electrical power connection from the Karnataka Electricity Board.

3. Thus in the name "Gammon Fer-Chems", the appellant commenced manufacturing operations at Belgola, which is completely a new establishment which commenced its operations for the first time in April 1977 and does not bear any connection with the previous owner.

4. It was under these circumstances, on 7th May, 1980 the appellant wrote to the Regional commissioner, Employees Provident Fund, Bangalore seeking infancy benefit and it would give effect to the provisions of the Employees Provident Fund Act, 1952 from April 1980. Concerning this, by letter dated 20th January, 1981 the appellant was asked to attend the enquiry proposed to be held u/s 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. On receipt of this on 2nd of March, 1981, the appellant wrote a detailed letter stating that it would be entitled to benefit of infancy u/s 16(1)(b) of the Employees Provident Fund Act. In any event the enquiry u/s 7A could be postponed till the appellant moved the Central Government u/s 19A. On 2nd May, 1982, the appellant was visited with a letter from the Regional Provident Fund Commissioner calling upon the appellant to comply with the provisions of the Act. Even prior to this, for not complying with the provisions of the Act, a show cause notice proposing to launch prosecution against it was issued on 5th of April, 1982. Then followed a request from the Advocate of the appellant by a letter dated 9th of April, 1982 praying for time to reply the show cause notice. It was at this stage Writ Petition 25969 of 1982 was preferred praying that the letter dated 2nd May, 1982 rejecting the request of the appellant for the grant of infancy protection u/s 16(1)(b) be set aside.

5. The learned Single Judge (our learned brother Justice Doddakalegowda) was of the view that under identical circumstance in Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, a request for claim of infancy protection has been rejected. Applying the ratio of this judgment to the facts of this case, he dismissed the writ petition. Thus, the appeal.

6. Mr. Kasturi, learned Counsel for the appellant, would vehemently urge that the order of the learned Single Judge confirming the conclusion of the Regional Provident Fund Commissioner cannot be supported in law. This is a case in which fertiliser company had gone into liquidation. In a Court auction the appellant had come to purchase the property.

- (i) The erstwhile employees of the fertilisers factory had been discharged. Only eleven of them had come to be re-employed.
- (ii) The appellant had invested a good deal of money by way of resurrect, because the machinery had not been under use for eight years. Therefore, the repairs, replacements and additions had come to Rs. 30,00,000/-.
- (iii) The erstwhile employees had been discharged and a new set of employees had come to be engaged.
- (iv) A new licence under the Factories Act of 1948 in the name of Gammon Fer-Chems had been obtained.
- (v) A new licence had come to be obtained under the Central Excise and Salt Act, 1944 for manufacture of Sulphuric Acid and Superphosphate.
- (vi) Fresh security deposits had been made with the Karnataka Electricity Board for securing electrical power.
- (vii) The management of the two companies are totally different. There is no connection between the former management and the present one.

If this factual background is taken into consideration, then it would be clear that the reasoning of the Regional Provident Fund Commissioner cannot be supported because he says that after 2 1/2 years of auction purchase, the appellant started the factory with the same machinery supplemented by additional machinery. Further he has stated that there is no alteration or change in the original layout of the plan. These conclusions clearly ignore the above facts. It is incorrect to state as is urged by the Commissioner that the Industrial Licence of the old company was transferred and the application for reduction of EMD would show that what was purchased was the old factory. The obtaining of Central Excise Licence has not been taken note of and the employment of 11 employees is made much of.

7. Reliance placed on Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, by the learned Single Judge cannot be considered to be correct, because that was a case where for a period of 11 months there was cessation of production, which was characterised as temporary. There again the significance was pointed out in the re-employment of substantial number of workmen and staff. Therefore, on facts that citation is clearly distinguishable. Further in that case the trial Court and the High Court, on an examination of facts, had come to the conclusion that it was not a new factory. Thus, it is submitted that the orders may be set aside.

8. In reply to these submissions, Mr. Shailendra Kumar, learned Counsel appearing for the Regional Provident Fund Commissioner would argue that the Employees Provident Fund Act is a beneficial Act for the employees. Therefore, it must receive strict construction to advance the objects of the Act. It was this legal background which prompted the learned Judges in Sayaji Mills Ltd. Vs.

Regional Provident Fund Commissioner, to take that view. What is it that has taken place in this case ? There was mere cessation of production for 2 1/2 years. The licence under the Factories Act as well as the Central Excise Act, the premise, the machinery, all belong to the erstwhile factory, and its continuation disentitled the appellant from claiming infancy protection. Rightly, therefore, the ratio of the Judgment in Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, came to be applied. Accordingly, he submits that no exception could be taken to the Judgment of the learned Single Judge.

