
(1976) 10 DEL CK 0010

In the Delhi High Court

Case No : Civil Writ Petition No. 637 of 1968

Radha Kishan Bal Kishan Muchhal and Co.

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 18-10-1976

Acts Referred:

Citation : (1977) ILR Delhi 162 : (1977) LabIC 1041

Hon'ble Judges : A.B. Rohtagi, J

Bench : Single Bench

Advocate : Ravinder Sethi and A.B. Saharia, for the Appellant;

Judgement

Avadh Behari Rohatgi, J.

(1) On November 12, 1957, four persons-Brij Lal Kejriwal, Hari Chander Kejriwal, Smt. Sushila Devi Singhania and Smt. Gita Bai Jalan-formed a partnership to carry on business at shops 266-268 Katra Pyarelal, Chandni Chowk, Delhi, This partnership had an agency of sale and purchase of cloth of M/s. Biria Cotton Spinning and Weaving Mills Ltd. The shop was called Biria Mills Cloth Shops. This partnership carried on business from 1957 till 19th July, 1962 when Biria Cotton Spinning and Weaving Mills Ltd. terminated the agency held by the said partnership.

(2) The partnership of 1957 was immediately succeeded by a new partnership which was formed on August 16, 1962. The new partnership consisted of five partners. One partner common in the old and new partnership was Brij Lal Kejriwal. The new partnership was called Radha Kishan Bal Kishan Muchhal & Co., petitioners in this case.

(3) This partnership came into existence on 16th August, 1962. A deed of partnership was executed between four persons. Two minors were admitted to the benefit of partnership. The object of the partnership was to carry on business of purchase and sale of cloth, brokerage and commission agency in cloth manufactured by M/s. Biria Cotton Spinning and Weaving Mills Ltd.

(4) On August 18, 1962, Biria Mills appointed the petitioners as their selling agents of cloth manufactured by the mills. An agency agreement in writing was made on August 18, 1962 incorporating the various terms. One of the terms was that the petitioners were to maintain separate account of the sale of mill's clothes. The petitioners were to get commission from the mills on the sales.

(5) After August 16, 1962, the petitioners employed more than 20 persons in their establishment. This establishment was called by them "Birla shop".

(6) The respondent the Regional Provident Fund Commissioner (Commissioner) issued notice to the petitioners. He called upon them to comply with the provisions of the Employees' Provident Fund Act, 1952 (The Act). He started an enquiry u/s 7A of the Act. He found that a sum of Rs. 14,772.75 on account of employers' contribution and another sum of Rs. 227.50 on account of administration charges were due from the petitioners. He called upon them to pay these amounts. The petitioners refused. Their case was that they are a new establishment u/s 16(l)(b) of the Act and Therefore were entitled to an infancy protection for 5 years from the date of the commencement of the partnership business on 16th August, 1962. The Commissioner did not accept this contention. He started proceedings for recovery of the amounts as arrears of land revenue.

(7) On 19th August, 1968 the petitioners brought the present writ petition claiming a certiorari seeking to quash the determination of the Commissioner.

(8) The Act : Before we go into the facts of this case let us acquaint ourselves with the Act. The Act was brought on the statute book for providing for the institution of provident fund for the employees in factories and other establishments. The basic purpose of providing provident fund appears to make a provision for the future of the industrial worker after his retirement or for his dependents in case of his early death. To achieve this ultimate object the Act is designed to cultivate among the workers a spirit of saving something regularly, and also to encourage stabilisation of a steady labour force in industrial centres. This Act has since its enactment been amended several times to extend its scope for the benefit of industrial workers.

(9) The Act is intended to apply only where an establishment has attained sufficient financial stability and is prosperous enough to be able to afford regular contribution provided by the Act. Contribution by the employer is an essential part of the statutory scheme for effecting the object of inducing the workmen to save something regularly. The establishment, Therefore, must possess stable financial capacity to bear the burden of regular contribution to the Fund under the Act. (The Regional Provident Fund Commissioner, Andhra Pradesh Vs. Sri. T.S. Hariharan,).

(10) The Act applies to a newly started business as well as to a business which has been in existence before. Section 16(l)(b) exempts a period of infancy in order to enable an establishment to stand on its own feet.

(11) By section 1(3) it is open to the Central Government to bring within the scope of the Act any establishment (other than a factory engaged in any industry specified in schedule 1) employing 20 or more persons. By virtue of a notification issued such establishments are brought within the scope of the Act. But section 16 has no relevance to the date on which such notification has been issued. It gives the period of protection of 3 or 5 years as the case may be not from the date on which any establishment is brought within the scope of the Act by virtue of a notification, but from the date on which the establishment is or has been set up. The word is in the sub section clearly indicates a newly started business and the word p "has been" indicates a business which has been in existence already before. The period of infancy is to be calculated from the first day of the establishment of the factory and not from the moment of time when the figure of employment of 20 or more workmen is first reached. [S. 16(1)(b) See : State of Punjab v. Satpal 1970 S. C. 665.

(12) The Act is a welfare legislation. It is a measure of social justice or what is now called distributive justice. What should be the manner of our approach to a piece of legislation such as this one in the welfare state? There should be, as Lord Diplock has said recently:

A purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them.

(R. V. National Insurance Commissioner (1972) Ac 914.

