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**(1979) 10 CAL CK 0008**  
**In the Calcutta High Court**

Pratap Ch. Sukhoni

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

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**Date of Decision :** 31-10-1979

**Acts Referred:**

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

**Citation :** (1980) 2 LLJ 296

**Hon'ble Judges :** Dipak Kumar Sen, J

**Bench :** Single Bench

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## Judgement

Dipak Kumar Sen, J.—Pratap Chand Sukhoni, the petitioner No. 1, carries on business at Kalimpong, in partnership under the name and style of Jetmull Bhojraj, the petitioner No. 2. It is not in dispute that the said business was originally carried on by a different partnership which was reconstituted from time to time. The said partnership was finally dissolved by a deed dated the 18th April, 1970, with effect from the 14th April, 1970, and the assets thereof were divided and partitioned between the partners thereof. Pursuant thereto, the petitioner No. 1 was allotted the business Jetmull Bhojraj at Kalimpong, and the petitioner No. 1 became the sole proprietor thereof, Subsequent thereto the petitioner again entered into a partnership in respect of the said business by a deed of partnership dated the 18th May, 1970, and the business is being continued by the new partnership.

2. It is also not in dispute that prior to its dissolution, the earlier partnership came under the Employees' Provident Funds and Family Pension Fund Act, 1952, and the scheme framed there under. By a letter dated the 13th June, 1970, the petitioner No. 1 informed the Regional Provident Fund Commissioner, West Bengal, about the dissolution of the earlier partnership and by letter dated the 1st July, 1970, gave a notice of discontinuance of membership from the provident fund.

3. On a subsequent query the Provident Fund Inspector was informed that on dissolution and partition of the earlier firm, Jetmull Bhojraj, Darjeeling, a new

business under the said name had been started at Kalimpong, Teesta Bridge and Siliguri and altogether ten persons were employed in the said business. As the Employees' Provident Funds Act, 1952, was not applicable to the new business it had discontinued the provident fund account maintained in the names of the employees of the earlier partnership who had been retained in employment in the new business.

4. On the 8th May, 1972, the Regional Provident Fund Commissioner, West Bengal and Andamans again issued a summons u/s 7A of the Act to the petitioner No. 1 alleging, inter alia, that he had failed to remit provident fund money in respect of the said business, Jetmull Bhojraj from July, 1970, till February, 1972, and had failed to furnish prescribed returns required to be submitted under the Act. The petitioner No. 1 was directed to appear before the Provident Fund Commissioner on the 10th May, 1972, to induce evidence and to produce all records for an enquiry and determination of the provident fund installments due.

5. On the 30th October, 1972, the Regional Provident Fund Commissioner issued another communication to the petitioner No. 1 stating inter alia, that has been ascertained on investigation that the petitioners had taken over possession of the Kalimpong Unit of the business, Jetmull Bhojraj, pursuant to the dissolution of the earlier partnership and had started a business under the same name and style with the same goodwill and the same set of employees. As the earlier partnership was already covered by the Employees' Provident Funds Act, 1952, it was obligatory on the petitioners to comply with the provisions of the Employees' Provident Funds Scheme, 1952, from the date of starting the new business. It was contended that a mere change of ownership did not affect the coverage of the establishment.

6. By further communications dated the 6th December, 1972, the 28th February, 1973, the 28th March, 1973, and the 2nd May, 1973, the Provident Fund Authorities reiterated their contentions and called upon the petitioners to comply with the directions given on the 30th October, 1972.

7. The petitioners by their letters, respectively, dated the 22nd March and the 3rd April, 1973, contended in reply that after the dissolution of the earlier partnership the new firm was commenced having its total number of employees below twenty and as such the Employees' Provident Funds Act, 1952, had no application to their case. There being genuine dissolution of the earlier firm, the old establishment ceased to exist and a new establishment came into existence.

