

(2009) 05 CAL CK 0006
In the Calcutta High Court
Case No : Writ Petition No. 6478 (W) of 2007

Jessore Industries (India) Limited and Another	APPELLANT
Vs	
The Regional Provident Fund Commissioner, West Bengal and Nicobar Island and Others	RESPONDENT

Date of Decision : 15-05-2009

Acts Referred:

Companies Act, 1956 — Section 445(2), 445(3)
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16,
16(1)(b), 16(1)(d)
Industrial Disputes Act, 1947 — Section 25FF

Citation : (2009) 123 FLR 715 : (2010) 2 LLJ 125

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Joydeep Kar, Sabyasachi Chowdhury and Abhijit Guha Ray, for the Appellant; Mihir Kundu, for the Respondent

Final Decision : Dismissed

Judgement

Jayanta Kumar Biswas, J.—The petitioners in this writ petition dated March 30, 2007 are questioning the decision of the Assistant Provident Fund Commissioner and Assessing Authority, Employees' Provident Fund Organization, Sub-Regional Office, Barrackpore dated February 28, 2007, Annexure-P11 at p.137, that Jessore Industries, the first petitioner, is not entitled to infancy benefit u/s 16(1) (d) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

2. Section 16 of the Act provides that the Act shall not apply to the establishments mentioned in its sub-section (1). Sub-section (1) of section 16 originally contained four clauses, viz. (a),(b),(c) and (d). Clause (d), omitted with effect from September 22, 1997, was as follows:

(d) to any other establishment newly set up, until the expiry of a period of three years from the date on which such establishment is, or has been, set up.

Explanation.—For the removal of doubts, it is hereby declared that an

establishment shall not be deemed to be newly set up merely by reason of a change in its location.

3. One Veegal Engines & Engineering Limited was running a factory at 8, Jessore Road, Kolkata-700 081. It used to produce small petrol engines for agricultural spray, fishing boats, etc. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 was applicable to it. In 1986 it went into liquidation, prior to that it was under lockout. By an order dated June 22, 1992, Annexure-P1 at p.45, its assets were sold to one Gunny Dealers that emerged as the highest bidder at the court sale. It was noted in the order that the state government that had leased the lands to Veegal and at one point of time decided to take over all assets of the company as a going concern but subsequently changed its decision, offered to lease out the lands including the sheds and structures erected thereon to the purchaser for a period to be decided by the court provided that, inter alia, the purchaser would protect the employment of the workers of the company by entering into a satisfactory agreement with the workers; and that the purchaser would not change the nature and character of the lands, sheds or structures, without its prior written consent. It was recorded in the order that an agreement dated June 14, 1992, Annexure-P3 at p.52, between Gunny Dealers and Veegal's workers would form part of the order, and that the workers would have a right to enforce the agreement against Gunny Dealers, if necessary.

4. In the agreement between Gunny Dealers and Veegal's workers it was stated that the new promoters would be at liberty to diversify and change the existing line of manufacturing motor machine parts to jute based processing unit or any other type of manufacture at their sole discretion; that after renovating the existing factory building they would install machinery for running the unit within six months; that they would engage a maximum of 150 of Veegal's workers; that, if necessary, the workers would be given training before absorption in the services; that in the matter of statutory and medical leave the workers would be governed by the provisions of the Factories Act, 1948 and the E.S.I. Act, 1948 respectively; that the employment of the workers under the new promoters would be deemed to be new appointment without any continuity of service; that Veegal would be treated as closed and all closure benefits would be realised by the workers from the official liquidator; that the new promoters would have no past liability whatsoever for services given by Veegal's workers as such.