(13) With this in mind we approach section 16 of the Act with I which we are concerned in this case. Section 16 reads:

The Act shall not apply- (a) to any establishment registered under the Co-operative Societies Act, 1912, or under any other law for the time being in force in any state relating to co-operative societies, employing less than fifty persons and working without the aid of power; or (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. (2) If the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case. it is necessary or expedient to do so, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt that class of establishments from the operation of this Act for such period as may be specified in the notification.

(14) The intention behind section 16 lead with paragraph 26 of the Scheme framed under the Act is to give a breathing time to new establishments. That reason does not hold when the establishment is already old and well founded (R.

Ramakrishna Rao Vs. State of Kerala,).

(15) Section 16(l)(b) gives an infancy protection to an establishment for a period of 5 years from the date on which the establishment was first set up if the establishment employs twenty or more but less than fifty persons. How are we to find the date of the establishment? That is the principal question. A simple answer would be : from the date of its foundation or setting up. But the question is easier asked than answered. Suppose the ownership changes. Can the establishment be said to continue? With every change of ownership will there be a new establishment? We will have to find a test. The Act does not lay down a test. It has to be ascertained from the Act as a whole.

(16) In Lakshmi Rattan Engineering Works v. Rpf Commissioner 1966 (1) LlJ 741 the Supreme Court gave us the test. That was the first case to go to the Supreme Court on section 16. The test is "continuity of working". The Supreme-Court said:

....A mere change of ownership would make no difference to the date of establishment of the establishment so long as there was continuity of working

(P. 743). The application of the test to the facts of a given case gives rise to difficulties.

(17) Neither the Act nor the Scheme provides tests for determining when an establishment can be said to have been established. The decided cases disclose a wide variety. Some are straight and simple. There a black-and-white approach will do. In others there are varying shades of gray.

(18) The statute is quite general, as I have said. I propose to start with a negative approach. What are those factors which do not affect the "continuity of working" of an establishment? Let us prepare a working catalogue. The following factors have been held by judicial decisions not to affect the continuity of an establishment :

1.Change of location.-Explanation to section 16(l) lays down that the date of the establishment of an establishment shall not be deemed to have been changed by reason of a change of the premises of the establishment. The change in the location of the establishment will not affect the date from which the establishment began, provided there was continuity of working.

2.Change of ownership.-The fact that there has been a change in the ownership makes no difference to the counting of the period of 3 or 5 years as the case may be, so long as the establishment has continued. If A takes over a running factory and agrees to employ all the workers working at the establishment at the time of the purchase he cannot say that the period of exemption should count from the date of his purchase (Lakshmi Rattan's case Supra).

3.Change of line of business.-A mere change in the line of business will not make any difference to the date of the first establishment. For example after taking

over the factory A changes the line of business from the manufacture of diesel engines to the manufacture of parts of textile machinery. This makes no difference (See Lakshmi Rattan's case Supra). Similarly change in the manufacturing process is not vital to the application of section 16. (See State of Punjab Vs. Satpal and Another,).

4.Change of composition of partners.-In State of Punjab Vs. Satpal and Another, one Tirath Ram started a factory on November 9, 1957. The factory was manufacturing tawas and chaff cutter blades. In September, 1962 Satpal and three others joined Tirath Ram as partners. The firm continued under the same name till February 13, 1963. On that date the old partnership was dissolved. Tirath Ram went out of the business and the remaining parties continued running the factory conjointly. Later on the factory was removed to new premises. The business was changed from manufacturing tawas to the manufacture of iron nails for shoes for the bullocks. It was held that the same factory continued in spite of the change of premises and manufacturing process. The Court said:

The next submission on behalf of the respondents is that the partnership changed and Therefore a new business came into existence. Here again, we are not concerned with the law of partnership but with the Employees Provident Funds Act. The law takes into account only the existence of establishments and the employment of a certain number of persons in factories over a given period. It is for this purpose that change of location or change of composition of partners or even a change in the manufacturing process is not considered vital in the application of this law", (p. 657).

5.Employment and recruitment of new employees in the new concern will not make it a new establishment. Suppose a new concern or a new lessee recruits workers and makes an announcement by notice that the workers recruited by the new management will not be entitled to any benefit which may have accrued to them by reason of previous service in the factory or commercial establishment it will not make any difference. It cannot be said that it is a new establishment: See Sayaji Mills Ltd. Vs. P.A. Bhaskar, .

6.Intervening closure and temporary discontinuance of business.-A closure for a short duration will not make the establishment a new business and a new establishment. A temporary cessation of the activities of an established factory cannot lead to the result that: the factory ceases to be established for the purposes of the Act, (See Sayaji Mills Ltd. Supra).

(19) This negative approach is in a sense misleading. Every single factor stated above and taken in isolation, it is true, is not an index of a new establishment. But several factors in conflation and combination may well indicate that a new, establishment has been set up. The decided cases give us a miscellany of indicia to distinguish a new establishment from an old one.

(20) Let us now examine the cases decided during the last 25 years since the Act came into force to see how and what test has been applied. These cases may be

catagorised under the following heads : 1. Cases of leases.

