

(1989) 07 OHC CK 0006

In the Orissa High Court

Case No : Original Jurisdiction Case No. 797 of 1982

Konchada Lakshminarayana Subudhi and Sons

APPELLANT

Vs

The Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 31-07-1989

Acts Referred:

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

Citation : (1989) 68 CLT 844

Hon'ble Judges : S.C. Mohapatra, J;K.C. Jagadeb Roy, J

Bench : Division Bench

Advocate : S.B. Nanda, M. Manwar, N.K. Misra and M.K. Rajguru, for the Appellant; A.B. Misra, for the Respondent

Final Decision : Allowed

Judgement

K.C. Jagadeb Roy, J.—This writ application has been preferred challenging the order dated 21-1-1982 passed by the Regional Provident Fund Commissioner, Orissa as per Annexure- 11 of the writ application. In the said order the Commissioner held that the present partnership firm was not entitled to the benefit of infancy u/s 16(i)(b) of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952, (hereinafter to be referred to as the "Act") and directed the Petitioner firm to report compliance of the provisions of the Act and the scheme framed thereunder from 2.5.1980 when it actually started business at the new premises.

2. The short facts of the case are as follows:

Konchada Laxminarayan Subudhi and Konchada Bhaskar Brundavanam Subudhi are brothers being sons of late Konchada Nilakantha Subudhi. They were members of a joint family. They along with their sons had constituted a partnership firm in the name and style of M/s Konchada Laxminarayan Subudhi and brothers which was registered under the Indian Partnership Act and consisted of seven partners as named below:

1. Konchada Lakshminarayan Subudhi.
2. Konchada Bhaskar Brundavanam Subudhi.
3. Konchada Sivaprasad Subudhi.
4. Konchada Surya Prasad Subudhi.
5. Konchada Ravi Prasad Subudhi.
6. Konchada Hari Prasad Subudhi.
7. Konchada Sambhu Prasad Subudhi.

Sl Section 3 and 6 are sons of SJ. 1 and

Sl Section 5, 6, and 7 are sons of SJ. 2.

The firm was carrying on business in manufacture and sale of Kharmasala and Koran and also doing money lending. The business premises for the manufacture and sale of Kharmasala etc. was a shop in Berhampur town and was covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Due to dissention and misunderstanding amongst the members of the joint family, there was a partition amongst the two branches Konchada Lakshminarayana Subudbi and Konchada Bhaskar Brundavanam Subudhi on 30-1-1980 by a registered deed of partition and since the members of the joint family were not pulling on well with each other, they also dissolved the partnership with effect from 31-3-1980. The terms for the dissolution of partnership is annexed as Annexure-1 to this writ application. Annexure-I shows that the accounts were settled, stocks taken and ultimately there was division of assets and liabilities amongst the existing partners. There was also stipulation in the said Annexure-I that none of the partners shall use the firm named Konchada Lakshminarayana Subudhi and Brothers and they were at liberty to carry on any business of their choice either themselves or in partnership with others at any place convenient to them.

3. The two brothers, because of their existing knowledge in the said manufacture of Kharmasala etc. which they were earlier doing, preferred to continue in the same line of business and since the shop room, where the Konchada Laxminarayan Subudhi and Brothers was running its business, fell to the share of Konchada Bhaskar Brundavanam Subudhi, the other brother, Konchada Laxminarayan Subudhi, formed a new partnership firm of his own with his sons Kanchada Siva Prasad Subudhi and Konchada Surya Prasad Subudhi on 9-5-1980 and got it registered under the Indian Partnership Act bearing Registration No. 84/81 and had moved to a different premises in Municipal area bearing holding No. 299/5 of Berhampur town and after having registered under the Orissa Shops and Commercial Establishment Act bearing Registration No. 354/81 and obtained licences from the Central Excise authorities for trading in Kharmasala and licence from the Berhampur Municipality under the Orissa Prevention of Food Adulteration Rules as well as the registration certificate under the Orissa Sales

Tax Act and the Central Sales Tax Act. The new firm started their new and independent establishment in the name and style of Konchada Lakshminarayan Subudhi and sons and started manufacturing and sale of Kharmasala etc.

