

(1962) 04 P&H CK 0029
In the Punjab And Haryana At Chandigarh

Jay Bharat Woollen and Silk Mills

APPELLANT

Vs

Regional Provident Fund Commissioner and Others

RESPONDENT

Date of Decision : 02-04-1962

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

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

Citation : (1963) 2 LLJ 21

Hon'ble Judges : P.C. Pandit, J;Dulat, J;Dua, J

Bench : Full Bench

Judgement

Dua, J.—Jay Bharat Woollen and Silk Mills, Amritsar, has approached this Court under Articles 226 and 227 of the Constitution for a writ in the nature of mandamus for directing the Regional Provident Fund Commissioner, Punjab, and the Secretary, Ministry of Labour, Provident Fund Section, Government of India, New Delhi, not to enforce the Employees' Provident Funds Act, 1952, against the petitioner; writ in the nature of mandamus is also sought directing the Collector, Amritsar, respondent 3, not to realize the contributions in pursuance of the recovery certificate sent by respondent 1.

2. According to the petitioner's allegations, the petitioner- firm is a partnership concern and was established on 1 October 1954. It carried on the manufacturing business of woollen and silk textiles at Bhushan Pura, Amritsar, The petitioner's manufacturing establishment was closed with effect from 31 May 1956, on account of losses. Prior to 1 October 1954, the premises in which the petitioner's mill started its manufacturing business, was occupied by Bharat Udhar Cloth Manufacturing Company, which was a proprietary concern of Balkishan Munjal. This concern had 45 power-looms along with other preparatory machinery. The partners of the present petitioner were admittedly related to Balkishan Munjal and it is stated that the entire family carried on different kinds of business in Amritsar and Delhi. Certain dispute having arisen between the members of the family, namely, Balkishan Munjal, Tej Bhan Das and Khilal Das (father of Girdharil Lal, one of the partners of the petitioner's concern, through whom the present

petition has been filed in this Court), the same were referred to the sole arbitration of Khushi Ram Mahajan. The arbitrator gave his award on 5 August 1954, and certain machinery was allotted to Khial Das, who in turn handed them over to Girdharl Lal. These items consist of power-looms, warping machines, electric motor, twisting machine, etc. Girdhari Lal, along with Prem Parkash, son of Tej Bhan, has started the petitioner-firm on 1 October 1954, with the help of the machinery which came to his share. The remaining machinery of Bharat Udhar Cloth Manufacturing Company was(?) stated to have been taken away by Balkishan Munjal to his new premises in Chheharta; the provisions of the Employees' Provident Funds Act and the scheme framed thereunder, according to the present petition, continued to apply to the Bharat Udhar Cloth Manufacturing Company after it shifted to the new premises.

3. The petitioner-firm when it started its factory represented to respondent 1 to exempt it from the provisions of the Employees' Provident Funds Act, as amended, on the ground that u/s 16 of the Act the exemption was claimable for the first three years. This representation was made in December 1954. Respondent 1, however, did not agree with the petitioner-Company and threatened prosecution and Imposition, of penalty u/s 14B of the Act, the position taken by the Commissioner being that the petitioner-firm had taken over a going concern which did not prejudicially affect the rights of the workers under the Act. It is pleaded that the Commissioner while adopting this attitude did not take into account the legal implication of the allocation of the machinery to Khial Das, who had nothing to do with the Bharat Udhar Cloth Manufacturing Company; nor did the Commissioner consider the fact that the same concern did not continue manufacturing under the present name. The petitioner-firm, according to the averments, was a new concern for all purposes except the premises in which the Bharat Udhar Cloth Manufacturing Company had been carrying on its business. The permission for the acquisition and installation of the power-looms allotted to Khial Das was also, according to the petition, obtained by the partnership concern from the Textile Commissioner, Bombay, u/s 12 of the Textile Control Order, 1948, Similarly, a certificate of registration was taken from the Chief Inspector of Factories under the Factories Act) in October 1954, Registration certificate under the East Punjab General Sales Tax Act, 1948, was also obtained by the petitioner. The manufacturing business having been closed by the petitioner on 31 May 1956, for the period between 1 October 1954 and 31 May 1956, exemption is claimed by the petitioner-firm from the operation of the Employees' Provident Funds Act.