(21) Regional Provident Fund Commissioner Vs. Vittaldas Jagannathadas, . This is a typical case. Members of a joint Hindu family owned a theatre known as Maharani Talkies in Madras. The theatre had land, buildings, talkie equipment machinery, fittings and furniture. The owners leased it to two persons. In execution of a decree possession was taken from them. For some time theatre remained vacant. A second lease was given to one Munrathnam Naidu. He was running the cinema and making provident fund contributions to the Commissioner in pursuance of the demand made on him. His lease expired. Lease was given to a third lessee, the respondent company. The respondent claimed that their establishment was not the same establishment as of the previous lessee of Maharani Talkies, but that it is a new establishment entitled to an exemption for a period of 5 years from 1st April, 1962, the date of the commencement of their lease

(22) Anantanarayanan, J. who heard the matter in the first instance held that the respondent company was a fresh legal entity and the old establishment had totally come to an end. The fresh legal entity, he decided, was entitled to infancy protection for 5 years and it did not matter that a large part of the personnel of the previous establishment was employed by the respondent company. He decided in favor of the new lessee. His judgment is reported as Vittaldas Jagannathadas and Another Vs. The Regional Provident Fund Commissioner, Madras and Another, . In the course of his judgment Anantanaryanan, J. said:

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 form also. But where, in reality, the old establishment, has come to and end, and 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.

(23) The Commissioner appealed. The division bench (Ramakrishnan and Sadasivan JJ.) reversed the single judge and held that the lease taken by the respondent company to run the Maharani Talkies did not make the establishment a new one for the purposes of the Act and the respondent company was not entitled to the infancy protection u/s 16(I)(6) of the Act. The division bench said:

.....Exemption available u/s 16(I) of the Act is to the organization or establishment itself as such, and not to the owner or lessee, or manager thereof and that it cannot be postulated that each time there is a change of hands, a new establishment has been set up. It is clear from that decision that a mere change of hands would not clothe the establishment with a newness

To quote them again:

The mere fact that there is a new lessee at different points of time does not mean that the establishment of the cinema theatre comes into existence each time a new lease is created.

(24) The bench followed two earlier decisions of the court. One was R.L. Sahni and Co. Vs. Union of India and Another, and the other was Devi Press Vs. Regional Provident Fund Commissioner, Madras and Another, . The division bench decided that every fresh lease cannot give rise to the setting up of a new establishment. The principle enunciated by the division bench is unexceptionable. The learned single judge was wrong in holding the contrary.

(25) This decision of the division bench in Regional Provident Fund Commissioner Vs. Vittaldas Jagannathadas, has not been noticed in several decisions. It has lain in obscurity. The industry of the counsel did not bring it to the notice of the courts. The result was that from 1965 till 1976 judges have expressed vigorous dissent from the view of Anantanarayan, J. but did not take note of the fact that the decision of the learned single judge in Vittaldas Jagannathadas and Another Vs. The Regional Provident Fund Commissioner, Madras and Another, was upset in appeal in Regional Provident Fund Commissioner Vs. Vittaldas Jagannathadas, . In fact even before the appeal was heard by Ramakrishnan and Sadasivarn, JJ. another division bench of the Madras High Court (P. Chandra Reddy, C.J. and Natesan J.) in R. L. Sahni's case supra had overruled the view of Anantanarayanan, J.

(26) R. L. Sahni's case supra was also a case of lease of a cinema. This time it was Raj Kumari Theatre. The facts were very much the same as in Vittaldas's case supra. R. L. Sahni's case was followed by the division bench in Vittaldas Jagannathdas's case.

(27) The decision of the division bench of the Madras High Court in Regional Provident Fund Commissioner Vs. Vittaldas Jagannathadas, was not brought to the notice of the court in Sayaji Mills Ltd. Vs. P.A. Bhaskar, where Chandrachud, J. (as he then was) speaks of the "discordant note" struck by Anantanarayan, J. Similarly in The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, the Supreme Court quoted the passage from the judgment of Anantanaryan J. which I have set out above with approval. But it must be clearly noted that only the observations extracted above were approved by their lordships of the Supreme Court. This does not necessarily lead to the inference that their lordships approved of the entire judgment of Anantanaryan, J.

(28) Again in a recent Gujarat decision P.G. Textile Mills (Pvt.) Limited, Baroda Vs. Union of India and Others, the judgment of the division bench Rpf Commissioner vs. Vittaldas Jagannathdas has not been noticed though the judgment of Anantanarayan J. and the Supreme Court decision in The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, have been referred to.

(29) The decision of the division bench in Rpf Commissioner v. Vittaldas Jagannathdas (supra) is of considerable importance. It was I think rightly decided. It is difficult to agree with the view of Anantanarayan, J. That was the view of Chandrachud J. also without knowing that the decision of Anantanarayan, J. had been upset in appeal. [See : Sayaji Mills Ltd. (Supra)]. Speaking for the division bench he said:

In the case of a lease of a cinema house, it would, in my opinion, be difficult to hold that the new lessee who conducts the same business has set up a new establishment so as to be able to claim the exemption u/s 16(I). If a new lessee or a new purchaser comes on the scene one may say that a new concern has come into existence. What is, however, relevant for the purposes of Section 16 is not whether it is an old or a new concern, but whether it is a new establishment.

