
(1972) 02 KL CK 0002
In the High Court Of Kerala

P. Narayan Nair

APPELLANT

Vs

The Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 01-02-1972

Acts Referred:

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

Citation : (1973) 1 LLJ 236

Hon'ble Judges : M.U. Issac, J

Bench : Single Bench

Judgement

M.U. Issac, J.—The petitioner was the proprietor of an industrial establishment, known by the name "Desabandhu Printing Works". According to him it was set up and started on 29-5-1963, and closed down in September, 1967 after retrenching all the workmen. There was a limited company by the name Swaraj Industries Private Limited which was conducting different branches of business. Its main business was running a printing establishment under the style "Swaraj Printing Works" and publishing a Malayalam daily by name "Desabandhu". The Swaraj Industries Private Ltd., was wound up by this Court in Company Petition No. 22 of 1961. The official liquidator terminated the services of all the employees of the company and fully settled their claims. The Swaraj Printing Works and rights in respect of "Desabandhu" were leased out by the official liquidator to different persons ; and the lessees conducted the press and the publication of the paper for some time. Then the official liquidator decided to dispose of the assets of the company by public auction ; and he published a notice, Ext. P-1 dated 20-4-1963, advertising them for sale in separate lots. There are three schedules to Ext. P-1, Schedule A is the goodwill of "Desabandhu", Schedule B is the press machinery and the printing tools, and Schedule C is furniture. The goodwill of "Desabandhu", and three items of the machinery were purchased by the petitioner in public auction. The petitioner purchased other necessary machines from outside, and started the business "Desabandhu Printing Works" with effect from 29-5-1963. He commenced publication of the newspaper "Desabandhu" with effect from 30-5-1963, which

was till the previous day conducted by the lessee from the official liquidator. The petitioner also employed some of the old employees of the Swaraj Industries Private Ltd. The Regional Inspector of Factories, by his letter Ext. P-2 dated 20-8-1963, called upon the petitioner to register the above establishment under the Factories Act as a new factory; and the petitioner accordingly applied for issue of a fresh licence.

2. While the petitioner was running this business as stated above, the Regional Provident Fund Commissioner, Kerala called upon the petitioner to comply with the provisions of the Employees' Provident Funds Act and the scheme thereunder, stating that he was the owner of the Swaraj Printing Works, which was an establishment covered by the Act with effect from 1956. The petitioner wrote to the Regional Commissioner pointing out the winding up of the Swaraj Industries Private Ltd., and the closing down of the Swaraj Printing Works by the official liquidator, and informing him that the petitioner's establishment "Desabandhu Printing Works" was a new establishment, and it was entitled to the juvenile protection u/s 16(1)(b) of the Act. The petitioner's claim was rejected by the Regional Commissioner, who made persistent attempts without success to recover contributions from the petitioner as if "Desabandhu Printing Works" is the same establishment as the Swaraj Printing Works. The petitioner had to file two writ petitions, O.P. Nos. 2459 and 3008 of 1966, challenging the validity of the proceedings taken by the Regional Commissioner against him. The first petition was allowed ; and the Regional Director was directed to adjudicate the question of the petitioner's liability, after hearing the ".petitioner. The second petition related only to the proceedings taken by the Regional Commissioner for the contributions claimed in respect of February and March of 1966. When this petition came up for hearing, the petitioner submitted that he was going to file an application u/s 19-A of the Act and seeking adjudication of the Central Government as to the date from which the establishment has to be started ; and in the light of that submission, that writ petition was dismissed. This Court also directed that proceedings for recovery of the contributions shall be stayed till the adjudication of the matter by the Central Government, provided the petitioner furnished security for Rs. 1000. Accordingly the petitioner moved the Central Government, and that application is still pending. The petitioner did not furnish security as directed by the Court; and thereupon the Regional Commissioner restarted proceedings against him. By his order Ext. P-7 dated 23-1-1970, the Regional Commissioner held that the Desabandhu Printing Works was only a continuation of the Swaraj Printing Works, that the petitioner was not, therefore, entitled to the protection of Section 16(1)(b) of the Act, and that he was liable to pay a sum of Rs. 17,468.30 in respect of the period from June, 1963 to May, 1966. The above order was followed by a notice, Ext, P-8 dated 2nd February, 1970 calling upon-the petitioner to pay the aforesaid amount within seven days of the receipt of the said notice, and informing him that, if he did not comply with the same proceedings would be taken against him under the Revenue Recovery Act. Thereupon the petitioner has filed this writ petition to quash Exts.

