(1981) 12 KL CK 0014

In the High Court Of Kerala

Case No : O.P. No. 219 of 1979

Oriental Export Agencies APPELLANT

Vs

Regional Provident Fund Commissioner and Others RESPONDENT

Date of Decision : 11-12-1981

Acts Referred:

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

Citation : (1982) KLJ 50

Hon'ble Judges : George Vadakkel, J

Bench : Single Bench

Advocate : Chakkappan Kalliath, for the Appellant; M.M. Abdul Aziz and Govt Pleader, for the Respondent

Final Decision : Dismissed

Judgement

George Vadakkel, J.—To borrow the language employed by Gopalan Nambiar C.J. in the judgment in Padmasree Enterprises v. The Regional Provident Fund Commissioner, writ appeal No. 250 of 1978, "the problem posed is the old and familiar one Do we get only the old wine in new bottles, or do we see new wine altogether." The learned Chief Justice in the aforesaid decision also said: "no hard and fast rules can be laid down as to when an establishment can be said to be a new establishment or when after transformations relating to management and ownership or regarding mode of operation etc; there had been a termination of the original establishment and a setting up of an altogether new one. The problem assumes importance because u/s 16(1)(b) of the Act infancy protection is available for the stated period from the date on which the establishment has been set up." It is the case of the petitioner-firm that is evidenced by Ext. P2 partnership deed that as per Ext. P1 lease deed, the petitioner-firm took on lease the movable and immovable properties of M/s. Crown Fisheries on a monthly rent of Rs. 9000/-. The movable and immovable properties which are the subject-matter of Ext. P1 lease are those scheduled to the said agreement. The schedule reveals that it is all the machinery, tools and other accessories that the Crown

Fisheries were having for the purpose of processing and exporting sea foods. There properties appear to have been previously taken on lease by the lessor-firm from one Mr. P. M. Mohammed Hussain. The lessor-firm, the Crown Fisheries, was an establishment covered under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and the scheme thereunder. The question is as to whether the coverage of the Crown Fisheries would extend to the petitioner.

2. The Regional Provident Fund Commissioner in his Ext. P4 proceedings found as follows:-

But on a close and careful scrutiny of the circumstances of the case and the records produced by the representative including Day Book, Ledger, Salary and Wage Register for the year commencing from 5/72 to 30-4-74, the following facts have been clearly revealed. Lessees viz. M/s Oriental Export Agencies took a lease not only land and premises of Crown Fisheries, but also plants and machineries, including freezers, electric motors, weighing scales, there vehicles having registration numbers, KLR 1305, RLE 5532 and KLF 674. They continued to use the same tools, equipments and freezers etc. used in processing packing and export of marine products by the lessor''s firm, viz., M|s. Crown Fisheries for a period of 2 years from 4-5-72. Though the lease term has been for 3 years with provision to extend it for another 2 years it has been terminated on 30-4-1974 (that is after 2 years).

The lessees commenced processing activity within the same premises using the same plants and machineries, tools, or equipments obtained as per the lease agreement and carried on the same line of activity without any change what so ever. It is also noteworthy that the lessee-firm commenced functions on 4-5-72 that is from the very date of the lease agreement.

3. On these facts the Regional Provident Fund Commissioner took the view that there is only a mere change of management and no new establishment has been set up or started. Consequently the said Commissioner passed orders in exercise of the powers conferred on him u/s 7A of the Employees'' Provident Fund and Miscellaneous Provisions Act 1952. This order is impugned herein. The said order is marked herein as Ext. P4, which is dated 14-9-1977,

4. It appears that on an earlier occasion the Regional Provident Fund Commissioner passed orders extending the coverage to the petitioner-firm. The petitioner-firm impugned the said order in this Court in O.P. No. 4692 of 1974. Ext. P3 is the copy of the judgment therein. By that decision this Court setting aside the impugned order directed the Regional Provident Fund Commissioner to hold another enquiry u/s 7A of the Act after affording an effective and sufficient opportunity to the petitioner-firm to present its case. It was pursuant to such direction and after holding an enquiry in compliance with the said direction that the Regional Provident Commissioner passed Ext. P4 proceedings.