4. In the writ application, the Petitioner firm apart from making averments of what is stated above had also stated in paragraph 5 that the firm had come to be recognised as a distinct Assessee under the Income Tax Act which according to them, was done after the authorities were satisfied about the bona fide the factual closure of the old partnership business and the starting of the new business by them. The three employees of the Konchada Lakshminarayan Subudhi and Brothers firm whose employments were terminated because of the disruption of the old firm and who had collected all their closure benefits on the eve of such dissolution of the firm on 31-3-1980 having sought new appointment had been taken into employment by the Petitioner firm along with fresh recruits on fresh terms and the total employment strength of the present firm at the material time was less than 20 persons. Accordingly it was contended by the Petitioner that according to all conceivable manner the Petitioner had set up an entirely new establishment after the dissolution of the old firm and it could never be considered as a continuation of the old firm or their business which had already dissolved. Accordingly, the Petitioner contended that since the firm was a new establishment it is entitled under the law to have the infancy protection u/s 16(1) (b) of the Act which reads as follows:

Section 16(1)(b).

This Act shall not apply

(a) xx xx

(b) to any other establishment employing fifty or more persons or twenty or more, but less than fifty persons until the expiry of three years in the case of the former and five years in the case of the latter from the date on which the 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.

5. The sale point that comes for decision in this writ application is whether the present Petitioner which admittedly has been registered as a new firm on 2-5-1980 and came into existence after the dissolution of the old firm on 31-3-1980 and continued the same kind of business in a new premises having received separate registration certificate licence etc. and with a new set of employees should be treated as a distinct and new establishment so as to get the protection of Section 16(1)(b) of the Act or be treated as a part of the old establishment.

6. The Regional Provident Fund Commissioner, Orissa, Bhubaneswar, who is the sale opposite party in this Case did not choose to be the counter challenging the

averments made in the writ application though at the time of hearing the learned Senior Standing Counsel Mr. A. B. Misra had appeared and argued on behalf of this opposite party supporting his order. Both the Petitioner and the opposite party relied on a decision of the Supreme Court reported in *The Provident Fund Inspector, Trivanedrum v. The Secretary, N.S.S. Co-operative Society, Changannacherry* AIR 1971 S.C. 12. Apart from this case, the opposite party also relied on several other decisions which do not have much bearing on the facts and circumstances of this case and the principles enumerated in them are no way different from what is already decided in the case, reported in *The Provident Fund Inspector. Trivandrum v. The Secretary, N. S. S. Co-operative Society, Changannacherry*¹ (supra).

In order to determine whether there was new establishment so as to attract the application of Section 16(1)(b) of the Act, the test that is to be applied in such cases is to find out whether on the entire complex of facts of a given case, it can be concluded that the original Establishment, had come to an end and had been succeeded as a fresh entity. If the answer is in the affirmative, then the fresh entity will be the entity to which the Act will apply as a first impact and that entity is entitled to infancy protection and that protection is to be granted as a matter of course, but if on the facts of the individual case it is found that the new establishment was not a genuine such but is only the old one formally resuscitated in order to avoid the legal obligation, then the Court may hold that it is in fact the same establishment and is substantially continuing and that the liability to contribute must be affixed to the apparently new form also. This was the view taken more or less in *M/s. Sri Balaji Enterprises v. The Deputy Regional Fund Commissioner* (41) 1980 I.F. and L.R. 112, Therefore, where there is a dissolution of the partnership firm and the partners have disturbed their assets and liabilities and started new firms of their own subsequently with new partners or some of the existing partners, the inference would ordinarily be that the old establishment did not continue and dissolved and the newly formed partnership firms would be held to be new Establishments but this view cannot be conclusive in every case. As stated earlier, the complete set of facts of each case is to be taken into consideration to come to a finding that there was a genuine and bonafide dissolution of the partnership firm not with as an intent to defraud the provisions of the Act.