P-I and P-8.

3. Section 16(1)(b) of the Act reads :

16. (1) This Act shall not apply-

(a) * * * * (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.

The only controversy is whether the Desabandhu Printing Works is a new establishment commenced on 29-5-1963 as claimed by the petitioner, or whether it is the same establishment as Swaraj Printing Works under a different name. If it is a new establishment, the petitioner is entitled to the protection of Section 16(1)(b); and the proceedings as per Exts. P-7 and P-8 are bad under law. The facts of the case are not in dispute, except in respect of one small matter. According to the petitioner, he purchased only three items of the machineries of Swaraj Printing Works ; while the counter-affidavit states that, on enquiry made to the official liquidator, it was given to understand that the petitioner purchased 12 items of machineries, and that the total price of all the machineries sold by the official liquidator was Rs. 37,517, out of which the machineries purchased by the petitioner came to Rs. 29,261. These are all matters which would be evidenced by documents. The parties have not produced any documents. I shall, however, proceed on the basis that the information alleged to have been received by the Regional Commissioner from the official liquidator is true. Then the admitted facts are : the Swaraj Industries Private Ltd., was compulsorily wound up by the Court; the services of all its employees were terminated by the official liquidator and their claims were fully settled ; all the assets of the company were sold in separate lots by public auction by the official liquidator; the goodwill of the paper as well as the major part of the press machineries were purchased by the petitioner ; the petitioner purchased a good amount of new machineries from outside, employed a number of workers who were former employees of the company, and he started the present establishment under the name "Desabandhu Printing Works" with effect from 29-5-1963. The paper "Desabandhu" was published by the petitioner with effect from the next day in the same fashion from the same premises. Sometime later, the machineries were shifted to a new premises, and the petitioner continued to conduct the establishment from that place.

4. Counsel for the petitioner submitted that the decision of the Supreme Court in *The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry*, would fully apply; and that this is a clear case entitled to the protection of Section 16(1)(b) of the Act, It is necessary to refer briefly to

the relevant facts of the case before the Supreme Court. The respondent, the N.S.S. Co-operative Society, purchased on 21-3-1961 from another Cooperative Society a printing press which had been let up in 1946. At the time of the purchase there were only nine employees. Their services were terminated and all their claims were settled by the vendor. After the purchase, the respondent employed six of the nine old employees, acquired more machineries, employed many more persons, shifted the press to another premises and continued to run it as before. The appellant, the Provident Fund inspector, instituted a number of criminal complaints against the respondent for non-compliance with the provisions of the Employees' Provident Funds Act. and the scheme thereunder, on the basis that the printing establishment run by the respondent was the same as the one conducted not the vendor, and that the respondent was not, therefore, entitled to the benefit of Section 16(1)(b) of the Act. The trial Court dismissed the complaints holding that the establishment run by the respondent was anew one set up by it after the purchase. In appeal, the High Court accepted the contention of the appellant that the establishment run by the respondent was the same which the vendor was running ; but it upheld the acquittal of the respondent on the ground that the respondent was entitled to the benefit of the protection of Section 16(1)(b) for a period of three years from the date of purchase. The Supreme Court held that the High Court was in error in holding that the period from which the benefit u/s 16(1)(b) is available should be reckoned from the date of acquisition of the establishment by the new owner and not from the date of its establishment. The Supreme Court also differed from the view of the High Court on the question whether the establishment was a new establishment of the respondent. The Court said :

...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 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, 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....