4. It is then averred that on 19 May 1958 the petitioner addressed a letter to respondent 1 challenging the Commissioner's action in realizing the amount of contribution. In his reply respondent 1 suggested that directions may be obtained from the Central Government u/s 19A of the Act. In pursuance of this suggestion the petitioner sent an application to respondent 2 u/s 19A of the Act on 24 May 1953, seeking a direction exempting the petitioner-firm from the operation of the Act for a period of three years from 1 October 1954. In spite of

several reminders, Respondent 2 did not finally dispose of the petitioner's petition and since respondent's kept instating on recovery of the amount of contribution the petitioner filed a writ petition in this Court (Civil Writ No. 1160 of 1958) which was disposed of by Chopra, J., on 18 March 1959 vide Jay Bharat Woolen and Silk Mills Vs. Regional Provident Funds Commissioner and Others, . It was held in that petition that the recovery of the contribution should not be insisted upon till the matter was decided by the Central Government u/s 19A. On 19 September 1959, the petitioner sent a detailed letter to respondent 2. On 5 December 1959, however, respondent 2 held that the petitioner's establishment was not exempt for three years under. Section 19A of the Act on the ground that the Bharat Udhar Cloth Manufacturing Company was governed by the provisions of the Act from 1 November 1952. Respondent 3 thereupon proceeded through the tahsildar to recover the amount of Rs. 7,668-15-0.

5. It is in these circumstances that the present petition has been filed in this Court seeking relief against the claim by the respondents. According to the petitioner's counsel, the facts and circumstances in which the petitioner-firm acquired a part of the machinery belonging to the Bharat Udhar Cloth Manufacturing Company, conclusively establish that the petitioner's is a new establishment, and, therefore, entitled to exemption for a period of three years from 1 October 1954. The respondents, according to the learned Counsel, are acting without jurisdiction and wholly outside the Act. Section 16 on which reliance is placed is in the following terms:

16. (1) This Act shall not apply to-

(a) any establishment belonging to the Government or a local authority, and

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

Explanation. For the removal of doubts, it is hereby declared that the date of the establishment of an establishment shall not be deemed to have been changed merely by reason of a change of the premises of the factory:

(2) If the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the official gazette, and subject to such conditions, as may be specified in the notification, exempt that class of establishments from the operation of this Act for such period as may be specified in the notification.

6. It is necessary here also to reproduce Section 19A which provides the manner in which difficulties and doubts arising in giving effect to the provisions of this Act may be removed:

19A. Power to remove difficulties. If any difficulty arises in giving effect to the provisions of this Act, and in particular, if any doubt arises as to

(1) whether an establishment which is a factory is engaged in any industry specified in Schedule I;

(ia) whether any particular establishment is an establishment falling within the class of establishments to which this Act applies by virtue of a notification under Clause (6) of Sub-section (3) of Section 1;

(ii) whether fifty or more persons are employed in an establishment; or

(iii) whether three years have elapsed from the establishment of an establishment; or

(iv) whether the total quantum of benefits to which an employee is entitled has been reduced by the employer,

the Central Government may, by order, make such provision or give such direction, not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for the removal of the doubt or difficulty; and the order of the Central Government, in such cases, shall be final.

7. It is apparent that according to the Central Government the establishment to which the provisions of the Act are being applied by it was established in 1952 and the petitioner firm is in essential particulars merely continuation of that establishment. The question which arises is, can this Court under Article 226 of the Constitution go into this matter.