In this case it is proved that on dissolution of the firm the business of the firm was closed completely and the employees were asked to leave their employment with their pecuniary benefits under the Industrial Disputes Act on closure of the establishment and the Petitioner firm which came into existence subsequently recruited their employees afresh with fresh condition of services which included some of the old employees, who have applied afresh and had taken out the certificate and licence from authorities as required for opening of such establishment running the business and was separately taxed to sales tax and income tax. These facts taken as a whole prove that the Petitioner firm was a newly formed establishment.

7. There are various cases decided on various aspects of the question. In a recent decision of this Court reported in Jagannath Sahu, Managing Partner v. The Regional Provident Fund Commissioner, Bhubaneswar 1988 (1) O.L.R. 201 this Court held that though the three brothers were carrying on business in transport separately and independently unconnected with one another with their own vehicles, staff and route permits and maintained different establishments when found unprofitable to carry on such, constituted a partnership business by executing a deed of partnership. The business carried on by the partnership was different from business carried on by them as individuals as the partnership business that was subsequently carried on was a different identity from those of the individuals, partnership business could not be treated as the same business or continuation of the same business which was being done by them earlier individually and it was held that the partnership business was entitled to exemption u/s 16(1)(b) with effect from the deed of such subscription. This case took note of several decisions of different High Courts and of this Court and of the Supreme Court which were on the field.

8. In the case of United Hoteliers, Calicut v. Government of India 1972 (2) L.L.J. 596, it was held that what is essential for holding that one business is a continuity of the other is the existence of the old business immediately before the commencement of the new one. In the present case the previous firm was dissolved on 30-3-1980 and the Petitioner's firm was brought into existence on 2-5-1989. This is itself a feature against continuity of the establishment. In a not her case reported in The Provident Fund's case (supra), it was the case of a printing press which was established in 1946 and sold in 1961. The work of the press was stopped on sale and was restarted after a break of about-three months, the machinery in the press was also altered the persons employed previously were not continued in service and fresh recruitment of employees took place amongst whom only six happened to be previous employees, whose jobs were already terminated and compensation was paid to the workmen at the time of the sale by the previous owner. It was held 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 and was entitled to the infancy protection u/s 16(1)(b) of the Act.

9. In the present case, the Petitioner's averments in the writ application which are not traversed by any counter of the opposite party and go unchallenged show that on dissolution of the firm on 20-3-1980, the employment of the old employer's were terminated on payment of their dues under the Industrial Disputes Act, 1947 which was payable for closure of the establishments. There was no allegation by the opposite party that such a dissolution was made only to avoid the application of the provisions of the Act to the old establishment. The Petitioner firm was registered under the Partnership Act almost two months after 2-5-1980 recruited new employees including three old employees whose jobs were earlier terminated and carried on manufacture and sale of the similar products which they were doing when were partners of the old firm. The new

firm i.e. the Petitioner received Registration Certificate under Orissa Sales Tax Act. Central Excise licence, licence of local Municipality Act, Preservation of Food Adulteration Rules, Registration Certificates for Orissa Sales Tax Act and Central Sales Tax Act and became a separate Assessee under the Income Tax Act.

10. These facts of the present case taken together will only lead to an irresistible conclusion that the Petitioner firm was entirely a new establishment and is not a continuation of the old establishment which was earlier dissolved and the Petitioner's establishment was entitled to the infancy protection u/s 16(1)(b) of the Act. We, accordingly, quash the order passed by the Commissioner dated 21-1-1982 as per Annexure-II and direct that the Petitioner firm be entitled to the protection u/s 16(1)(b) of the Act as claimed by them.

11. In the result, the writ application is allowed. There shall be no order as to costs.

S.C. Mohapatra, J.

I agree.

Writ application allowed.