(30) Chandrachud J. refers to R. L. Sahni's case where the view of Anantanarayan, J. was overruled. But Rpf Commissioner (Supra) was not noticed. It is just possible that the division bench judgment of Madras which was delivered on 18th October, 1968, had not been reported till 25th August, 1969 when Chandrachud, J. delivered the judgment of the division bench in Bombay.

(31) In Sayaji Mills Ltd. Vs. P.A. Bhaskar, One Hirji Mills Ltd. was ordered to be wound up. The plaintiff company purchased the assets from the official liquidator. After the purchase the plaintiffs commenced their manufacturing operations on 12th November, 1955. On being asked by the Commissioner to contribute to the provident fund the plaintiffs claimed that they were an infant factory u/s 16. The commissioner rejected the contention. The plaintiffs brought a suit. The trial judge held that the plaintiffs were not a new factory. On Appeal the High Court confirmed the decision of the trial court. Chandrachud, J, who delivered the judgment of the division bench said:

.....Whether a particular establishment is an infant factory, must primarily depend upon the facts and circumstances of each case. The mere circumstance that the ownership has changed hands, cannot justify the conclusion that the Act will cease to apply to the particular establishment if prior to the change of hands, the Act was applicable to it.

(p. 421). In the course of his judgment he said:

SECTION 16(I) creates an exemption in favor of infant factories, not in favor of new or infant owners. In terms, the exemption is created by the statute in favor of factories and not in favor of persons who run those factories. The circumstance Therefore, that the Hirji Mills Ltd., changed hands cannot give to the plaintiffs the benefit of the exemption contained in section 16(I)" (p. 421).

(32) Chandrachud, J. followed an unreported decision of Tendolkar J. in Chhanganlal Textile Mills Pvt. Ltd. vs. Regional Provident Fund Commissioner (12) decided on November 5, 1956 which is "the starting point of almost all of these decisions". Tendolkar, J. was also dealing with a case where a company

was wound up. The liquidator gave a lease of the Mills to one Kotak & Co. On the termination of the lease the lessee discharged the employees and paid them their dues. The liquidator then granted a lease to Babulal Srivallabh for one year. The lease provided that the lessee shall not be liable for the past liabilities of the mills and that they shall work the Mills as a new concern and not as successors either of the Lesser or the lessee Kotak & Co. The new lessee Babulal Srivallabh recruited the workers and announced by notice that the workers would be recruited on a new temporary basis and would not be entitled to any benefit that may have accrued to them by reason of their previous service in the Mills. Finally the liquidator sold the mills to the new lessee. The new lessee claimed that they were entitled to an exemption u/s 16(I). Hendolkar, J. rejected the contention. He held that there was a temporary cessation and discontinuance of business but no new establishment was set up.

(33) In the Bombay decision of Sayaji Mills the Supreme Court decision in Lakshmi Rattan was not noticed though the decision of the Punjab High Court in Regional Provident Fund Commissioner, Punjab and Another Vs. Lakshmi Ratten Engineering Works, Ltd., (Dulat ar Dua, JJ) from which appeal went to the Supreme Court is referred to.

(34) In P. G. Textile Mills v. Union of India (1976) 1 LlJ 312 (Supra) a division bench of the Gujarat High Court in a case of sale on winding up held that on purchase there was a new establishment. The facts were quite interesting. Baroda Spinning and Weaving Mills Co. Ltd. was wound up. The official liquidator was authorised to sell the properties of the company. In the meanwhile Gujarat State Textile Corporation took over the textile unit on lease for two years to give unemployment relief to workers. The Central Government gave infancy benefit for a period of 3 years u/s 16(I)(b). On the expiry of the lease the properties of the Mills were sold to the petitioner company. Sale was confirmed. Deed was executed. Possession was delivered. The petitioner started the mill from May 15, 1972 after spending 18 lacs on new machinery. The petitioner approached the Central Government u/s 19A and asked for infancy benefit. The Central Government declined. They held that it was the old establishment and had enjoyed infancy benefit under the State Corporation. The company challenged the order in writ proceedings.

(35) The division bench (Mehta and Desai JJ.) decided that the old company's business was completely wound up after it was closed in 1966 and the new purchaser came on the scene at the court sale of the assets of the old company. It was held that the new employer had no continuity with the past as the old company was wound up and its business had finally closed down. Mehta J. speaking for the court said:

Therefore, not only so far as the employer is concerned it is totally a new concern which has severed all connection with the old company and the corporation, but in so far as the employees are concerned, there is not an iota of evidence for showing any content duty either with the old concern or with the

Corporation because they had accepted employment only as fresh recruits with the petitioner company.

The learned judges went on to say:

The question of continuity will have to be examined not merely from the fact that it is the same site or part of the machinery is the same machinery or even the employees are the old employees. The correct test as laid down by their lordships is that there must be continuity so far as the employer, employees and their joint venture or the establishment is concerned, and it is such a continuity in the change which keeps the identity intact.

The conclusion was that:

The sale is not of a going establishment.

(36) The significant feature of the case is that as a result of a written agreement it was agreed that the services of the employees with the Textile Corporation were to be finally terminated and the employees were to look for their legal dues to the Textile Corporation. It was also agreed that the petitioner company would start the mills and would be entitled to employ afresh such number of workers as required by it as new employees. Therefore, the employees had their services terminated by the old company and by the Textile Corporation and they had agreed to close down their accounts with them before they were employed afresh by the petitioner company. On these facts the court said:

The old concern or the concern of the Corporation had nothing to do with the concern of this new employer which has recruited all the employees afresh, even though they may be old employees.