5. According to the order dated June 22, 1992 the state government leased the lands and other properties to Jessore Industries, Gunny Dealer's nominee, under an agreement dated April 12, 1993. On July 1, 1993 Jessore Industries absorbed Veegal's workers. It started production with effect from December 6, 1993. It started manufacturing of spare parts for jute machines, plastic products, etc. On March 18, 1994 the enforcement officer of the provident fund organization visited its establishment. It was asked to apply the Act from the date of resumption of production in the factory. Under the circumstances, it submitted an application dated April 12, 1994, Annexure-P4 at p.64, contending that in view of the

provisions of section 16(1)(d), the Act would not be applicable to its establishment that should be treated as newly set up on July 1, 1993 since when it started providing employment to the workers. In the application it was stated that Gunny Dealers had signed and executed a memorandum of understanding dated April 16, 1992 that would establish that its establishment was a newly set up one completely different from the one of Veegal that was closed before Veegal's liquidation in 1986.

6. The provident fund organization did not accept Jessore Industries' contention, and by a notice dated November 25, 1994, Annexure-P5 at p.67, directed it to comply with the provisions of the Act with effect from July, 1993 as a going concern. Feeling aggrieved, it moved this court by filing a writ petition that was registered under C.O. No. 1814 (W) of 1995. By an order dated June 6, 2006, Annexure-P9 at p.82, that writ petition was disposed of directing the Assistant Provident Fund Commissioner, Barrackpore to treat the writ petition as a representation and to consider whether its establishment was entitled to any benefit u/s 16(1)(d). Accordingly, the commissioner gave the impugned decision dated February 28, 2007.

7. Relying on section 16(1)(d) and *Vittaladas Jagannathadas and Another Vs. The Regional Provident Fund Commissioner, Madras and Another*, ; *Workmen of Brahmputra Tea Estate, represented by Assam Chah Karamchari Sangha, Dibrugarh Vs. The Incoming Management of Brahmputra Tea Estate and Others*, *The The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry*, *The P.G. Textile Mills (Pvt.) Ltd. Baroda vs. The Union of India & Ors.*, 1976 Lab I.C. 666, Mr Kar, counsel for the petitioners, has argued that in view of the facts that before Gunny Dealers purchased the assets there was a complete cessation of business activities in Veegal's establishment, and further that with the assets Jessore Industries started altogether a new business, simply because it employed some of Veegal's workers, purchased the machinery thereof and started business using the same immovable properties, the commissioner could not hold that its establishment was a continuation of Veegal's establishment.

8. Mr Kar has said that authorities cited to the commissioner were not considered by him. According to him, the decision is perverse and vitiated by total non-application of mind. Placing heavy reliance on *Vittaladas* and *N.S.S. Co-operative Society*, he has said that the facts of the present case are almost identical with the facts of the cases in which the decisions were given. He has repeatedly pointed out that the order of the court dated June 22, 1992 read with the memorandum of understanding dated June 14, 1992 will clearly show that Veegal, once sought to be taken over by the state government as a going concern, was ultimately sold not as a going concern. By referring me to the provisions of section 445 (3) of the Companies Act, 1956 he has argued that once the winding up order was filed with the Registrar of Companies concerned and the fact was notified in the Official Gazette, Veegal's officers and employees

stood discharged, since its business, suffering complete cessation from long before the winding up order was made, was not continued.

9. Clause (d) of sub-section (1) of section 16 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and its explanation were omitted by Act 10 of 1998 with effect from September 22, 1997. Hence it is evident that in July, 1993, the date from which Jessore Industries was directed to comply with the provisions of the Act and it claimed infancy benefit, the provisions of cl. (d) and its explanation were in force. It is, therefore, to be examined whether its establishment was newly set up at that date. I do not think for the purpose the provisions of section 445(3) of the Companies Act, 1956 are relevant. The deemed discharge of Veegal's officers and employees, even if it is assumed that the winding up order was notified according to the provisions of section 445(2), cannot automatically lead to a conclusion that Jessore Industries' establishment was newly set up thereafter. It is to be noted that I have drawn Mr Kar's attention to Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner,

10. In Vittaldas the persons who filed the writ petition were partners in a firm that started a fresh business after leasing the premises concerned from their owners to whom the previous lessee carrying on the business, after ending his business, discharging all his employees after notice and payment of bonus due, and liquidating the business outright, delivered possession of the premises and machinery. Nineteen employees many of whom had been discharged by the previous lessee were employed by the firm. The provident fund organization contended that the establishment of the firm was not entitled to infancy benefit u/s 16 of the Act. After considering the facts and circumstances, the court held that as a matter of fact the firm set up a new establishment, and hence it was entitled to infancy benefit.

