

(2001) 03 BOM CK 0141

In the Bombay High Court

Case No : Writ Petition No. 1927 of 1994

Pragati Metal Works

APPELLANT

Vs

The Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 12-03-2001

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 16(1), 17, 7A

Citation : (2001) 4 BomCR 555 : (2001) 3 BOMLR 228 : (2001) 89 FLR 981 : (2001) 4 MhLj 646

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : Mr. P. Ramswamy and Mr. P.L. Naik, for the Appellant; Mr. R.C. Master, for the Respondent

Judgement

R.J. Kochar, J.—The petitioner Company is aggrieved by the order dated 18th May, 1994 passed by the respondent. Regional Provident Fund Commissioner, u/s 7(A) of the Employee's Provident Fund Act, 1952 (hereinafter referred to as the Act) whereby it was held that the provisions of the Act were applicable to the present establishment of the petitioner which was rightly covered by the department as a continued business of the erstwhile establishment. It was also held that the petitioners were not entitled to infancy protection in terms of Section 16(1)(b) of the Act.

2. After passing the said order, the learned Commissioner posted the matter for assessment of dues. According to the Respondent, the petitioners were in continuous business which was carried on by its predecessor (the erstwhile establishment) and having completed the requisite number of employees i.e. 19 in number, the provisions of the Act were attracted by the petitioner's establishment. It was the case of the petitioner before the authority that it had purchased the concern of M/s. Amar Weaving Factory, a textile concern by a Deed of Assignment dated 19th March, 1984 and the petitioners started the new business of trading and/ or manufacturing of stainless steel, brass and aluminium

articles. According to the petitioner, therefore, there was absolutely no continuity of business and there was complete change of the ownership and the nature of the ownership and the nature of business. Earlier, the establishment which was known as M/s. Amar Weaving Factory had closed down its establishment from 26th March, 1982 and all the workmen had settled their dues with the said Company including their accounts with the respondent. The petitioners have purchased the said concern and have carted on the entirely new business of trading and manufacturing of stainless steel, brass and aluminium articles by employing new employees, who were about 4-6 in number, during the relevant period. According to the petitioner, the machinery required for the present business of the manufacturing of stainless steel, brass and aluminium utensils was entirely new and the machinery required for textile unit was not of any use at all and therefore, the textile machinery was sold while the furnitures and fixtures were retained. The petitioner further states that the new business required new licences and certain existing licences required modification. According to the petitioner, therefore, the new business was started on entirely new slate and there was absolutely no continuity with the textile business carried on by the earlier Company which was totally closed down with effect from 26th March, 1982.

3. There is no dispute that from the year 1992. the petitioners have voluntarily offered to be covered by the Act. The respondent, however, did not accept the said offer and insisted that the petitioner should pay the arrears from 1984 till 31st December, 1991. The petitioners are refusing to pay the same as. according to them, their establishment was a totally new establishment and had nothing to do with its predecessor, which did not exist after its closure. The petitioners have also given emphasis on the fact that they had never employed workmen exceeding 6 In number during the relevant period from 1984 to 1992. and therefore, were not liable to be covered.

4. On the contrary, it is the case of the respondent that the petitioners have purchased as "a going concern", the textile unit and merely because there was change in the business, the establishment of the predecessors did not cease to have the application of the Act. It was also contended on behalf of the respondent that the establishment was a going concern and had a line of continuity in the sense that stone licences were used by the petitioner Company, I have heard the learned Counsel for both the parties. I have also perused the records and proceedings.

5. Shri Ramaswami. the learned Counsel for the petitioners had taken support from the following judgments :-

(i) Bajaj Food Products and Central Board Trustee and Ors.

(ii) Regional Provident Fund Commissioner and B. RukmintK. Shetly,;

(iii) Shri Hotel Arjun v. The Regional Provident Fund Commissioner in Karnataka & Anr.,;

(iv) Senthilnathans Pharmaceuticals and Regional Provident Fund Commissioner,.

6. Shri R.C. Master, the learned Counsel for the respondent has cited the following judgments :-

(i) Lakshmi Rattan Engineering Works Regional Provident Fund Commissioner, Punjab & Ors.,;

(ii) State of Punjab v. Satpal & Anr.

(iii) Sayaji Mills Ltd. u. Regional Provident Fund Commissioner,.

7. Shri Ramaswamy has contended that there was absolutely no continuity of the business of the petitioner's predecessor which was closed and had settled the dues of the workmen and also the provident fund accounts and that there never existed any continuity. He has submitted that there was a complete change in the business from textile to stainless steel utensils and the petitioners had purchased entirely new machinery required for the new business. Obviously, textile machinery could not be used for the stainless steel utensil's business.

