

(1999) 01 KAR CK 0003

In the Karnataka High Court

Case No : Writ Petition No"s. 26797 to 26800 of 1993

M/s. Udayashankar Transport, Koppa and Others

APPELLANT

Vs

Regional Provident Fund Commissioner, Bangalore and Others

RESPONDENT

Date of Decision : 22-01-1999

Acts Referred:

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

Citation : (1999) 3 KarLJ 46

Hon'ble Judges : G. Patri Basavana Goud, J

Bench : Single Bench

Advocate : Sri A.G. Holla, for the Appellant; Sri Harikrishna Holla, for the Respondent

Judgement

1. M/s. Shankar Transport Company Private Limited, a company incorporated under the Companies Act, 1956, Koppa-Kadur in Chickmagalur District, had been running transport business having a fleet of passenger buses. Labour dispute started, leading to strike and lock out. As the settlement eventually reached as Annexure-B would show, the management of Shankar Transport Company had decided to close down the establishment permanently, but, due to intervention of well wishers, a settlement was amicably reached before the Conciliation Officer, by which, five independent entities came into existence, four partnership concerns and the fifth one, an organisation of the employees of the Shankar Transport Company itself. The buses of Shankar Transport Company were sold to the said five concerns viz., 12 buses to one concern, 13 buses to another concern, 8 buses to the 3rd concern, 15 buses to the 4th concern and 13 buses to the employees concern, The terms of settlement provided that the employees of Shankar Transport Company stood retrenched and gave up their claim for re-employment/reinstatement. But, with a view to rehabilitate the said workers, the new concerns offered employment to the said retrenched workers on fresh appointment basis, but, at the scale and salary which were payable to such workers at the time of retrenchment by protecting the same. That is bow the

earlier employees also continued in the new concerns. When the five new concerns thus started running of the said buses, the 1st respondent-Regional Provident Fund Commissioner under the order impugned herein, directed after an enquiry u/s 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("Act" for short) that the said five concerns also stood covered under the Act, since the earlier company Shankar Transport had stood covered. While so deciding u/s 7-A of the Act, the 1st respondent-Authority negated the claim of the new concerns that they are new establishments and as such, are entitled to infancy protection u/s 16(1) of the Act. Four of the five new concerns question the said order of the 1st respondent in these writ petitions.

2. The learned Counsel for the petitioners Sri Vishwanath submits that, the original company i.e., Shankar Transport Company is very much in existence and is not wound up. As will be presently seen, except that the Company is not wound up, it is evident that all its operations are made over to the five concerns referred to earlier for being carried on and managed. Therefore, the mere fact that Shankar Transport Company is not wound up would not help in deciding the matter at issue in these writ petitions.

3. Referring to various decisions, the learned Counsel for the petitioners Sri Vishwanath urges that, the new concerns for all purposes are establishments newly started and as such, entitled to infancy protection u/s 16 of the Act. Before referring to the said decisions, we may look to the factual position, because, apart from the principles enunciated in some of the decisions, particularly the one relied upon by Sri Harikrishna Holla, learned Counsel for the 1st respondent in *Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner*, each of the decisions referred to very much centered around the factual position concerned therein.

I have referred to the settlement at Annexure-B earlier. As the 1st respondent-Authority itself notices in the impugned order, M/s. Shankar Transport Company had been a premier transport company, one of the oldest transport undertakings in the area, having been brought under the purview of the Act way back in the year 1959 though having offered an alternative provident fund scheme which enjoyed exemption u/s 17 of the Act. Such a company was faced with severe labour problems, leading to strike and lock out. As the background set out in the ultimate settlement at Annexure-B would indicate, on account of the said problems, the management of Shankar Transport Company virtually decided to close down the establishment permanently. It was the efforts of well wishers as also the Conciliation Officer that avoided such permanent closing down of the establishment. But, on the other hand, as the very word used in the second term of settlement would show, the management was transferred as per the settlement at Annexure-B. So far as employees were concerned, vis-a-vis, Shankar Transport Company, the said employees, no doubt, were made out to have terminated their relationship by getting retrenchment compensation and giving up the claim for re-employment/reinstatement, but, that was not the truth

underlying the settlement as is obvious from Clause 7 of the terms and conditions, which would show that the five new concerns that came into being very much had to not only take them back, but, take them back by giving the wages at the scale they had been getting at the time of the so called retrenchment. In other words, eventually the employees continued uninterrupted.