11. In Brahmaputra Tea Estate the question was whether the incoming management, purchasing only the equity of redemption in a part of the assets belonging to Brahmaputra in relation to which the official liquidator was still functioning, could be considered a successor in interest of Brahmaputra so as to make it liable to meet the claims of Brahmaputra's workmen u/s 25-FF of the Industrial Disputes Act, 1947. It was held that the incoming management, purchasing only the equity of redemption in a part of Brahmaputra's assets could not be considered its successor in interest for the purposes in question.

12. In N.S.S. Co-operative Society the provident fund inspector prosecuted the secretary of the society for an offence punishable under provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. It was alleged that the society failed and neglected to pay statutory dues and other allied charges during the period between May, 1961 and February, 1964. Before the magistrate the question arose whether in view of the provisions of section 16 the society was entitled to infancy benefit. According to the society, its establishment, newly set up in April, 1961, could not be treated as a continuation of the old establishment set up in 1946. The magistrate acquitted the secretary

of the society holding that, being a new establishment set up in 1961, the society was entitled to infancy benefit. The high court upheld the orders of acquittal, and dismissing the appeals their Lordships held (para.5):

5. ...On a discussion of the entire evidence and in view of the fact that the burden of proof lay on the appellant, we think that the conclusions of fact which must be accepted are: that, at the time of the purchase, a new owner came in place of the previous owner; the work of the Press was stopped on sale and was re-started after a break of about three months; the machinery in the Press was also altered; the persons employed previously were not continued in service, while a fresh recruitment of employees took place amongst whom only six happened to be previous employees; and compensation was paid to the workmen at the time of the sale by the previous owner. On these facts, no other conclusion can be drawn, except that the old establishment was completely closed when the transfer of ownership took place and an entirely new establishment was set up three months later, so that, in this case, the benefit of non-applicability of the Act u/s 16(1)(b) of the Act for a period of three years was available to the respondent from June or July, 1961 when the new establishment was set up.

13. In P.G. Textile Mills the division bench of the Gujarat High Court, while holding that P.G. Textile's establishment was entitled to infancy benefit, placed heavy reliance on Vittaldas. It was especially noticed that the tripartite agreement concerned clearly showed that there was no continuity of the old establishment that had not been sold as a going concern.

14. In Sayaji Mills, Sayaji, a public limited company, purchased the factory of Hirji Mills Ltd. that was carrying on manufacturing and sale of textile goods in its factory before December, 1954. Hirji was ordered to be wound up and its assets were ordered to be sold by the official liquidator. Before purchase Hirji's workmen had been discharged and its goodwill was not acquired by Sayaji. The work of the factory was discontinued for some time, and Sayaji restarted the factory on November 12, 1955. It invested some fresh capital, renovated the machinery and employed workmen on fresh contracts, though 70% of the workers were formerly working in the factory. Sayaji started producing certain new types of goods after obtaining a new licence. The provident fund organization called upon it to comply with the provisions of the Act as a continuation of the old establishment. Sayaji claimed that it set up a new establishment on November 12, 1955, and hence entitled to infancy benefit. Since the provident fund authority was not accepting its contention, it moved a writ petition. Later on it withdrew the writ petition and filed the suit seeking a declaration that in view of the provisions of s. 16, the Act would not be applicable until expiration of three years from November 12, 1955. The trial court dismissed the suit. The judgment of the trial court was affirmed by the high court, and dismissing the appeal their Lordships, after considering Vittaldas and N.S.S. Co-operative Society, held (para.12):

12. ...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 overrule the decision of the Calcutta High Court in *Bharat Board Mills Ltd. Vs. The Regional Provident Fund Commissioner and Others*, 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 *Vittaladas Jagannathadas and Another Vs. The Regional Provident Fund Commissioner, Madras and Another*, 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.