8. On behalf of the petitioner, reliance was placed on *Bharat Board Mills, Ltd. v. Regional Provident Fund Commissioner and Ors.* 1958 I L.L.J. 285, though in support of the second argument which may also be stated here. The learned Counsel contended that if I was unable to uphold the first contention, then Section 19A of the Employees' Provident Funds Act must be held to be unconstitutional and it was in support of this challenge to the constitutionality of Section 19A that this decision was cited. In the reported judgment, however, there is also a discussion about the effect of purchase of an establishment. The following passage is reproduced here:

After the purchase by the petitioner there were no doubt some breaks in the continuity of the production but there is no doubt that this factory ran into production in 1936 and it is this identical factory which is still manufacturing goods though the ownership of the factory has changed hands in the meantime. The petitioner is of course a new concern since 29 June 1930, but the factory continues to be the same. In my view, the date of establishment of the factory is the date when the factory starts its manufacturing process. The fact that a new company or concern subsequently takes over or acquires the factory does not shift the date of the establishment of the factory to the date of its taking over or acquisition: nor does the fact that the factory had ceased to produce goods for a certain time and resumed production after certain brief intervals result in extinction of the old factory and establishment of a new factory.

9. In *Vegetable Products Ltd. Vs. Regional Provident Fund Commissioner and Others*, , D.N. Sinha, J., stated that for purposes of considering the exemption contained in Section 16(6) of the Employees' Provident Funds Act, Courts are not concerned with the owners of the factory but with the factory itself, and the point for consideration is as to when such a factory was established. The question has to be considered on the facts and circumstances of each case. The learned Judge puts the position thus:

It is apparent that the solution of this problem must depend on the facts of each case. A factory may be established and then it might change hands, and the person who acquires it may entirely dismantle it or take it elsewhere or remove the machinery and install a completely new set of machinery or produce something else. Where the change or the alterations are of such magnitude that it cannot be said that the same factory was continuing, then indeed the continuity can be said to have been broken. Again, if a factory becomes so moribund and defunct that for all intents and purposes it has become dead and then after a long period of time somebody else recommences production, entirely anew, it might be said that the factory has been newly established. As I have stated above, the solution will depend entirely on the facts of each case. What will have to be considered is the lapse of time, the conduct of the parties, the intentions of the transferor and the transferee, and a consideration of all other surrounding circumstances.

10. A reference was in this case made to a decision in *Bharat Board Mills case 1958 I L.L.J. 286* (vide supra).

11. In *Kunnath Textiles Vs. Regional Provident Fund Commissioner*, , a Division Bench of the Kerala High Court also observed that having regard to the definition of a factory in Section 2(g) of the Act, the continuance of a factory as the same factory is unaffected even by a change of ownership, and it matters little by what means the change is effected, whether by a transfer, or by the death of the previous owner, or by some other transaction. Much less can it be affected by a mere change in the name of the owner and no one can be allowed to evade the law by purporting to deal with only the buildings and equipment of a factory when in fact what is dealt with is the factory as a running concern.

12. *Golden Silk Mills Vs. Central Provident Fund Commissioner and Another*, relied upon by the petitioner's counsel is of no real assistance, because no question arises before me as to whether or not the petitioner is employer of 50 or more persons in a factory engaged in a scheduled industry. Similarly, *Workers of Sagar Talkies (South India Cinema Employees' Association) Vs. Odeon Cinema and Others*, is unhelpful and indeed the counsel stated at the bar that he merely wanted to refer to this decision for the contention that no sanctity attaches to the premises.

13. *A. St. Arunachalam Pillai v. Chairman, Central Government Industrial Tribunal, Madras 1957 II L.L.J. 632*, has been cited in support of the contention

that the transferee of the part of assets of an establishment; is not the successor of the previous establishment. The reported case dealt with the Industrial Disputes Act and the award of the tribunal was challenged on the ground that it had no jurisdiction to direct payment of compensation to workers, because, there was no relationship of employee and employer between the workers and the petitioner in that case. I am unable to get much assistance from this decision for solving the point which arises before me. Same remarks would apply to *Ramjilal Nathu Lal and Ors. v. Himabhai Mills Company, Ltd.* (No. 2) and Ors. 1958 II L.L.J. 244.