4. When we come to the ownership as also the management aspect, it could be seen that, out of the five new concerns, one related to the employees themselves as being a representative organisation of the employees, that was given 13 buses. The four other concerns were only for namesake, partnership concerns, whereas, in fact, Manohar Rao who was the Managing Director of Shankar Transport Company had control over each of the four concerns to the extent of 95% in one concern directly, in another concern, through his daughter Kum. Anjana Rao, in the third concern, through his son Rajesh Rao and in the fourth concern, through his wife Vasanthi Rao. Among the three persons that represented the management while arriving at the settlement, two of them happened to be Manohar Rao and Vasanthi Rao. Thus, the four concerns though termed as partnership concerns, were nothing more than fronts furthering the interests of Manohar Rao who had been the Managing Director of Shankar Transport Company. Sri Vishwanath, learned Counsel for the petitioners pointedly refer to the fact that the buses given to each of the five concerns were actually sold to the said concerns. It is true, a document is made out to that effect. The most that can be said with regard to the said sale is perhaps that the employees had to pay the sale consideration for the buses given to their Union. Significantly, the said Employees Union though held in the impugned order as having been duly covered under the Act, has not chosen to question the said order of the 1st respondent. When it comes to the four concerns, if we say that, Shankar Transport Company sold the buses to these four concerns, it would be only for the sake of formality, the reason being that, it was like Manohar Rao selling his buses to himself, because, as seen earlier, in each of these four concerns, Manohar Rao had 95% of the interest. Thus, the ownership continued to be the same insofar as the present four petitioners are concerned, the management continued to be the same insofar as present four petitioners are concerned, the ownership and management functions having continued to be exercised by Sri Manohar Rao, earlier acting as Managing Director of Shankar Transport Company and later controlling 95% of interest in each of the four concerns. Major portion of buses also remained with these four concerns viz., 48 buses. The buses continued to operate on the same routes as before. The employees also continued. The result was that, even after the settlement at Annexure-B, there was no change either in the ownership or in the management or in the employees or in the routes that the buses had to ply on nor was there any additional investment required to be made by the new concerns, because, the same buses continued to ply. In the circumstances, the change over from company to five independent concerns could at the most be called an attempt at satisfying the demands of the employees who had gone on strike by giving 13

buses to the said employees to be managed by themselves, rather than five new establishments coming into existence. It is in the light of this factual position that it would be relevant to extract the observations of the Supreme Court in *Sayaji Mills Limited's* case, *supra*. Reminding that the Act is a beneficent statute, Supreme Court said thus in Paragraph 6 of the judgment.

"6. 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. If a period of three years has elapsed from the date of the establishment of a factory, the Act would become applicable provided other conditions are satisfied. The criterion for earning exemption u/s 16(1)(b) of the Act is that a period of three years has not yet elapsed from the date of the establishment of the factory in question. It has no reference to the date on which the employer who is liable to make contributions acquired title to the factory. The Act also does not state that any kind of stoppage in the working of the factory would give rise to a fresh period of exemption. The work in a factory which is once established may be interrupted on account of factory holidays, strikes, lockouts, temporary breakdown of machinery, periodic repairs to be effected to the machinery in the factory, non-availability of raw materials, paucity of finance etc. It may also be interrupted on account of an order of Court like the one we are confronted with in this case. Interruptions in the running of a factory which is governed by the Act brought about by any of the reasons mentioned above without more cannot be construed as resulting in the factory ceasing to be a factory governed by the Act and on its restarting, it cannot be said that a new factory is or has been established. On the resumption of the manufacturing work in the factory, it would continue to be governed by the Act. In *Chagganlal Textile Mills Private Limited v P.A. Bhaskar* (Miscellaneous Application No. 289 of 1956, disposed of on November 5, 1956) on the file of the Bombay High Court which is one of the earliest decisions delivered on the above question (which is unreported) Justice Tendolkar observes thus.-