15. The question whether an establishment claiming infancy benefit is a newly set up establishment is always to be decided on the facts of the given case. As was held in *Sayaji Mills*, in a case where the establishment was sold in a winding up proceeding, what is to be seen is what was the real intention with which the establishment was sold. It cannot be said as a general rule that an establishment carrying on business after purchasing the assets of an establishment has actually set up a new establishment. An establishment is newly set up only when it has nothing to do with the sold establishment. On mere change of things which could be changed by the sold establishment, or happening of events that could happen in the course of running business by the sold establishment, the sold establishment does not of course become a new establishment. For example, mere change of owner, location, machinery, line of production, employees, or suspension or cessation of business activities for some time cannot be considered a decisive factor to hold that the sold establishment has ceased to exist and in its place a new establishment has come into existence. For a new establishment to come into existence, its newness must be apparent. In my opinion, a very important test to be applied for getting answer to the question is to see how the employees of the sold establishment are placed in the context of the newness claimed by the purchaser seeking infancy benefit. The whole purpose of denying the benefit of section 16(1)(d) to such a purchaser is to continue to give the benefits of the Act, a social welfare legislation, and the schemes framed thereunder to the employees of the already covered sold establishment. The purchaser knowingly purchases an already covered establishment. Hence for entitling him to the infancy benefit he must prove that he has newly set up an establishment, and only in an apparent case the flow of statutory benefits to the employees should be stopped.

16. In the present case, the position can be ascertained from two things: (i) the

memorandum of understanding dated June 14, 1992; and (ii) the order of the court dated June 22, 1992. From the order dated June 22, 1992 it is evident that at one point of time the state government decided to take over Veegal as a going concern. The interest of the state government was to protect the employment of the workers, and nothing else. Subsequently the state government expressed its inability to take over but filed affidavit stating that if any purchaser was willing to protect the employment of the workers, then it would lease out the lands including the sheds and structures to such purchaser. Occasion for such an affidavit and assurance arose because the lands using which Veegal had set up its factory belonged to the state government that leased them out to Veegal. On Veegal's liquidation the purchaser of its assets was not to acquire any right, title or interest in the lands. Thus a purchaser intending to carry on business from the same factory needed the lands. Gunny Dealers was quite conscious of this situation, and that is why it entered into the agreement dated June 14, 1992 with Veegal's three employees' unions. If Gunny Dealers was not required to purchase the establishment as a going concern, there could be no reason why it should be asked to enter into any agreement with Veegal's workers. In terms of the agreement Gunny Dealers incurred an enforceable legal obligation to employ as many as 150 of Veegal's workers. Jessore Industries has admitted that the workers were employed in July, 1993. It is important to note that in view of the condition put by the state government Gunny Dealers could not dismantle the existing factory, sheds and structures.

17. Under the circumstances, I am unable to hold that the intention of the court selling Veegal's assets was to give the purchaser a freedom to set up a new establishment using or with the proceeds of the assets. As a matter of fact, Gunny Dealers purchasing the assets and its nominee, Jessore Industries, resuming the business activities using the assets, could not set up a new establishment within the meaning of section 16(1)(d) of the Act. I am, therefore, of the view that the commissioner has rightly held that Jessore Industries' establishment is not to be considered a newly set up establishment entitled to infancy benefit u/s 16(1)(d) of the Act.

18. For these reasons, I find no merit in the writ petition. It is, accordingly, dismissed. There shall be no order for costs.

19. Urgent certified Xerox of this order, if applied for, shall be supplied to the parties within three days from the date of receipt of the file by the section concerned.