(37) The division bench rested its decision on these factors:

- 1.It was not a sale of a going concern.
- 2.Continuity was completely broken. The business of the old establishment was completely closed "giving rise to the new" establishment.
- 3.Employment of a large part of the personnel of the previous establishment did not make it the same old establishment.
- 4.Rs. 18 lacs was spent on additional machinery to make the Mills a viable unit.
- 5.Temporary cessation of work from February 3, 1972 to May 15, 1972 when the petitioner company started the Mills did not matter.
- 6.That the very fact that the Central Government granted infancy benefit to the Textile Corporation showed that it recognised break in continuity with the old establishment.

(38) In the result the order of the Central Government was quashed. The court relied on *The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-*

operative Society, Changanacherry, to which I shall now turn. In *The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry*, purchased on 21st March, 1961 a press from the Travancore-Cochin Central Printing and Publishing Co-operative .Society Limited. This printing press was set up in 1946 and it continued in existence when in March 1961 the press was purchased by Nss Co-operative Society. The Nss Cooperative Society maintained that it was not an old establishment and that it must be regarded as a new establishment from 1961 and secondly that for a period of three years from April, 1961 the provisions of the Act would not apply to this establishment because of the provisions contained in section 16(1)(b) of the Act. On a discussion of the entire evidence the Supreme Court accepted the following conclusions of fact:

1. There was no continuity of business.
2. The services of the workmen of the old establishment were terminated. The recruitment of workmen was undertaken by the new establishment.
3. The machinery in the press was altered. Bhargava J. speaking for 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 yes available to the respondent from June or July, 1961 when the new establishment was set up.

(39) The Court was referred to a decision of Srinivasan, J. in *Devi Press vs. Rpf Commissioner (Supra)*. In that case a public limited company known as *Devi Press* went into liquidation. Its two managing agents purchased the machinery, its accessories and the furniture of the company. They formed a partnership on January 25, 1957 to carry on the business of printing. The factory and corporation licenses were transferred in the name of the partnership. The partnership also obtained lease of the premises. The reasons for winding up business of the company were not apparent from the records of the resolution passed by the company but the dissolution took a week or ten days before the date of the issue of the notification making the Act applicable to the company. On the closure of the company disputes that arose between the workers and the management were resolved amicably and the workers except those in one department were paid compensation and recruited by the partnership as new

employees.

(40) In 1959 the Commissioner called upon the partnership firm to comply with the requirements of the provident fund scheme. The partnership firm pointed out that the firm came into existence only in January 1957 and that the provision of the Act would apply only after 3 years of its life having been completed. The Commissioner rejected the claim of the partnership firm holding that the liquidation of the former company would not have the effect of postponing the applicability of the Act. He also contended that the petitioner firm had taken over the machinery of the former company and was also housed in the same premises as the old company and Therefore the exemption contemplated by section 16(1) did not apply.

(41) The partnership firm challenged the decision of the commissioner in writ proceedings. Srinivasan J. held that the old establishment continued and the date on which the establishment came into existence was not 25th January, 1957 the date of the formation of the partnership but the date on which the old Devi Press came into existence and Therefore the partnership was not entitled to an infancy protection. Srinivasan, J. held that the old establishment continued.

(42) The learned judge took the following factors into consideration:

1. that the company was wound up a week or ten days before issue of notification making the Act applicable to the printing industry.
2. that in effect it was a sale of a going concern.
3. that the entire machinery, furniture etc. were taken over by the new partnership.
4. that the factory and the corporation licenses were transferred in the name of the partnership firm.

As regards the recruitment of the workers the judge said:

The fact that the claims of the workers vis-a-vis the old company were settled up to the date of the 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.

(43) The Supreme Court did not express any opinion on the correctness of this judgment. Without expressing any opinion as to whether the learned judge was correct in holding that there was continuity of business in that case, their lordships said that the very fact that he held the establishment not to have been newly established on the ground that it was a transfer of a going concern distinguished that case from the case before them. In the Supreme Court case of N.S.S. Co-operative Society (supra) on the facts established the court held that the old business had been closed and restarted as a new business after recruiting new workmen. The court referred to Vittaldas Jagannathadas and Another Vs.

The Regional Provident Fund Commissioner, Madras and Another, and quoted the observations of Anantanarayan J. extracted above with approval.

(44) It is difficult to reconcile the decision of Srinivasan, J. with the Supreme Court decision. Before Srinivasan, J. there were two dominant facts:

1.that the old company was wound up a week or ten days before the Act was applied to the printing industry, and

2.that the licenses were transferred to the partnership.