8. On the contrary, Shri Master for the respondent has supported the judgment of the Competent Authority and had laid emphasis on the deed of assignment which specifically talks of purchase of the then existing establishment as a going concern and, therefore, he emphasised that even if there is a change in the business and the ownership, the establishment continues to be covered under the Act.

9. I am not able to agree with the submissions of Shri Master that there was a continuity of business and the Act, therefore, continues to apply even today, to the new establishment and to the new business of the petitioner Company. Merely because in the deed of assignment the draftsman of the agreement has used the words "going concern" it cannot be concluded that the business of the predecessor Company which was a textile unit can be said to be continued to mean the same in the business of manufacturing of stainless steel utensils. No doubt the petitioners have purchased the entire plant and machinery and the structure on the land and have also purchased the furnitures and fixtures of the Company which was admittedly closed with effect from 26.3.1982. There is further no dispute that some of the licences which could be used as common for the purpose of factories have also been used by the new establishment with and without some modifications. It is possible that In the existing licences modification of the nature of name and the new business required might have been stated. I, however, do not agree with the contention of Shri Master that the business of the predecessor of the Company continued in the business of the petitioners and, therefore, continuation of the coverage or application of the Act. Merely because plant and machinery was purchased and the land and structure of the earlier Company was purchased, it cannot be said that there has been continuity in the business. There is no dispute that the textile plant and machinery was sold as it was useless for the manufacturing of stainless steel and

metal utensils. Further, there is no dispute that the provident fund account of the workmen of the predecessor Company were also settled and that the petitioner Company has not employed or engaged even a single workman of its predecessor Company. It has employed new persons. Further, significantly, there is no enquiry or investigation on the point of number of persons employed by the newly started business of the petitioner Company. The petitioner Company has given the number of 4 to 6 persons as employees during the period from 1984 to 1991. It has emphatically stated that it never exceeded the number of employees more than 19. In my opinion, the coverage or application of the Act would cease and discontinue with its irrevocable closure. As soon as an establishment is closed and its activities are discontinued permanently, the application and coverage of the Act would also co-terminate and it will cease to apply. The petitioners have vehemently contended from the beginning that the earlier Company which was a textile factory had closed its business and activities and had wound up its affairs with effect from 26th March, 1982. There was, therefore, cessation of the application of the Act to the said establishment. The workmen became entitled to collect their provident fund dues from the respondent in accordance with rules. The said workmen appear to have settled their accounts with the respondent and they are not continued in employment of the petitioners. There is, therefore, no question of continuing the coverage and application of the Act to an entirely new establishment of the petitioner Company. It cannot be said that the petitioner Company has carried forward the textile factory and, therefore, it has also carried the coverage and application of the Act with it. Since the textile factory was permanently and irrevocably closed, there is no question of successive coverage and application of the Act which had ceased on the date of the closure of the factory. The Act applies to the workmen employed in an establishment and not to the plant and machinery and furniture and fixtures. The Act would cease to apply when workmen ceased to be employees as would be the case on retirement or termination of their employment. A dead factory or a dead unit cannot continue to be covered under the Act. Similarly, a newly born unit would attract the provisions of the Act if it satisfies the other prescribed conditions such as the number of persons employed exceeding 19 coupled with other mandatory conditions. In the present case, there is no question of infancy protection. The Act contemplates the continuity of the business and actual running or working of the factory or industry or any establishment. The Act obviously does not cover a closed factory, industry or an establishment. Section 1(3)(a) & (b) read as under :-

"1(3) Subject to the provisions contained in Section 16, it applies :-

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which (twenty) or more persons are employed, and;

(b) to any other establishment employing (twenty) or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf :

Provided that the Central Government may, after giving not less than two months notice of its intention so to do, by notification in the Official Gazette. apply the provisions of this Act to any establishment employing such number of persons less than (twenty) as may be specified in the notification."

From the above it is clear that the employees must be actually employed in a running establishment. Similarly it is further significant to note the following definitions of basic wages, employee and factory :

"basic wages" means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include -

(i) the cash value of any food concession;

(ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;

(iii) any presents made by the employer ;"

"employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer and Includes any person -

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961) or under the standing orders of the establishment.

"Factory" means any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power."

