

(1967) 09 KL CK 0007
In the High Court Of Kerala

Provident Fund Inspector

APPELLANT

Vs

N.S.S. Co-operative Society

RESPONDENT

Date of Decision : 06-09-1967

Acts Referred:

Employees Provident Fund Act, 1962 — Section 14, 14A

Citation : (1967) 2 LLJ 821

Hon'ble Judges : K. Sadasivan, J

Bench : Single Bench

Judgement

K. Sadasivan, J.—These appeals are directed against the decision of the Industrial Tribunal and Special First Class Magistrate (for Labour Laws), Alleppey, in Calendar Cases Nos. 357 to 368 of 1966 on the file of his Court. Those are cases filed by the Provident Fund Inspector, Trivandrum, against the Secretary, N.S.S. Co-operative Society, Changanacherry, for contravention of the provisions of the Employees' Provident Funds Scheme, 1952 (shortly stated the scheme). The specific charges brought against the accused were that he failed?

(1) to pay to the employees' provident fund the employees' and the employer's share of contribution together with administrative charges for the wage-month of May 1961 to February 1964;

(2) to submit the returns in forms 5 and 10 for the wage-months of May 1961 to February 1964;

(3) to send statement of recoveries of contributions in form 12 for the wage-months of May 1961 to February 1964; and

(4) to send the initial return in form 9 showing the particulars as on 30 April 1961 along with form 2 in the manner specified under Paras. 38 (1), 36 (2)(a), 36 (2)(6), 38 (2) and 36 (I), respectively, of the scheme.

According to the complainant the failure to make the above payments and submission of returns, etc., was wilful and thereby the accused has committed

offences punishable under Paras. 76 (a), 76 (c) and 76 (e) of the scheme read with Sections 14 and 14A of the Employees' Provident Funds Act, 1962 (shortly stated the Act). By a letter dated 30 September 1964 the accused was given a further opportunity to comply with the above provisions of the scheme within ten days; but that demand was not complied with. Accordingly the prosecution was launched with the necessary sanction as provided under 13.14 of the Act. The details of the defaults in each case have been given in the complaint, Pursuant to the summons, the accused appeared and pleaded not guilty. His case is that the establishment in question would not come within the purview of the Act and the scheme. In any event he is entitled to the protection u/s 16 (1)(t) of the Act. It was further urged by him that the establishment had emerged as a fresh concern after the purchase of the machinery of the old concern. Even though some of the old employees were also taken into the service, the concern was entirely a new one, and a different entity altogether. The learned Magistrate accepting this plea of the accused has acquitted him. It is against the order of acquittal that the complainant has come up in appeal.

2. I was taken through the evidence in the case and also the various authorities bearing on the subject to show that the establishment in question was not a new one, but the old concern itself though continued by adding some more labourers and also a few more machinery. The complainant's definite case is that the printing press would come within the purview of the Act. The Section was having a press at Trivandrum and the secretary of the No. 8. Co-operative Society was the employer of the said press from 21 March 1961 to 15 March 1964. The press was purchased by the N.S.S. Co-operative Society from the Travancore-Cochin Central Co-operative Printing and Publishing Co-operative Society, in April 1961. The Travancore-Cochin Central Co-operative Printing and Publishing Co-operative Society, Ltd. and the N.S.S. Cooperative Society are two different legal entities. The main work carried on in the N.S.S. Co-operative Press was the printing of the newspaper Malayana, Besides this, other piecework was also being undertaken. After the purchase, the press was removed to another place. According to P.W. 1, at the time of the purchase the compensation due to the workmen was disbursed by the vendor-society itself. There were only nine workers in the press at the time. Out of this, six were taken by the purchaser to work under him and together with a few others the business was carried on under the accused. The case of the accused is that at the time of the purchase the establishment had, in fact, been closed down and the work in the press had come to a standstill and thereafter it was re-started as a new concern. D.W. 1 has stated that the workers of the predecessor-society were not taken in under the successor-society and actually the press started functioning under the N.S.S., only from July 1961. That work could be started only after the installation of the new machinery which were brought from Changanacherry and Coimbatore. According to him there was no continuity of the work of the press at all. It is mainly on the evidence of D.W. 1 that the learned Magistrate has found that after the purchase, the concern proceeded to function as a new establishment. This

finding cannot be supported. Change of management or ownership will not transform the business; nor would the change of workers give a new garb and shape to the business, The following observation of the learned Magistrate is significant:

In the instant case, it has come in evidence that by the sale deed the printing press was not purchased by the accused-society as a going concern. Again, although the machinery were purchased, the accused-society has begun their establishment only after purchasing new machineryTherefore, in the light of the circumstances, in the instant case, It cannot be considered that the N.S.S. Press, Trivandrum, is a continuing concern of the press run by the T.-C. Central Co-operative Printing and Publishing Society, Ltd.

The above reasoning, I do not think, is correct, " The question " as has been held by a Division Bench of this Court in Shanmugam Chettiar v. Regional Provident Fund Commissioner 1965 II LLJ 654

is one which has to be decided on the facts of each case. The change of ownership of one establishment is not the end of the establishment and the commencement of another. All facts and circumstances have to be taken into consideration before a conclusion is reached.

3. The decision in *Devi Press Vs. Regional Provident Fund Commissioner, Madras and Another*, I think, is on a par with the present case. There a public limited company by name *Devi Press, Ltd.*, was running a printing press. The company was wound up as a result of voluntary liquidation. The entire print press machinery with all its accessories together with types and furniture were sold to the managing agents who later on formed a partnership and commenced to run the printing press. The licence under the Factories Act was transferred to the vendees. The services of all the employees were terminated and their accounts were settled. Most of the old employees were reemployed as fresh entrants by the vendees, who commenced their business on 23 January 1947. In 1959 the Regional Provident Fund Commissioner called up the vendees for contributions under the Employees' Provident Funds Act, 1952. The purchasers raised the contention that the date of establishment for purposes of deciding the applicability of Section 16 of the Act should be taken as 23 January 1957, when they commenced the business and hence they could not be called upon to pay the contributions under the Act till January 1960 which contention was rejected by the Regional Provident Fund Commissioner. In appeal the Madras High Court held:

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-firm. The fact that the claims of the workers vis-a-vis the old company were settled up to the date of winding up of that the workers were reemployed by the petitioner-firm would not

in any way touch upon the question as to the date on which the establishment came into existence. Hence, the date on which the establishment came into existence for the purposes of deciding the applicability of Section 16 of the Act would be not 23 January 1957, but the date on which the old Devi Press, Ltd., came into existence.

Thus It could be seen that change of management or change of workers or machinery will not effect a change in the business as such. The business is the same as it was at the time of the purchase. In the circumstances, it would be unreasonable to hold that after the purchase, in view of the fact that the management had changed and new workers and machinery were employed, a new concern had come into existence different from the one before purchase. The learned Magistrate's conclusion is hence incorrect.

4. But the order of acquittal can be supported on another, more important, circumstance. It is the admitted case of the complainant that at the time of the purchase there were only nine workers in the press (P. W. 1 had admitted this in his deposition). For an establishment to come under the purview of the Act there must at least be 20 persons working therein. So at the time of the purchase the present establishment was one not coming within purview of the Act. The purchase was on 21 March 1961. The establishment, even if construed as one coming within the purview of the Act after the purchase, is entitled to protection u/s 16 (1)(6) of the Act. The section reads?

This Act shall not apply to?

* * * (b) any other (establishment) established whether before or after the commencement of this Act, unless three years have elapsed from its establishment.

The principle is that for at least three years the establishment will be considered as an infant establishment standing in need of protection. During this infancy the establishment will, therefore, be exempted from all obligations under the Act including the provident fund contribution. To sum up, the establishment before it was purchased by the respondent was one not coming under the purview of the Act and after the purchase it was entitled to infant protection which would last for three years from 21 March 1961. The contributions now claimed and for the non-payment of which the prosecution has been launched are the contributions due from the concern between the years 1961 and 1964 which by virtue of the protection afforded u/s 16 (1)(b) the respondent was not obliged to pay. The acquittal, in the circumstances, is proper and I see no reason to interfere.

5. In the result all these appeals are dismissed.