On these facts obviously Srinivasan J. was right in "holding that it was the old establishment under a new name. But the question remains whether the Supreme Court decision in N.S.S. Co-operative Society (supra) can be reconciled with the case of Lakshmi Rattan (supra). Their Lordships distinguished the case .from Lakshmi Rattan's case on the ground that there was no continuity of business. But the question is: do the following factors viz., (1) a sale, (2) a break for three months, (3) alteration of the machinery, (4) fresh recruitment of employees (5) payment of compensation to the workmen at the time of sale by the previous owner ; make the establishment a new establishment? A sale does not necessarily mean that a new establishment has come into being. This is settled law that the change of ownership does not mean a new establishment. That the original machinery was altered is also of not much consequence. That there was a temporary cessation of activities cannot lead to the result that the establishment ceases to continue for the purposes of the Act. That compensation was paid to the workmen at the time of the sale by the previous owner and there was a fresh recruitment of employees by N.S.S. Cooperative Society does not necessarily lead to conclusion that it was a new establishment. If that were so, as Tendolkar, J. said in the unreported judgment (referred to in Sayaji Mills Ltd. Vs. P.A. Bhaskar,).

....The class of employers who spare no ingenuity in seeking to deprive the employees of all the benefits conferred upon them by statute would have convenient handle whereby the activities of an established factory have to be discontinued for a few months in order to deprive the employees of the benefits under the Employees Provident Funds Act.

(45) It appears that the Supreme Court decision in N.S.S. Coperative Society is irreconcilable with Sayaji Mills Ltd. Vs. P.A. Bhaskar, and other cases on this subject. The Supreme Court decision is binding on all courts. But a decision, is an authority only for what it actually decides and the same set of facts seldom repeat themselves.

(46) Another decision to which reference may be made is Kubera Press vs. Rpf Commissioner, Madras 1968 (2) Lj 799. In that case the original printing press was owned by a proprietor. In 1960 it went into voluntary liquidation. The company was a member of the provident fund scheme and was submitting returns when it went into voluntary liquidation. Its employees were discharged.

They were paid all arrears of provident fund and their account with the commissioner was closed. In the course of winding up one Puran Prakash purchased the press. He was running it. He was not a member of the provident fund scheme. In 1961 the petitioner purchased the press. This commissioner asked the petitioner to pay contribution to the fund. The petitioner questioned the validity of the commissioner's order. Venkatadri, J. held that it was a new establishment and Therefore entitled to protection under the Act.

(47) Winding up cases disclose a marked difference of opinion. Some judges have held that on winding up a new establishment comes into being. That is the view taken in the recent Gujarat decision (P. G. Textile Mills's case supra). In Sayaji Mills Case (Supra) a contrary view was taken.

(48) On this point there are two decisions of the Kerala High Court. In Mohammed Kutti (K.M.) Vs. Regional Provident Fund Commissioner and Others, a division bench of that court held that partition disrupts the integrity of the establishment and separate establishments which come into existence by reason of the disruption are new establishment. All that the court has to see is: (1) Is this partition bona fide and real; and (2) did it disrupt the integrity of the establishment and create separate establishments? A learned single judge of that court doubted the correctness of the judgment in Mohd. Kutti's case (Supra) in view of the Supreme Court decision in Lakshmi Rattan's case and State of Punjab v. Satpal (Supra). He referred the case to a larger bench. A full bench of that court came to the conclusion that the view taken by the division bench was correct. (See: T. A. Zainulabdeen v. Regional B. F. Commissioner, 1975 Lab. I.C. 412.

(49) In Lakshmi Rattan's case (supra) there was a sale of the factory. It was held that it was a sale of a going concern and Therefore the establishment in the hands of the purchaser was not a new establishment. The other case is The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, where on sale it was held that N.S.S. Co-operative Society v/as a new establishment and Lakshmi Rattan's case, (supra) was distinguished in the latter Supreme Court decision.

(50) State of Punjab v. Satpal (supra) was a case of change of partnership. The Supreme Court held that change of composition of partners did not amount to a new establishment. As Hidayatullah F C. J. said:

We are not concerned with the law of partnership but the Employees Provident Fund Act.

(51) There are three previous decisions on this point of the Mysore High Court. In Subbarama Chetty v. Zewar Ali, Air 1960 Kar 14 (17), the facts were these. Two partners of a partnership firm carried on the business of manufacture of silk goods. The firm was in existence at the time the Act came into force on 1st November, 1952. The Act applied to the factory as it employed more than 50 persons. The manager of the firm remitted the amount of the employer's

contribution till 10th February, 1956 when the partnership firm was dissolved by a registered partnership deed. The assets and liabilities of the firm were divided between the two partners. The Commissioner disbursed the provident fund to all the employees of the firm on receipt of information about dissolution. In January 1957 one of the partners restarted the business of manufacturing silk goods in a portion of the premises making use of the looms of the old firm. It was held that it was a new establishment and was entitled to infancy protection. There was nothing to show, the learned judge said, that the employers had divided the running factory as a subterfuge to avoid the liability of contribution under the Act.

(52) The other decision is Palanimalai v. R.P.F. Commissioner, (1969) 2 K L. J. 392. In that case one Palanimalai and his two brothers and their father carried on business. That business was wound up on April 13, 1963. After dissolution Palanimalai and his three adult sons started a new partnership business. The minor children of Palanimalai were also admitted to the benefits of the partnership. The business was the same as before, namely, perfumery. A division bench of the Mysore High Court held that the establishment is not a continuance of the dissolved partnership. It was a new establishments, the judges said. It was held that the petitioner's establishment was a new establishment since there was no reason to hold that "the dissolution of the old partnership was a mere artifice for the circumvention of the provisions of the Act".