8. Apparently the Provident Fund Authorities did not accept the contentions of the petitioners and by three letters respectively dated the 7th December, 1973, the 21st March, 1974, and the 6th July, 1974, the Provident Fund Inspector, West Bengal, called upon the petitioner to comply with the earlier directions to submit monthly returns in respect of payment of Provident Fund installments and to pay up the arrears of installments from the 14th April, 1970. By the last letter dated

the 6th July, 1974, the petitioners were informed that unless they paid up the entire dues and submitted all outstanding returns within the prescribed time legal action would be taken against the petitioners.

9. At this stage the petitioners moved this Court and obtained the present Rule on the 19th July, 1974, calling upon the respondents, namely, the Regional Provident Fund Commissioner, West Bengal and Andaman, the Provident Fund Inspector, West Bengal, the Inspector of Provident Fund, Darjeeling, and the Union of India to show cause why appropriate writs should not be issued directing them to act in accordance with law and not to proceed any further or take any action on the said notices issued by the Provident Fund Authorities and for setting aside or quashing the same. An interim order was also passed staying all further proceedings by the Provident Fund Authorities till the disposal of the Rule.

10. This application is opposed. An affidavit of one Sayed Ashfaq Ali, the Assistant Provident Fund Commissioner, West Bengal, affirmed on the 16th August, 1976, has been filed in opposition to the petition. It is, inter alia, alleged in this affidavit that inasmuch as the business of Jetmull Bhojraj was covered u/s 1(3)(b) of the Employees' Provident Funds Act as a composite unit under the head "Trading and Commercial" with effect from the 30th June, 1962, the dissolution of the firm had no effect on the continuation of the establishment. The contention of the petitioners relating to the number of employees in the establishment is not admitted and it is contended that the petitioners having continued the business under the same name and in the same premises came under the purview of the Provident Funds Act and the provisions of the Act continued to be applicable to the establishment of the petitioners. Accordingly it is submitted that the petitioners were bound to comply with the notices served on them.

11. The petitioner No. 1 has affirmed an affidavit on the 9th August, 1979, in reply to the said affidavit in opposition. It is reiterated in the said affidavit that after partition of the assets of the earlier partnership the number of employees in the new firm was only seven and below the number prescribed in the said Employees' Provident Funds Act. It is further alleged that presently there are only two employees in the said business.

12. At the hearing the learned advocate submitted in support of the respective contentions of the parties and very fairly brought to my notice the relevant decisions on the question involved, which are dealt in their chronological order hereafter:

(a) Pamadi Subbarama Chetty v. Mirza Mewar Ali, reported in AIR 1969 Mys 14. The facts in this case were that a partnership firm engaged in manufacturing silk goods and covered under the Employees' Provident Funds Act, 1960, was dissolved and by a registered agreement its assets and liabilities were divided between its two partners. About a year thereafter one of the partners in another

partnership started a business of manufacturing silk goods in the same premises using some of the looms used in the earlier business. The Provident Fund Authorities contended that the new business was also covered by the Employees' Provident Funds Act, 1952, and prosecuted the new partnership for contravention thereof. The petitioner was convicted at the trial but on appeal a single Bench of the Mysore High Court held that the conviction was not justified as the Act did not provide that the machinery of a factory was subject to any liability under the Employees' Provident Funds Act. It was held further that if one of the partners of the old firm started a new business with a part of the machinery which fell to his share, there was no presumption that the new factory would be part of the old factory and liable to contribute towards the provident fund of the employees irrespective of the number of the employees in the new firm.

(b) *T. Sadashiviah v. Mahadev* reported in AIR 1962 Mys 132. In this case it was held by a Division Bench of the Mysore High Court that before a person could be called upon to contribute to the Employees' Provident Fund under the Employees' Provident Funds Act, 1952, the requirements were that there must be a factory and fifty or more than that number of persons should be employed there. Unless these conditions were fulfilled, the liability to pay contributions to the Employees' Provident Fund would not arise.