14. In my opinion, answer to the question whether three years had elapsed from the establishment of a particular establish men within the contemplation of Section 16(6) and whether the transfer of a part of the establishment operates as a break in the continuity of the original establishment depends on a large number of facts and circumstances, and, therefore, it is not possible to give an answer on the basis of any well-formulated proposition of law. Once this position arises, the Court is immediately confronted with the query whether it is open to this Court in writ proceedings to go into this matter and give its own decision contrary to that given by the Central Government u/s 19A. In my opinion, it is not easy to assume such a power in the discharge of this Court's duty under Article 226 of the Constitution.

15. This necessarily brings me to the question whether Section 19A is ultra vires the Constitution. Strong reliance has been placed by Mr. Bhagirath Dass on the decision of Bose, J., in *Bharat Board Mills case* 1968 I L.L.J. 235 (vide supra). That decision has undoubtedly struck down this section as unconstitutional. The conclusions of the learned Judge have been put thus at pp. 288-289:

It is argued that the provisions in this Section 19A vest an uncontrolled and arbitrary power in the Government to make a subjective determination of the various matters specified in Clauses (i) and (iv) of the section without giving the owner of the factory any opportunity of a hearing or without giving such owner opportunity to make representation against or to prefer an appeal against any adverse order made by the Government. Accordingly, the provision is an unreasonable restriction on the fundamental right of the petitioner as guaranteed under Article 19(1)(g) of the Constitution. It appears to me that This contention is not without force. The order of the Government is made final under the provisions of this section. There is no provision for any appeal or representation by the party aggrieved by the order. The Government is not required to disclose its reasons for making any order. The matter is, therefore, left to the subjective satisfaction of the Government. There are no means of checking whether the order is arbitrary or mala fide or not, Further unless it can be established that the Government has acted outside the four corners of the statute or in excess of its jurisdiction, recourse to the civil Court by the aggrieved party is barred inasmuch as the order of the Government is, as I have pointed out already, made conclusive by the terms of the section. There is no specific procedure laid down

for making the determination. The Government may or may not give the owner of the factory an opportunity of hearing before making the order. So the party owning the factory or having interest in the factory is left entirely at the mercy of the Government. It appears to me, therefore, that the section lacks the element of reasonableness and abridges and violates the fundamental right guaranteed by Article 19(1)(g) of the Constitution and as such is void under Article 13(2) of the Constitution.

16. No decision to the contrary has been brought to my notice on behalf of the respondents. I am, however, not quite convinced, as At present advised, of the correctness of the view taken in the Calcutta case. At any rate, the point raised is of some importance and is likely to arise in a number of cases, for, it is not difficult to visualize that the proprietors in a big establishment may so divide it amongst themselves that it may legitimately be urged in answer to the claim of the department under the Employees' Provident Funds Act that the divided establishments, being new, should be exempt u/s 16 of the Act. It is true that, for the exercise of the power u/s 19A, the legislature has not laid down expressly in specific language any guiding principles. The question, however, arises as to whether the discretion vested in the Government can on this ground alone be held to be violative of Article 19(1)(g), as has been observed in the Calcutta case. It is of course correct that the discretionary power conferred on the State Government or the Union Government by law does not by itself necessarily operate as a reasonable restriction, but at the same time merely because no right of appeal is conferred or no duty to hear a party interested is expressly provided, may not by itself expose the provision to the constitutional challenge. Guidance may certainly be available from the statutory provisions, the statutory scheme and the object sought to be achieved thereby.

17. The matter being of great importance, it is, in my opinion, desirable that this case should be heard and disposed of by a larger Bench. I, accordingly, direct that the papers be laid before the learned Chief Justice for constituting a larger Bench.