From the above it is crystal clear that the Act would apply only to such establishments or factories which are actually breathing its life and not to any dead activities. The work in the factory, establishment or industry must continue, to continue to attract the provisions of the Act. The application of the Act is co-extensive with the physical existence of the establishment. As soon as the establishment, industry or factory ceases to breathe life, the Act would automatically withdraw its application. Section 6 provides for contribution payable by the employer to the fund and the rate. It specifically gives the percentage of the basic wages for the time being payable to each of the employees. It, therefore, means that the establishment should continue to

employ the employees who continue to get wages for the work done or who should be continued in employment meaning thereby, there should not be any cessation of the employer employee relationship. As soon as a workman ceases to be in employment, the liability of the employer to contribute to the fund of such workman also comes to an end. Similarly, if all the workmen cease to be in employment the liability of the employer would also come to an end. This contingency would arise when the establishment is permanently and irrevocably closed. Such liability would never revive and will have no relation back merely because the dead plant and machinery, furniture and fixture and even the licences are purchased by a new person who starts his own business severing the past connections and contracts of the establishment which was permanently and irrevocably closed. The new establishment will create its fresh and new liabilities and obligations. It cannot be burdened with the past liabilities and obligations. In my opinion, therefore, the petitioners cannot be continued to be covered under the Act from 1984 to 1991 on the ground that it had purchased the licences of its predecessor.

My conclusions are supported by the following observations of the Division Bench of Delhi High Court in the case of Bajaj Food Products and Central Board Trustee and Ors.. (supra). The head note of the judgment which is a summary of paras 8 and 9 is reproduced below :-

The mere fact that two of the erstwhile partners of a dissolved firm have started a new business in the same premises under a new name is not sufficient to conclude that the new establishment is a continuation of the old establishment. The Commissioner has accepted the findings of the Area Provident Fund Inspector that the old firm was dissolved on 24th September, 1981; the machinery of the establishment was disposed off; the employees were retrenched and the benefits admissible under law were given to them; Sales Tax Registration number was surrendered to the Sales Tax Department; a new partnership has come into existence carrying on new business. There is no semblance of any connection between the business carried on by the dissolved firm and the business carried on by the new firm. Partners of the new firm have raised their own capital from their own resources. Therefore, the new firm is entitled to infancy protection from the date of its formation on 5th October, 1981. A new firm cannot be treated as part of the old establishment."

The Division Bench of the Karnataka High Court has also considered the point of what is a new establishment in its judgment in the case of Regional Provident Fund Commissioner (supra). It has been observed in para 13 as under :- (head note).

"Where the firm owning restaurant leased out the same to one who obtained the possession of the premises after filing a suit for execution of the decree and thereafter leased out the premises in favour of another who obtained loan from the Bank for establishment of a restaurant and purchased new furniture and utensils, obtained fresh licence from the municipality, recruited new employees

and did not continue the services of the employees of the previous establishment, such new establishment is entitled to infancy protection u/s 16(1) (b) of the Employee's Provident Fund and Miscellaneous Provisions Act, 1952 notwithstanding the fact that the name of the new establishment continued to be the same as the old establishment. It is not as if the claim for infancy protection must follow whenever there is a fresh lease. On the contrary, if the fact is established that there is a commencement of new business and it is not a continuation of the old, infancy protection u/s 16(1)(b) of the Act cannot be denied. No doubt, if it had been a continuation of the old establishment by reduction of the number of employees below 20, certainly it would not amount to new establishment so as to claim the benefit of Section 16. But once it is established that is not continuation of the old establishment, denying infancy protection is wrong."

The learned Single Judge of the Karnataka High Court has also considered the same point in the case of Shri Hotel Arjun (supra) and has observed in para 7 as under ;-

The benefit of infancy period of 3 years or 5 years, as the case may be, u/s 16(1) (b) of the Act is available to all new establishments if they satisfy the requirement which may be held to be essential having regard to the object of the "Act". None of the employees of the previous establishment should be borne on the rolls of the new establishments. No member of the management of the previous establishment should be a member of the new establishment. In other words, the change of management should not be with the object of extending the period of infancy. The test has to be applied by the Regional Provident Fund Commissioner to see whether there is a genuine termination or end of the previous establishment and not a colourable attempt to clothe the old establishment as if it were a new establishment. It is only on being satisfied that it is only the old establishment to gain extended period of infancy, should the Provident Fund Commissioner reject the claim put forward by the new establishment."

The learned Single Judge of the Madras High Court has observed in the case of Senthilnathans Pharmaceuticals (supra) as under: (para 14)

"After hearing the rival submissions and after perusing the relevant records, I am of the opinion that there is considerable force in the submissions made by the learned Advocate for the petitioner. According to me, the present case clearly comes within the purview of the decisions which I have referred earlier. However, the learned Advocate for the respondent invited my attention to Section 17-B of the Act which speaks about liability in case of transfer of establishment and also to the provisions of explanation to Section 16(1)(b) which says, 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, placing reliance on those sections, the learned Advocate for the respondent submitted that the present establishment is not a new establishment, and it is an old establishment

being continued. I am unable to agree with the said argument of the learned Advocate for the respondent. A careful analysis of the present case clearly goes to show that the establishment is a new one started by the petitioner and it has nothing to do with the old establishment which was closed. The ratio of the decisions referred supra willfully cover the present case."