9. In order to appreciate the factual position it is necessary for us to refer to the following.

The fertiliser company admittedly was wound up by an order of this Court dated 14th of December, 1972. However, one important fact which cannot be lost sight of is, this company had stopped its manufacturing operations even long prior to 1972 and discharged its workmen. Though attempts were made to bring the company into life, it has failed and the assets were sold in public auction, which were purchased by the appellant on the 27th June, 1975 for a sum of Rs. 85,00,000/-. The sale in favour of the appellant was confirmed on 11th of July, 1975. The particulars are as under :

Purchased by GIL through Official Liquidator at a Court auction (Auction confirmed by Court in favour of GIL on July 1975) and the subsequent Capital Expenditure incurred from time to time till 31st July 1981.

----- Particulars Freehold land Buildings Railway Siding
Plant and Motor Cars Furniture Total Machinery & Lorries Fixture & Office
Equipments -----

----- 1 2 3 4 5 6 7 8 -----

----- Cost of Acquisition allocated to different assets as per the certificate of
Universal Surveyors & Adjusters Pvt. Ltd. 10,00,000 19,00,000 1,00,000
49,00,000 69,300 30,000 80,00,000 Net Additions during the year ending
31-7-1976 9,850 * 16,54,801 25,163 16,89,814 Gross Block as on 31-7-1976
10,09,850 19,00,000 1,00,000 65,54,801 69,300 55,863 96,89,814 Net
Additions during the year ending 31-7-1977 - 8,15,344 - 13,50,914 - 61,594
22,27,879 -----

----- Gross Block as on 31-7-1977 10,09,850
27,15,344 1,00,000 79,05,801 69,300 1,17,457 1,19,17,693 Net Additions
during the year ending 31-7-1978 - - - 3,00,286 1,57,714 24,592 4,82,592
Gross Block as on 31-7-1978 10,09,850 27,15,344 1,00,000 82,06,028 2,27,014
1,42,049 1,24,00,285 Net Additions during the year ending 31-7-1979 1,17,527
* 2,72,300 - 9,89,277 38,900 41,686 14,59,690 Gross Block as on 31-7-1979
11,27,377 29,87,644 1,00,000 91,95,305 2,65,914 1,83,735 1,38,59,975 Net
Additions during the year ending 31-7-1980 - - - 5,500 - 13,935 8,435 -----

----- Gross Block as on 31-7-1980 11,27,377 29,87,644
 1,00,000 91,89,805 2,65,914 1,97,670 1,38,68,410 Net Additions during the
 year ending 31-7-1980 - 61,270 - 2,754 675 10,984 75,683 -----

----- Gross Block as on 31-7-1981 11,27,377 30,48,914 1,00,000 91,92,559
 2,66,589 2,08,654 1,39,44,093 -----

----- * Stamp duty
 registration charges etc.

SECRETARY

The matter did not stop there. For nearly eight years, the machinery had not been used. It became worn out and several parts were missing. Therefore, the plant had to be re-designed, modified and supplanted. Pipelines, wires and various machines and their parts had to be repaired and replaced. This was undoubtedly a time consuming process. It was in April 1977, the appellant was in a position to commission it and that too after incurring an expenditure of Rs. 30,00,000/-

10. All the workmen of the fertilisers company had been discharged. Therefore, it became necessary on the part of the appellant to recruit anew workmen to carry on and look after the manufacturing work proposed to be undertaken by it. When it commenced its production, the appellant had to recruit 187 workmen apart from the administrative staff, no doubt it had employed 11 among them, who were the erstwhile employees of the fertilisers company.

11. The raw material secured by the appellant is a commodity controlled in regard to use, storage and distribution under the Arms Act. Therefore, necessarily it had to secure new licence and sanction in their own name. A new licence under the Factories Act was obtained from the Central Excise and Salt Act, Central Sales Tax and Income Tax authorities. A new power connection was also obtained in the name of the appellant by the Karnataka Electricity Board after fresh deposits were made.

12. Now what is put against the appellant can be gathered by the latter date 2nd of May, 1982. The Regional Provident Fund Commissioner states the following :-

"(1) You have taken over the assets of M/s. Mysore Chemicals and Fertilisers Ltd., a No. KN/124, through Court auction and restarted the factory after nearly 2 1/2 years, with the same machines etc., supplemented by certain additional machinery, retaining, however, the identity and complex of the existing factory with its machineries.

(2) the factory licences for this factory have been obtained on the strength of the old licence. "No change or alteration has been made in the original layout of the plan, excepting revalidation and improvement in design" which only indicates that there has been only an improvement in plan/design.

(3) The Industrial Licence of the Old company has merely been transferred to

you.

(4) Your application for reduction in the E.M.D. clearly indicates that you have taken over an old factory.

(5) Central Excise licence for the factory has been obtained on the basis of the Industrial Licence granted to the old company and transferred to you later on.

(6) You have re-employed 11 employees who were previously working in the old establishment.