(c) *Mohammed Kutti (K.M.) Vs. Regional Provident Fund Commissioner and Others*, . The facts in this case were that a rubber estate came within the ambit of the Employees' Provident Funds Act, 1952, and the Scheme framed there under. On the death of the owner the said rubber estate was partitioned between his sons and daughters. The part of the said rubber estate which was allotted to one of the heirs employed less than twenty persons and he claimed that the said part should be treated as a separate establishment and not liable to contribute to Employees' Provident Fund. It was held by a Division Bench of the Kerala High Court that the original establishment having been partitioned and split into three separate establishments had ceased to exist. It was further held that the applicability of the Employees' Provident Funds Act, 1952, in such a case depended not on the number of persons employed in the original establishment but on the number of persons employed by each of the separate establishment formed after the dissolution of the original establishment.

(d) *T.A. Zainulabdeen v. Regional P.F. Commissioner, Kerala*, reported in 1975 Labour and Industrial cases 412. In this case at the material time a rubber estate was being managed by a partnership, the partners whereof were the heirs of the deceased owner. Subsequently, the said rubber estate was partitioned into specific portions which were made over to the partners. Services of the workmen were terminated on due notice after payment of retrenchment compensation and provident fund benefits. The question arose whether the portions of the said rubber estate in the hands of the individual allottees continued to be covered by the Employees' Provident Funds Act and the Scheme framed there under. It was held by a Full Bench of the Kerala High Court that Sub-section (5) of Section 1 of

the Employees" Provident Funds Act did not prevent the disruption of an establishment and breaking up thereof into new and separate establishments either expressly or by implication. Where a disruption takes place by a partition and different establishments are created with less than twenty persons employed the liability under the Employees" Provident Funds Act did not continue and such separate establishments cannot be treated as departments or branches of the original establishment.

13. At this stage I may refer to the relevant sections of the Employees" Provident Funds Act, 1952.

Section 1(3)(a) of the said Act reads as follows:

Subject to the provisions contained in, Section 16 it (the Act) applies (a) to every establishment which is a factory engaged in any industry specified in Schedule 1 and in which fifty or more persons are employed?.

Section 1(5) provides as follows:

An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty.

14. In the instant case the dissolution of the original partnership and subsequent allotment of the assets thereof have not been disputed by the Provident Fund Authorities. The petitioner's allegation that the present establishment employs less than the prescribed number of employees which would bring it within the mischief of the Act has not been admitted. But no records have been produced before me to show that the petitioners employ the prescribed number of persons or more in their present establishment. There is not even a positive averment in the affidavit on behalf of the Provident Fund Authorities as to the actual number of persons employed in the present establishment.

15. I respectfully agree with the views expressed by the High Court of Mysore and Kerala and hold that there is no provision in the Employees" Provident Funds Act, 1952, which lays down that an establishment covered under the said Act and the scheme there under can never be disrupted or dissolved or that the assets of such an establishment if utilised in another establishment would make the latter a part or a continuation of the former.

16. The facts admitted in the instant case are that the original partnership was dissolved by a deed and its assets were divided and allotted to the partners. Subsequently another business was commenced in the same name and at the same place as that of the original partnership. The ownership and organisation of this business and its establishment are admittedly different from those of the original business and the establishment. Some of the employees of the earlier establishment have no doubt been employed in the subsequent establishment but it does not follow that the two establishments are one and the same or that the latter is a continuation of the earlier.

17. For the above reasons, the petitioners succeed in this application. A writ in the nature of mandamus will issue directing the respondents not to give any or any further effect to the impugned notices respectively dated the 18th June, 1970, the 7th May, 1972, the 30th October, 1972, the 28th February, 1973, the 28th March, 1973, the 2nd May, 1973, the 7th December, 1973, and the 6th July, 1974. A writ in the nature of prohibition will also issue commanding the respondents to refrain from taking any further steps pursuant to the impugned notices.

18. The Rule is made absolute to the extent as aforesaid. There will be no order as to costs.