5. The main paint taken before me is that though the petitioner-firm had taken

over the plant and the machinery along with motors and other movable properties including the vehicles, it had not taken over the employees of Crown Fisheries. Though it was also contended that the Crown Fisheries was defunct for some period extending over two years before the petitioner-firm took over the concern on lease, it does not appear that the petitioner has such a case either in the writ petition or had before the Regional Provident Fund Commissioner. The sole point therefore, that requires consideration is as to whether merely because the petitioner-firm employed fresh hands disbanding the employee:, of the Crown Fisheries, can it be said that the establishment, Crown Fisheries, was terminated and whether a new establishment was set up by the petitioner-firm.

6. I may here with advantage quote the following passage from the judgment in SLP (Civil) No. 4583 of 1977 disposed of by the Supreme Court after notice to the respondents.

The sole question that arises in such a situation is as to whether a new establishment has been set up or whether there is a continuation of the old establishment. This is essentially a question of fact depending on many variables. The identity of the establishment cannot be confounded with the identity of the workman employed. A constellation of factors conduce to the conclusion regarding continuity of the establishment or otherwise. When an establishment changes hands and a plea is put forward that in the hands of the transferee, a new establishment has been set up extinguishing the old establishment, the Court has to survey all the facts and reach a result which takes note of the essential features Change of location may be a circumstance, but 1 certainly is not a clinching one. Change of machinery, change of workmen, change of licences and the like may have some bearing but it is only the totality that tells, Confounded by such a question the court has to determine whether the old concern, in substance persists or had perished. If only the machinery has been purchased and not the concern as such, the inference may be of discontinuity. But, if the location is the same, the machinery substantially continues the same though supplemented later, if the concern de facto runs on, then the inference is more readily available that no new establishment has been set up.

7. Therefore, the identity of the workmen is not material in considering the question of the identity of the establishment. Applying the tests enumerated by the Supreme Court in the aforesaid case it cannot be said that this is a case where there was a termination of the establishment run by Crown Fisheries. Mark, there is no change of location - even change of location by itself is not a clinching factor; there is no change of machinery or plant-even if there were changes in this regard they by themselves would not lead to any inference. The totality of the circumstances is that the Crown Fisheries leased out their establishment with all the plants, machinery including the vehicle and the premises. The only factor in favour of the petitioner-firm is that there was a change of workmen. This by itself is immaterial insofar as, as stated by the Supreme Court, the identity of the establishment cannot be confounded with the

identity of the workmen employed.

8. A mere change of hands would not constitute setting up of a new establishment. It appear to me that the word "establishment" in the Act and the scheme has to be given the meaning assigned to it by the Madras High Court in R. L. Sahni and Co. v. Union of India (A.I.R. 1966 Madras 416), namely, "the house of business." The question would therefore be as to whether the establishment, namely, "the house of business" is the same as that of the Crown Fisheries. So long as it is not shown that the house of business of the Crown Fisheries has been closed down, it cannot be said that merely because someone else took it on lease it is a different "house of business." The burden of proof in that behalf is upon he who seeks to prove that the house of business run by the former was closed down and a new house of business was set up. Till such proof is forthcoming it would be legitimate to presume that the house of business once established continues to exist though run by a different person than he who originally set it up. This would, I suppose, be the common sense approach to find out as to whether the establishment is the same or is a different, one. By the decision, Ext. P-3, this Court afforded an opportunity to the petitioner-firm to substantiate its case that the establishment in question has been one newly set up by the petitioner-firm. The petitioner-firm has not adduced any material in support of their case. There is also no material to come to the conclusion that Crown Fisheries closed down their establishment or house of business. If that be so, the Regional Provident Fund Commissioner rightly inferred that the same house of business or establishment continues in the hands of the petitioner-firm. Ext. P4 order has, therefore, to be up-held. I do so. In the result, this writ petition fails and it is dismissed. In the circumstances of the case, there will be no order as regards costs.