The above facts go to prove that you have taken over an existing establishment with its premises and machinery and restarted the same with certain improvements under the licence transferred to you from the old company, change in management/ownership, line of production etc., will not u/s 16 of the Employees' Provident Fund and Miscellaneous Provisions Act. 1952, invest the establishment with fresh infancy. As such, you are liable to continue implementation of the various schemes framed under the Act from the date of commencement of trial production by you from June 1976 and discharge all our liabilities in respect of remittance of contributions/administrative charges and submitting of various returns under various schemes from the said date/month."

We will take up each one of these reasons.

(i) It is not legally correct to state that the appellant has taken over the assets of the fertilisers company, because, as we have observed above, it went into liquidation and thereafter when attempts were made to restart the fertilisers company, it was not found feasible. Therefore, the assets had to be sold and in the sale conducted by this Court, the appellant had come to purchase the property.

As to what he has purchased, we have already extracted above. No doubt it purchased the machinery and buildings. That by itself does not establish that there is continuity. All said and done, the assets of a company cannot be nothing other than these. Therefore, the first of the reasoning cannot hold good. To merely state that with the same machinery supplanted by certain additional machinery disregards the time lag and disregards the improvements made and bringing those old rusty machinery to life.

(ii) With regard to obtaining of licence based on the strength of old licence ignores the fact, as we stated above, that the commodity which the appellant is called upon to deal with requires to be licenced. The licence had been obtained anew in the name of the appellant This applies to all the other licences talked of in paragraphs 3, 4 and 5.

(iii) With regard to reasoning No. 6, it clearly ignores that practically all the workmen of the fertilisers company had been discharged long ago even prior to 1972. Only eleven employees had come to be re-employed from the old establishment.

13. With this factual background, we now come to the question whether the decision in Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, would apply. In dealing with the decision of the Bombay High Court in Chagganlal Textile Mills Pvt. Ltd. v. P. A. Bhaskar Misc. Appln. No. 289 of 1956 DD 5th November, 1956, their Lordships have extracted the following from the judgment of that case -

"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 benefit 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 Employees" Provident Funds Act."

A careful reading of this clearly discloses where the activities of an established factory is to be discontinued for a few months and there is a temporary cessation of its activities, certainly the new company or the factory, as the case may be, cannot claim infancy protection. It was this dictum that was approved in paragraph 8, which is as follows Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner,

"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 state earlier by the winding up order and the factory was restarted after it was sad 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 12th November, 1975. 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 u/s 16(1)

(b) of the Act for a fresh period of three years."

14. One thing is clear from this case. The cessation of activities was for a period of hardly eleven months from 17th December 1974 to 12th November, 1975. Secondly substantial number of workmen and staff who were working under the former management, had been employed though new contracts of employment were entered into with them. Factually, therefore, this case is clearly distinguishable. The reason why we hold this is, in paragraph-3 of the Judgment, the factual position had been analysed and it was found that the continuity of the old factory had not been broken and therefore, the appellant there was liable to make contribution under the Act. But here it is not the case of the Regional Provident Fund Commissioner that the new factory is an alter ego of fertilisers company. Nor again is it the case that the managements of the old and the new companies are one and the same. There is no continuity at all except the continuity in the building and the same machinery. This we do not consider to be the proper test. Then again, this is not a temporary cessation of activities. There has been a long cessation, even prior to 1972 practically for eight long years. Of course, we are not for a moment stating mere investment of additional capital of Rs. 30,000,00/- would alone enable the appellant to claim infancy protection.

15. It will also be useful to refer to the dictum of the learned judge in the case reported in *Vittaladas Jagannathadas and another v. The Regional Provident Fund Commissioner, Madras and another* (1966 I Ilj 240) where the learned Judge (Ananthanarayanan, J. as he then was) refers to the ruling of Justice Srinivasan reported in *R. L. Sahni and Co. v. Union of India* in (1964 II Ilj 169) which reads (1966 I Ilj 240) :

".... the case may undoubtedly be different if the factory itself was closed down for some reason or other and it is started afresh under certain circumstances ..."

The reason why we refer to this ruling is, it was this ruling which came to be approved in *The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry*, , *Provident Fund Inspector v. Secretary, N. S. C. Co-operative Society* concerning which the learned Judges in *Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner*, had also made a note in paragraph 12 of the Judgment.

16. We have endeavoured to say as to how each one of the reasoning of the Regional Provident Fund Commissioner cannot be said to apply here. Therefore, taking a cumulative view and in the background of law in which we have analysed these facts, we are clear in our mind that the reasoning adopted by the Employees Provident Fund Commissioner cannot be supported. Therefore, disagreeing with the learned Single Judge, we hereby quash the order of the Regional Provident Fund Commissioner and remit the matter back for consideration afresh in the light of the above observations.

17. Accordingly, the writ appeal is allowed. However, there shall be no order as to costs.