(53) Yet another decision of the same hue is B. Sundara Rao v. R.P.F. Commissioner (1967) 2 Kar L. J. 439. There the Bangalore Bar Association was enjoying canteen facilities in a canteen in the Association premises run by one contractor or another. When a new contractor was engaged by the Association to succeed the previous contractor it was argued that since the new contractor employs his own men, his own material and other paraphernalia for the canteen, it was a new establishment. The court held that the canteen established by each contractor is established for the first time when he commences it and each contractor is Therefore entitled to the infancy protection of five years u/s 16(1) (b). Iyer J. speaking for the court said:

The fact that the members of the Bangalore Bar Association have been during a long period of time able to get food and refreshments from a canteen operated by someone or another in the Association premises made available to him, does not support the postulate that the canteen establishment on the earliest occasion by the person who agreed to run it during the period of his agreement, was continued by another contractor when he ran one. The uninterrupted availability of canteen facilities for "the members of the Association does not, when one contractor winds up his canteen and another commences his, obliterate the distinctness between the two. The canteen operated by each contractor is established for the first time when he commences it, unless there is a devolution of the old. The unbroken enjoyment of canteen facilities by the members became possible not because the old establishment opened -by the earliest of the contractors at some stage continued, but for the reason that on the cessation of

one establishment, another was opened. That is, the true position when as in the case before us the petitioner was asked to open his own canteen and not to work one which was existing.

(54) The view taken by the Mysore High Court in Palanimalai and B. Sundara Rao (supra) is questionable. It is difficult to support this view in view of the Supreme Court decision in State of Punjab vs. Satpal (supra) where it was laid down in explicit terms that the mere fact that the partnership changed did not mean that a new business came into existence. Nor is it possible to say that each time a new contractor came in to run the canteen a new establishment was established.

(55) It is true that one of the factors to be taken into account is whether the establishment in question is genuinely such or is only an old one formally resuscitated in order to avoid the legal obligation, as was said by Anantanarayanan, J. in Vittaldas's case, (supra). If this is so, it is always open to the court to hold that it is the old establishment which is substantially continuing and Therefore not entitled to infancy protection. Cases of avoidance of legal liability do not present any difficulty. Nearly everyone is agreed that if the dissolution of partnership or winding up of a company is the result of a subterfuge the law will refuse to recognise that a new establishment has come into existence. The question arises only in those cases where there is no such intention to avoid legal obligation. There is a genuine change of partnership. Old partners go out. New come in. The question then arises : Is it a new establishment?

(56) On appeal from the judgment of Anantanarayanan J. in Vittaldas's case, supra the division bench conceded that the learned single Judge was right in the enunciation of the principles applicable to cases arising under the Act but in their view he went wrong in their application to the facts of the case before him. This also appears to be view of the Supreme Court in N.S.S. Co-operative Society case when their lordships approvingly referred to a passage in the judgment of Anantanarayanan J. But it cannot be predicated that their lordships were approving the decision of Anantanarayanan, J. on the facts before him. The judgment of Anantanarayanan, J. was overruled in R. L. Sahni's case supra, and was upset in appeal in Regional Provident Fund Commissioner Vs. Vittaldas Jagannathadas, , Supra and was expressly dissented from in Sayaji Mills" case supra. It is a matter of regret that the decision of the court of appeal was not noticed in N.S.S. Co-operative Society supra by the Supreme Court and Sayaji Mills" case by the Bombay High Court and P.G. Textiles Mills" case, supra by the Gujarat High Court.

(57) There are three decisions of Srinivasan J. in the Madras High Court on the Act. The first one is the case of Devi Press, Supra. This case I have considered already. The second is his decision in R. L. Sahni's case, supra where as a judge of first instance he decided that every time when there is a new lease of a cinema house by a lessee it does not mean that a new establishment comes into existence on each of such occasions. On appeal his judgment was affirmed by a

division bench of Madras High Court (Chandra Reddy, C. J. and Natesan, J.), in R. L. Sahni's case, supra.

(58) The third decision of Srinivasan J. is reported as Sri Varadarajaswami Transports (Pvt.) Ltd. Vs. Regional Provident Fund Commissioner, Madras and Another, . That case raised a new point. A single individual carried on the business of transport. On 10th May, 1960 he formed a company and got it incorporated under the Companies Act. The individual and his wife were the only members of the company. The Commissioner issued a notice to them in 1962 demanding certain payments under the Act. The company contended that it was entitled to an infancy protection for five years since it came into existence only on 10th May, 1960. The Commissioner in his affidavit averred that the establishment in question had been in existence since 1932 and that its incorporation as a company did not entitle it to say that it was a new establishment to which the benefit of section 16 is available. The learned judge rejected the claim for infancy protection. He said:

The introduction of an incorporate personality in 1960 does not, Therefore, have any effect upon the continued existence of the establishment. It seems to me that since there is no doubt that the establishment was originally set up in 1932. the mere fact that the owner formed a company in 1960 makes no difference to the date on which the establishment has been set up.