P.C. Pandit, J.—This is a petition by Jai Bharat Woollen and Silk Mills, Amritsar, through Girdhari Lal, one of its partners, under Articles 226 and 227 of the Constitution of India for a writ of mandamus praying that the Regional Provident Fund Commissioner, Punjab, and the Secretary, Ministry of Labour, Provident Fund Section, Government of India, respondents 1 and 2, be directed not to enforce the Employees' Provident Funds Act, 1952, against the petitioner and directing the Collector, Amritsar, respondent 3, not to realize the contributions in pursuance of the recovery certificates sent by respondent 1.

2. According to the allegations of the petitioner, it was a partnership concern and was established on 1 October 1954, and carried on the manufacturing business of woollen and silk textiles at Bhushan Pura, Amritsar. This establishment, however, was closed on 31 May 1956, because it had incurred losses. Prior to 1 October 1954, the premises in which the petitioner-firm started its business was

occupied by Bharat Udhar Manufacturing Company, which was a proprietary concern of Balkishan Munjal. The partners of the petitioner-firm were related to Bal-kishan Munjal and the entire family carried on different kinds of business in Amritsar and Delhi. Since disputes arose between the members of this family, namely, Balkishan Munjal, Tej Bhan Dass and Khial Dass (father of Girdhari Lal, one of the partners of the petitioner-firm), they were referred to the sole arbitration of one Khushi Ram Mahajan of Amritsar. On 5 August 1954, the said arbitrator gave his award and part of the machinery which was owned by Balkishan Munjal, was given to Khial Dass, who handed over the same to his son, Girdhari Lal. With this machinery, Girdhari Lal along with Prem Parkash, son of Tej Bhan Dass, started the petitioner-firm on 1 October 1954. The remaining machinery of the Bharat Udhar Cloth Manufacturing Company was, however, taken away by Balkishan Munjal to his new premises situated in Guru Bam Dass Cotton Mills, Grand Trunk Road, Ghheharta, district Amritsar. After the starting of the factory, the petitioner-firm represented to respondent 1 to exempt it from the provisions of the Employees' Provident Funds Act, 1952, on the ground that u/s 16 of this Act, an exemption had to be enjoyed for a period of three years from the date on which the establishment had been set up. A request was also made that the directions of the Central Government be obtained in this behalf. Respondent 1, however, took up the position that the firm having been taken as a going concern without in any way affecting the rights of the workers, the petitioner-firm continued to be governed by the provisions of the Employees' Provident Funds Act. According to the petitioner, however, it was a new concern for all purposes, except that the premises in which the Bharat Udhar Cloth Manufacturing Company was carrying on its business was now being utilized by the petitioner concern. The permission for the acquisition and installation of the power-looms allotted to Khial Dass under the award was obtained by the petitioner-concern from the Textile Commissioner, Bombay, u/s 12 of the Textile Control Order, 1948. On the start of the factory from 1 October 1954, a certificate of registration was also taken from the Chief Inspector of Factories under the Indian Factories Act. A registration certificate under the East Punjab General Sales Tax Act, 1948, was also taken by the petitioner-concern. Since the initial period of three years as from 1 October 1954 had not expired, the petitioner-firm could not be made liable for the amount of contributions under the provisions of the Employees' Provident Funds Act, 1952, for the period 1 October 1954 to 31 May 1955, which were sought to be recovered by respondent 1. On 24 May 1958 the petitioner-firm sent an application u/s 19A of the Employees' Provident Funds Act to respondent 2 for a direction exempting the petitioner-concern for the initial period of three years from 1 October 1954. On 5 December 1959, respondent 2, however, held that the petitioner-concern was not exempt for three years u/s 16 of this Act, because it was previously owned by the Bharat Udhar Cloth Manufacturing Company which was governed by the provisions of this Act as from 1 November 1952. Since respondents approached the petitioner for the recovery of Rs. 7,688-15-0, being the contributions under this Act, the petitioner concern filed the present writ petition in August 1960. It

was also mentioned in this petition that Section 19A of the Act was ultra vires of Article 14 of the Constitution of India inasmuch as the decision of the Central Government was not open to any appeal and the entire matter had been left to the arbitrary and uncontrolled discretion of the Central Government. Neither any rules had been laid down nor any guiding principles had been mentioned with a view to regulate the exercise of this discretion by the Central Government.

