

(1994) 07 KAR CK 0012
In the Karnataka High Court
Case No : W.A. No. 1446 of 1994

Regional Provident Fund Commissioner	APPELLANT
Vs	
Wipro Ltd.	RESPONDENT

Date of Decision : 11-07-1994

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 16 (1)
(d), 7 A

Citation : (1994) ILR (Kar) 2127 : (1995) 4 KarLJ 254 : (1996) 1 LLJ 423

Hon'ble Judges : S.B. Majmudar, J; Harinath Tilhari, J

Bench : Division Bench

Judgement

H.N. Tilhari, J.—This appeal u/s 4 of the Karnataka High Court Act arises out of Judgment and Order dated 17th September, 1993 passed in Writ Petition No. 10424/93 1994 I CLR 53 whereby the learned single Judge of this Court was pleased to allow the writ petition and quash the order dated 15-3-1993 passed by the Regional Provident Fund Commissioner, Karnataka u/s 7-A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short "the Act").

2. The brief facts of the case are :

That M/s. Margarine and Refined Oil Company Pvt. Ltd., which was closed long back had stopped its operation and stopped its employees completely in 1980 after paying the retrenchment compensation and this closed establishment was purchased by the respondent and according to the respondent it was their new establishment and there was no continuity. The Regional Provident Fund Commissioner started proceedings u/s 7-A of the Act and also issued a notice u/s 14/14-A of the Act. The Company took the defence that it was entitled to the benefit of exemption u/s 16(1)(d) of the Act. The Commissioner by order dated 15-2-1993 held that M/s. Wipro Consumers Products Private Ltd., Thumkur is liable to implement the provisions of the Act and the scheme as framed

thereunder from the date of its start i.e., 13-4-1988. It, further held that the Company was not entitled to the fresh units protection in terms of the provisions of Section 16(1)(d) of the Act. Having felt aggrieved the respondent-Company filed the writ petition. The writ petition was heard by the learned single Judge and the learned single Judge set aside the order of the Commissioner. The learned single Judge in paragraph 21 of his judgment has stated :

"It is not the case of the respondent that M/s. Margarine and Refined Oil Co. Ltd., was in actual operation and working order as on the date of the transfer. On the other hand the respondent has stated in the order that it was a closed company. It is seen from the records that all the employees were discharged long back as on 12-4-1980; 5 years thereafter the factory was sold. Therefore the contention of Sri B. C. Prabhakar that the description of Ms. Margarine and Refined Oil Co. Ltd., as a going concern is a misnomer commends acceptance. Even the sale of registration certificate and employment of two persons will not change the nature of transaction. In these circumstances, it not possible to hold that the petitioner establishment is the continuation of M/s. Margarine and Refined Oil Co. (P) Ltd. and hence continued to be an establishment in operation and not entitled for infancy protection in terms of Section 16(1)(d) of the Act. The petitioner-establishment, on the other hand, is a new and independent establishment and "hence entitled for infancy protection in terms of Section 16(1)(d) of the Act. The impugned order is therefore liable to be quashed."

After having recorded the above finding the learned single Judge had been pleased to allow the writ petition and quash the order impugned herein.

3. Having felt aggrieved by the above mentioned order of the learned single Judge the petitioner has filed this appeal. We have heard Sri Shylendra Kumar, learned standing counsel for the appellant. Sir Shylendra Kumar submitted that the learned single Judge has acted illegally in holding the respondent-concern to be a new establishment. He submitted that there was an admission in the document wherein it has been mentioned as going concern. Sri Shylendra Kumar invited our attention to the Sale Deed which has been annexed as Annexure-R in which it is said as "vendor has agreed to sell and transfer as going concern their undertaking". Sri Shylendra Kumar has emphasised that the vendor has agreed to sell the going concern and the use of expression "going concern" is important. When the sale has been made of a going concern to the respondents the concern or unit which has been resumed after the purchase cannot be termed as a new establishment. Mr. Shylendra Kumar submitted that the admission is a binding one of the party and under Article 226 of the Constitution it must be taken at its face value. Sri Shylendra Kumar, further, submitted that under Article 226 this Court should not have recorded a finding on fact to the effect that the description of the unit as a "growing concern" is a misnomer. He submitted that under Article 226 it is not open to the Court to enter into the realm of appreciation of fact.

4. We will take up for consideration the last point at the threshold itself since it

relates to the jurisdiction of this Court. So far as the jurisdiction of this Court under Article 226 is concerned, it is wide enough but we exercise constraint on the ground of policy. Finding on facts are not ordinarily interfered with by this court. But if the finding of fact recorded by the authority is perverse and is based on no evidence and on non-consideration of material facts available and the material on record indicates that the description is a misnomer and the authority has committed error of law apparent by ignoring relevant and material evidence and in such circumstances it is open to the Court under Article 226 to interfere with the finding of the fact. The law on the subject has been very clearly laid down in Syed Yakoob Vs. K.S. Radhakrishnan and Others, The relevant portion where their Lordships have laid down the law is at page 479 and the same is quoted :

"There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent of the fact of record can be corrected by a writ but not an error of fact, however, grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal has erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of facts to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Court under Article 226 to issue a writ of certiorari can be legitimately exercised".

This view has been followed in many other cases as well. So it is wrong to suggest that this Court cannot enter into the finding of fact. As mentioned earlier, though ordinarily this Court does not interfere with the finding of fact, but if a finding is vitiated by error of law apparent on the face of the record i.e., ignoring material facts or ignoring the admissible piece of evidence or it has been arrived at on a wrong premises of law or fact, it is always open to this court to interfere with that and may record a finding.