"The important point to notice about this provision is that the Act is made applicable to factories and not to the owners thereof; or, in other words, it applies to factories irrespective of who the owners from time to time may be".

In *R. Ramakrishna Rao Vs. State of Kerala*, , the Supreme Court pointed out that, the intention behind Section 16 of the Act read with Paragraph 26 of the Scheme quite clearly show that the period was intended to give breathing time to new establishments and that, that reason did not hold when the establishment was also old and well founded.

Another decision referred to by Sri Harikrishna Holla, learned Counsel for the 1st respondent showed transaction of a similar nature as concerned herein though in the strict sense the transaction concerned in these writ petitions cannot be called a partition between the members of the family. In *D. Appavoo Prop. Chandra Bus Service, Thanjavur Vs. The Regional Commissioner, Provident Funds, Madras*, ,

the transport business owned by the father was partitioned between him and his two sons, with two buses with route permits being allotted to father's share and three buses with route permits to the sons. In spite of partition, buses were continued to be operated with the same employees and there was no closure or stoppage of business at any time and there was no starting of new business establishment. When sons claimed infancy protection u/s 16 of the Act, the Regional Provident Fund Commissioner rejected it, challenge to which was negatived by the Madras High Court holding that, an establishment not only connotes the persons in management and the owners of the business and the employees who are employed in the business, but, so long as business continues as usual without any change either in the assets or in the employees who are involved in the business, the establishment should be taken to be continuing and that the partition and allotment of shares will merely result in a reduction of liability for payment of contribution as the individual sharers are now owning less number of buses and consequently a lesser number of employees working under them. Except for that difference, the business which is being carried on by each of the three sharers cannot be said to be new business establishment because the old business never came to an end. If partition and allotment of shares in a business is to be taken as amounting to a closure of the old business, and starting of new business establishment in the hands of the sharers, then the provisions of the Act may easily be defeated by bringing about a partition once in three years, thus depriving the employees of the benefits of the Act.

5. Coming to the decisions that Sri Vishwanath, learned Counsel for the petitioners relied upon, in Regional Provident Fund Commissioner Vs. Wipro Ltd., , the old concern had stopped its functioning and operation in the year 1980 and all the employees of the said concern were completely discharged as far back as in 1980. The establishment had been closed and that closed establishment after five years was sold to the respondent. After the purchase of that old establishment, the said respondent started the concern after shifting it to Tumkur in the year 1988. Even after the purchase by the respondent, the establishment had started functioning, but, had not got the life. It was in those circumstances that a Division Bench of this Court agreed with the finding of the learned Single Judge that the establishment concerned was a newly set up establishment, entitled to protection u/s 16 of the Act for a period of three years from the date of setting up of the new establishment i.e., from 13-4-1988.

6. The transport operations of Shankar Transport Company, no doubt, had come to a halt for some time, but, that was on account of labour disputes arising out of a strike and lockout. It was when the company wanted to close down permanently because of the said difficulty that the new settlement was arrived at. It can, therefore, hardly be called an establishment closed long back with a new purchaser starting a new establishment.

In Regional Provident Fund Commissioner and Another Vs. Dharamsi Morarji Chemical Co. Ltd., , relied upon by Sri Vishwanath, learned Counsel for the

petitioners, the Supreme Court noticed that, there was no evidence to indicate any interconnection between the two factories in the matter of supervisory, financial or managerial control and that merely on the ground of being owned by the same company, the Roha factory concerned therein could not be said to be a branch or department or the other factory nor was it an adjunct of the main parent establishment functioning at Ambarnath since 1921. It was in those circumstances that the Roha Factory was afforded infancy protection. The said decision would be hardly applicable to the facts of the present case.