Even in the judgment cited by Shri Master, In the case of Laxmi Rattan Engineering Works (supra) the continuation of the working is emphasised. According to the ratio, the change In ownership or line of business makes no difference provided the establishment has continued to work all along.

In the present case, the textile factory was closed and therefore, there was no continuity of working. Secondly, the business of the earlier Company was textile and the business of the petitioner Company was manufacturing of stainless steel and other metal utensils. The textile factory was closed in 1982 and it was started as a manufacturing unit of stainless steel and other metal products in the year 1984. In the case before the Supreme Court the new establishment continued to work and continued to employ employees of the old establishment.

In the case of Sayaji Mills Ltd., (supra), the Supreme Court has in the facts and circumstances of that case-observed that change in ownership of factory and subsequent temporary interruption in running of the factory does not amount to establishment of a new factory. The Supreme Court, therefore, did not grant the infancy period of 5 years u/s 16(1)(b) of the Act. In that case, the appellant had re-started factory after investing some fresh capital in the business by renovating the machinery and had also employed 70% of the former employees. It had started the same plant and machinery and the same business. The Supreme Court has observed in para 11 as under :-

This is not a case where the old factory was reduced into scrap and a new factory was erected in its place. Nor can it be said that there was total discontinuity brought about between the old factory and the factory which was restarted after the appellant purchased it. The stoppage of production was brought about temporarily as stated earlier by the winding up order and the factory was restarted after it was sold to the appellant by the Official Liquidator. The finding of fact recorded by the Trial Court in this case which is affirmed by the High Court clearly establishes that it was the same old factory which recommenced production on November 12, 1995. What is of significance is that a substantial number of workmen and staff who were working under the former management had been employed by the appellant though it is claimed that they had entered into new contracts of employment. Mere investment of additional capital or effecting of repairs to the existing machinery before it was restarted, the diversification of the lines of production or change of ownership would not amount to the establishment of a new factory attracting the exemption u/s 16(1)(b) of the Act for a fresh period of three years."

The factors which are contemplated by the Supreme Court to exist are existing in

the present case. In our case, the old factory was reduced to scrap and a new factory was erected in its place. In our case also there was total discontinuity brought about between the old factory and the new factory. What was contemplated by the Supreme Court is present in our case. The Act would not apply if the old establishment comes to an end and a new establishment is born. It is further observed in para 12 of the said judgment as under :-

"On behalf of the appellant, reliance was placed on the decision of this Court in *Provident Fund Inspector. Trivandrum v. Secretary, N.S.S. Co-operative Society, Changanacherry*. That was a case in which the Secretary of a cooperative society which owned a press had been acquitted by the Magistrate of the charge of not complying with the provisions of the Act. The High Court had confirmed the order of acquittal. On appeal, this Court found that there was no ground to interfere with the acquittal. The defence of the accused in that case was that the Co-operative Society of which he was the Secretary had acquired the press in question in March, 1961 and had established a new press subsequently and hence the Act was not applicable to the press as the period of three years prescribed by Section 16(1)(b) of the Act had not expired. The evidence in that case showed that after the purchase, a new owner had come in the place of the former owner, the work of the press was stopped on the date of its sale and was started again after a break of three months, the machinery in the press was also altered and the persons employed previously were not continued in service. While a fresh recruitment of workmen had taken place, out of those workmen only six happened to be the former employees and compensation had been paid to the workmen at the time of the sale by the former owner. On these facts it was held that a new establishment had come into existence. 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.* 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 *Vitthaladas Jagannatahdas v. Regional Provident Fund Commissioner, Madras* 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 be contrary. The learned Trial Judge had held that the intention in this case was to maintain the continuity of the old factory. Hence the decision on which reliance is placed before distinguishable on facts is not of much use to the appellant."

In the aforesaid circumstances, the petition succeeds. The Impugned order of the respondent is quashed and set aside. The respondent shall adjust the amount which is already deposited by the petitioners with the respondent as against the

liability of the petitioners for the years 1984 to 1992 for the future period in accordance with law as I have already held that the petitioners were not liable to make any contribution from 1984 to 1991. Rule is thus made absolute with no orders as to costs.

10. The above order is stayed for a period of four weeks. Certified copy of the order is expedited.