5. As regards the main question involved in this case, before we proceed, it will be proper for us to make a reference on Section 16 of the Act, which reads thus :

"16. Act not to apply to certain establishment, - (1) This 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 belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government Governing such benefits; or

(c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits; or

(d) to any other establishment newly set up, until the expiry of a period of three years from the date on which such 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 so to do, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, except whether prospectively or retrospectively that class of establishments from the operation of this Act for such period as may be specified in the notification".

According to the language used in this Section, the Act is not to be applied to the cases covered by either of the Clauses (a), (b), (c) or (d). Therefore, the question whether the Act will apply to an establishment or not and whether the establishment in question is an establishment newly set up with the reference to Clause (d), is not a simple question of fact, because if by recording a finding erroneously that an establishment has not been a newly set up establishment, the authorities take the view that the Act applies and issue a direction u/s 7A or impose penalty under Sections 14 or 14-A of the Act, and this Court comes to the conclusion that the finding recorded as erroneous, then it will be tantamount to nothing but usurpation of jurisdiction by subordinate Court or Tribunal by taking an erroneous decision on a question of fact or law touching the jurisdiction and similarly an erroneous decision on such question may result in illegal refusal to exercise the jurisdiction vested in it. So far as the question of establishment being newly set up, in application, has been a question not only of simple fact but of a jurisdictional fact. Powers under Article 226 of the Constitution, are more wider than that of Section 115 of the Code of Civil Procedure. Even Section 115 C. P. C. where the jurisdiction of the High Court is restricted and limited to the question of jurisdiction and is not as wide as under Article 226. The view has

been taken by the Privy Council as well as by the Supreme Court the question touching jurisdictional fact can be investigated and if by taking wrong view on such question, the subordinate Court or authority has either illegally refused to exercise the jurisdiction vested in it or not, a case of error of jurisdiction is made out and in such cases, it is open to the High Court what to say under Article 226 of the Constitution even u/s 115 C. P. C. to appreciate and re-appreciate the evidence. The jurisdiction under Article 226 is wider and therefore, in our opinion, if the learned single judge appreciated the evidence on this question and recorded a finding, he did not commit any error of law in recording that finding and allowing the writ petition on the ground that if unit was new establishment or going concern in this context of Section 16(1)(d) of the Act, and the question of application or non-application of the Act. For this proposition, we have referred to the decision of the Supreme Court in *Chaube Jagdish Prasad and Another Vs. Ganga Prasad Chaturvedi*, As we have held earlier, the learned single Judge has acted according to law in coming to the conclusion on the question of jurisdictional fact.

6. Coming to the merits of the case, the language of Section 16 of the Act, shows that the Act is not applicable to any other establishment newly set up until the expiry of a period of three years from the date on which such establishment is, or has been set up. The facts, as found by the learned single Judge beyond dispute are to the effect that the old concern had stopped its functioning and operation in 1980. All the employees of the concern are completely discharged as long back as in 1980. The establishment had been closed and that closed establishment after five years, was sold to the respondent. It is also the fact that has come out of the record that after purchase of the old establishment the respondent started the concern after shifting it to Tumkur in the year 1988. Even after the purchase by the opposite party, the establishment had started functioning, it had not got the life. The employees were employed and of whom two or three were of the old concern, but that employment of two or three employees of old concern did not make the old concern as continuing one.

7. Learned Counsel for the petitioner made a reference to the decision of the Supreme Court in *Sayaji Mills Ltd. v. Regional Provident Fund Commissioner* 1985 I CLR 232 in support of his contention. The perusal of paragraph 11 of the said judgment, per se shows that stoppage of production in that case was temporary and it was due to the interim order of the High Court in the proceeding for winding up of the Company. Their Lordships have observed that where the stoppage of production in a factory was brought about temporarily due to proceedings in respect of the Company owning the factory, for sale of assets of the Company and it was the same old factory. It is further observed by Their Lordships in paragraph 11 of the judgment that it is not a case where old factory was reduced into scrap and a new factory was elected 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. These lines per se show that where there is almost a total discontinuity or where old company

reduced to scrap and new factory established, it cannot be said to be the continuity of the old factory in the shape of new one. As such, the aforesaid decision in Sayaji Mills Ltd. case (supra) relied upon by the learned Counsel for the appellant, is not at all applicable to the facts of the present case. The facts of the present case appear to us to be almost akin to the facts of the case in the matter of The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, In that case, it has been laid down by the Supreme court that where old establishment was completely closed when the transfer of ownership took place and an entirely new establishment was set up three months later, then in that case, the establishment was entitled to the benefits in protection from the date of establishment. The relevant observations may be quoted as hereinafter :

"5. On a discussion of the entire evidence and in view of the fact that the burden of proof lay on the appellant, we think that the conclusions of fact which must be accepted are : that, 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 re-started 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. In these facts, no other conclusion can be drawn, except that the old establishment was completely closed when the transfer of ownership took place and an entirely new establishment was set up three months later, so that, in this case, the benefit of non-applicability of the Act u/s 16(1)(b) of the Act for a period of three years was available to the respondent from June or July 1961 when the new establishment was set up".

Taking into consideration, the entire matter and the facts of the case and the law applicable, we are of the opinion that learned single judge acted in accordance with law in taking the view that the establishment concerned was a newly set up establishment and it was entitled to protection of law u/s 16(1)(b) of the Act, for a period of three years from the date of new establishment set up i.e., dated 13th April, 1988. Having thus considered, we find that the Appeal is devoid of merits and therefore, the same is dismissed.