In *Senthilnathans Pharmaceuticals v Regional Provident Fund Commissioner*, though the business of R.R. Pharmaceuticals was closed on January 31, 1983 and a new firm with its new partners started this business on 1st of February, 1983 obtaining fresh licence, employing some of the employees of the erstwhile business on fresh employment basis, the Madras High Court found that, the medicines, furniture and fittings had been purchased at cost price and that, together with other circumstances as noticed therein, entitled the new establishment to claim eligibility for infancy protection. Sri Vishwanath, learned Counsel for the petitioners, in this context pointedly refers to the fact that the buses were sold to the new concerns. So far as these petitioners are concerned, as I have already pointed out earlier, if the buses given to these petitioners are to be taken as having been sold by Shankar Transport Company, it is nothing, but, saying that, Manohar Rao sold the buses to himself, because, as pointed out earlier, while Manohar Rao was the Managing Director of Shankar Transport Company, he controlled 95% of interest in these four concerns directly as also through his wife, son and daughter. The aspect of purchase of buses by the new concerns, therefore, is only a make believe affair.

Sri Vishwanath, learned Counsel for the petitioners, refers to a decision of Division Bench of this Court in *Regional Provident Fund Commissioner Vs. B. Rukmini K. Shetty*, . The factual situation therein was that, one Krishna Murthy Bhat had taken the premises on lease and had started a Hotel, that the owners of the property filed a suit for eviction and after bitter contest ended in an eviction decree to be passed and even possession was obtained through execution of that decree and it was then that the said premises in question was leased to Rukmini Shetty, one of the partners that owned the property. The said Rukmini Shetty obtained loan from the Bank, purchased new furniture, utensils, obtained fresh licence from the Municipality, recruited new employees and started a Hotel, except that one slip she made, as observed by the Division Bench, by starting her Hotel in the earlier name and style of Hotel Shivaprasad. It was in those circumstances that the Division Bench agreed with the conclusion of the learned Single Judge that it was a new establishment for the purpose of Section 16 of the Act. This finding is of no help to the petitioners herein. As noticed earlier, without the necessity of investing a single paise, the new concerns could continue the transporting business earlier being carried on by Shankar Transport Company. In fact, so far as these petitioners are concerned, it is the same Manohar Rao who continued to operate the 48 buses. It was not a

case like the premises having been obtained after bitter contest through eviction proceedings and execution of the decree and then starting a new Hotel with a new furniture, new licence, new employees and loan from the Bank as was the case in the decision in Rukmini Shetty's case, supra.

In the last decision that Sri Vishwanath, learned Counsel for the petitioners relies upon, viz., The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, , a Printing Press established in the year 1946 was sold in 1961. The work of the Press was stopped on selling and was restarted after a break of three months. The machinery in the Press was altered. The persons employed previously were not continued in service. Fresh recruitment of employees took place, amongst whom, only six happened to be previous employees. Compensation was paid to the workmen at the time of sale by the previous owner. It was in those circumstances that the Supreme Court held that the old establishment was completely closed when the transfer of ownership took place and an entirely new establishment was held to have been set up three months later, so that, infancy protection u/s 16 of the Act was available to the new establishment. The facts of the present case need not be repeated to point out as to how on facts this decision is inapplicable.

7. I have exhaustively referred to the facts of the case earlier, which leaves one in no doubt as to no new establishments having been started even after the settlement at Annexure-B. Therefore, the petitioner-concerns cannot claim infancy protection u/s 16 of the Act. The first respondent-Regional Provident Fund Commissioner has rightly negated their claim in that regard. There is no merit in these writ petitions. Same are dismissed.