(59) The Act does not give us the definition of the term "establishment" though it uses that term at various places. An establishment is not synonymous with the employers. The Act was passed for the amelioration of the employees. From the decided cases no other test can be gleaned except that of continuity as laid down by Wanchoo J. in Lakshmi Rattan's case supra. Every case has been decided on its own facts-sometimes one factor is prominent, sometimes another. But no central or nodal idea is discernible from the cases. The judges, as Lord Wright once put it in an unexpectedly picturesque phrase, proceeded "from case to case, like the ancient Mediterranean mariners, bugging the coast from point to point, and avoiding the dangers of the open sea of system or science". [The Study of Law (1938) 54 LQR 185. Or as Dr. Johnson put it the other way round: "The more precedents there are, the less occasion is there for law; that is to say, the less occasion is there for investigating principles" (Boswell. The life of Samuel Johnson. J. M. Dent and Co. Everyman Edition 1906, Vol. I, p. 416).

(60) If there is one principle which ought to guide the courts and which can be stated without fear of contradiction it is this. The Act must be interpreted with regard to its manifest purpose.

(61) It is difficult to predict what weight would be given by a judge to the various factors upon which the question turns. There is no common standard, since a fact that appeals to one mind as being of decisive significance, seems of trivial importance to another. These cases present this difficulty. The Supreme Court case of N.S.S. Cooperative Society and the Gujarat decision in P.G. Textile show

one trend. The Bombay case of Sayaji Mill and the unreported decision of Tendolkar, J. indicate another. Chandrachud, J. did not consider the introduction of new capital, renovation of old and purchase of new machinery as of sufficient importance so as to prove a new establishment. He followed Tendolkar J. These two Bombay cases were not cited before the Supreme Court in N.S.S. Co-operative Society case where brief cessation of business, alteration of machinery and fresh recruitment of workers were held to constitute a new establishment.

(62) Undue stress must not be laid upon any single "act, however, impressive it may appear when viewed out of its context, for its importance as a determining factor may well be minimized when considered in the light of other qualifying event" Again, no one fact is of constant value, for every case varies in its circumstances, and what is of decisive importance in one may be of little weight in another.

(63) It is not surprising that the court decisions exhibit a multiplicity of different factors that have been regarded as indicia of an old establishment. It is in the competition of the old and the new, the past and the present and the living and the dead that the judges have had to make a choice. This competition is the epitome of cases decided during the last 25 years since 1952. Some judges saw the death of the past in the old establishment and birth of the new in the living present. Others thought there was no break with the past and found the threads of continuity treasured in the present. Continuity itself represents an inheritance from the past. owners come and go; the establishment remains. This was the view of Srinivasan, J. in the three Madras cases. Those three cases bring out in bold relief the instinctive wisdom of the law. They represent a "purposive approach" of which Lord Diplock speaks. The establishment is like Lord Tennyson's running brook. The waters change and comingle. They are never the same. But the brook remains.

(64) Coming to the facts of the case in hand what we find is this. There was a partnership of four persons which was formed on 12th November, 1957. This partnership took the agency of Birla Mills. They carried on business till 1962. On July 19, 1962, Birla Mills terminated their tenancy. On 13th August, 1962 a dissolution deed was executed which operated from the 18th August, 1962. On 16th August, 1962 a new partnership deed was executed. One common partner in the old as well as the new partnership was Brij Lal Kejriwal. The tenancy of the shop premises at Katra Pyare Lal was in his name. On 16th August, 1962 the Birla Mills gave agency to the new partnership. The shop was known as Birla shop. There were 29 employees of the old partnership business. Their services were terminated. Seven out of them were re-employed by the new partnership in 1962. The premises of the new partnership remained the same. Its business also was the same, namely, sale and purchase of Birla Mills Cloth.

(65) The petitioners contend that with the formation of the new partnership in 1962 a new establishment came into existence. The Commissioner contends the contrary. He says that there was only a change of partners in 1962 and the same

business of selling cloth of Birla Mills was continued after a brief gap of two days under the changed name of Radha Kishan Bal Kishan Muchhal and Company and this did not mean that a new establishment came into being.

(66) There is no difficulty in deciding the present case. The nature of business was identical under both partnerships. Previously in 1957 it was a Birla cloth shoo. In 1962 also it continued to be a Birla shop. Its business was sale of mills' cloth. The shop remained the same. Brijlal was a common partner. He claimed to be the tenant of shops 266-268 of Katra Pyare Lal, Chandni Chowk, Delhi. Seven of the old employees were re-employed by the new partnership business.

(67) It will be seen that there was no break in business. The dissolution deed came into effect from 18th August, 1962. The new partnership deed was executed two days before that, that is, 16th August, 1962. On that very date the Birla Mills gave their agency again to the new partnership. There was no gap and the continuity of the old establishment remained unbroken. All that happened was that the old partners went out and the new came in. Applying the dicta of the Supreme Court in *State of Punjab vs. Sat Pal*, supra it cannot be said that with the change of partnership a new establishment came into existence. A change in the composition of partners is not vital to the application of the Act. That is a mere "change of hands". The Act applies to the establishment and not to the owners. We are not concerned with the law of partnership but with the Act. The conclusion is irresistible. It is this. The petitioner's establishment is not a new establishment. It is continuation of the old establishment. Partners have come and gone. But the establishment has gone on as there was no break in its continuity.

(68) For these reasons I would dismiss the writ petition but make no order as to costs.