The court after referring to a number of decisions of various High Courts, quoted the following passage from the decision of the Madras High Court in *Vittal Dass Jagannath Dass and Anr. v. Regional Provident Fund Commissioner and Anr.* 1968 1 L.L.J. 240, as stating the correct legal position :

...If, in a particular case, it appears that the new establishment is not genuinely such, but is only an old one formally resuscitated in order to avoid the legal

obligation, it is always open to the Court to hold that it is the old establishment which is substantially continuing, and that the liability to contribute must be affixed to the apparently new firm also. But where, in reality, the old establishment has come to an end, there is a new establishment, this establishment is entitled to infancy protection in its own right, even if it happens by coincidence to have employed a large part of the personnel of the previous establishment....

In the case before me, there was in reality and under law an end of the whole establishment of the Swaraj Printing Works. Its proprietor, the Swaraj Industries Private Ltd., went into liquidation; the official liquidator took possession of its assets; the services of its employees were terminated and their claims were fully settled; the whole establishment was closed down; then the printing press was given on lease to one person and the right to publish the newspaper was leased to another person; the lessees conducted the press and the paper separately in their own way ; and subsequently the petitioner purchased in public auction the goodwill of the newspaper and a part of the machines of the press in separate lots, employed some of the former workmen and started the business of running the press and publishing the newspaper under a different name. The facts are, in my view, more conclusive than in the case before the Supreme Court that the petitioner's is a new establishment.

5. Counsel for the first respondent relied on a single Bench decision of the Madras High Court in *Devi Press Vs. Regional Provident Fund Commissioner, Madras and Another*, , in support of his argument that the petitioner's establishment is a continuation of the Swaraj Printing Works. This decision has been referred to by the Supreme Court in the decision cited above, and their Lordships stated as follows:

One of the prominent facts before the Judge was that the particular business transferred was being run under licences, and these licences were also transferred by the seller to the purchaser. In view of this transfer, the learned Judge held that it was a case of sale of a going concern, and there was continuity of business. Without expressing any opinion as to whether the learned Judge was correct in holding that there was continuity of business in that case, the very fact that he held the establishment not to have been newly set up on the ground that it was a case of transfer of a going concern distinguishes that case from the case before us.

The instant case is obviously not a transfer of a going concern ; and the above decision of the Madras High Court has, therefore, no application. Counsel, however, relied on the following passage from the above decision of the Madras High Court:

It has been pointed out that these two petitioners were the managing agents of the previous company. That business went into voluntary liquidation. The reasons for winding up that business are not apparent from the records or even the

resolution passed by the members of that company. But that the dissolution took place a week or ten days before the issue of notification making the Act applicable to the printing industry is a patent fact. While in terms the business was not sold as a going concern to the petitioner-firm, in effect that was what was done. The entirety of the machinery, its accessories and the furniture were taken over. The very factory and corporation licences were transferred in the name of the petitioner-partnership. The fact that the claims of the workers vis-a-vis the old company were settled up to the date of winding up or that the workers were re-employed by the petitioner-partnership does not in any way touch upon the question as to the date on which the establishment came into existence, In truth, the old establishment continued, although in a different name.

The above passage shows that the winding up of the company, the formation of the partnership and the transfer of the establishment to the firm were all an arrangement to avoid the liability under the Employees' Provident Funds Act, and the scheme thereunder ; and that it was not a bone fide transaction. It also shows that the whole establishment was taken over by the transferee as a running concern. The facts of the case before me are entirely different. I may, however, point out that the statement in the passage quoted above to the effect that the fact that the claims of the workers of the transferor were settled up to the date of transfer and/or that the workers were re-employed by the transferee does not touch upon the question as to the date on which the establishment came into existence cannot be accepted as a correct proposition of law, in the face of the aforesaid decision of the Supreme Court, according to which the fact that the services of the workers were terminated and their claims were settled by the transferor, and the transferee only re-employed them is a most relevant, if not a conclusive fact, in deciding the question of continuity of the establishment.

6. For the reasons stated above, I hold that the Desabandhu Printing Works is a new establishment entitled to the protection u/s 16(1)(b) of the Act. It follows that the orders Exts. P-7 and P-8 cannot be sustained and they are accordingly quashed. In the circumstances of the case, there will be no order as to costs.