3. In the written statement, the main point taken up by the respondents was that the petitioner-concern was actually established long before 1952 under the name and style of Bharat Udhar Cloth Manufacturing Company, Amritsar. On 1 October 1954, however, on division of the assets and liabilities between the various members of the family on the basis of the award given by Khushi Ram Mahajan, a number of looms and other accessories, which were installed in the present premises, fell to the share of the petitioner-firm, which started functioning under the name and style of Jai Bharat Woollen and Silk Mills, Amritsar. This concern continued the same manufacturing process, which was being carried on in the factory of Bharat Udhar Cloth Manufacturing Company and employed the same workers, who were working in the factory prior to 1 October 1954. The number of workers employed by the petitioner-firm on 1 October 1954 and thereafter till the date of its closure, had been above 50. It was stated in Para. 7 of the written statement-

... the factory named Jay Bharat Woollen and Silk Mills, Amritsar, was started with effect from 1 October 1954, in the same premises with the same machinery and set of workers as was being used by Bharat Udhar. Cloth Manufacturing Company, Amritsar, and also continued the same manufacturing process. This in turn boils down to the fact that there was merely a change of management and nothing else.

4. This writ petition came up for hearing before Dua, J., who (vide his order dated 3 November 1961) referred the same to a larger Bench in view of the fact that one of the points raised in the petition was whether Section 19A of the Act was ultra vires the Constitution or not and there was a decision of the Calcutta High Court in *Bharat Board Mills, Ltd. v. Regional Provident Fund Commissioner and Ors.* 1958 I LLJ 285 (vide supra) which had struck down this section as unconstitutional and the learned Judge was not quite convinced as to the correctness of the view taken in the Calcutta case.

5. It may be mentioned that the point regarding the constitutionality of Section 19A of the Act was not argued before us by any of the parties. It was admitted by the learned Counsel for the petitioner that the petitioner-concern was an establishment as contemplated in the Employees' Provident Funds Act, but his sole contention was that the same was exempt from the provisions of this Act u/s 16 for a period of three years from the date when it was set up, that is, 1 October 1954, and that it was a new concern. The relevant portion of Section 16 is in the following words:

S. 16. This Act shall not apply to-

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

Explanation. For the removal of doubts it is hereby declared that the date of the establishment of an establishment shall not be deemed to have been changed merely by reason of a change of the premises of the establishment.

6. It was conceded by the learned Counsel that if a going concern was taken over by a new person, he would be bound by the provisions of this Act. But, in the present case, his contention was that the petitioner-concern was not a continuation of the old establishment and it had not taken the Bharat Udhar Cloth Manufacturing Company as a going concern. The petitioner-firm, according to him, was a new concern and it had been started with effect from 1 October 1954, after obtaining the necessary certificates.

7. No hard and fast rule can be laid down for finding out whether a particular establishment is new or old for the purposes of S. 16 of the Act. It would depend on the facts and circumstances of each case. In the present case, however, after going through the record I find that the petitioner-firm was not a new concern. Admittedly, Bharat Udhar Cloth Manufacturing Company was being run in these premises long before 1952, Certain disputes having arisen between the members of the family, the matter was referred to the arbitration of Khushi Ram Mahajan and on the basis of the award given by him, some portion of the machinery fell to the share of Khlal Dass, and with it was started the petitioner-firm, which then carried on its business in the same premises with the same machinery and set of workers as were being used by Bharat Udhar Cloth Manufacturing Company, Amritsar, under the name and style of Jai Bharat Woollen and Silk Mills, Amritsar. They continued the same manufacturing process. Under these circumstances, it cannot be said that the petitioner-firm was a new establishment and was set up with effect from 1 October 1954. That being be, the provisions of the Employees Provident Funds Act would apply to this concern.

8. The result is that this petition falls and is dismissed. There will, however, be no order as to costs.

P.C. Dulat, J.

9. I agree.