

(1969) 08 BOM CK 0007
In the Bombay High Court
Case No : A.F.O.D. No. 406 of 1964

Sayaji Mills Ltd.

APPELLANT

Vs

P.A. Bhaskar

RESPONDENT

Date of Decision : 25-08-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Constitution of India, 1950 — Article 226
Employees Provident Fund (Amendment) Act, 1958 — Section 3
Employees Provident Fund (Amendment) Act, 1960 — Section 5
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3),
16, 16(1), 2, 2(1)
Evidence Act, 1872 — Section 101, 102, 103, 104

Citation : AIR 1970 Bom 418 : (1970) 72 BOMLR 312 : (1971) 21 FLR 110 :
(1970) ILR (Bom) 787 : (1970) MhLj 579

Hon'ble Judges : Chandrachud, J;Apte, J

Bench : Division Bench

Advocate : R. Jethmalani, for the Appellant; R.J. Joshi, instructed by Little and Co., Attorneys, for the Respondent

Judgement

Chandkachud, J.—This appeal arises out of a suit for a declaration that the provisions of the Employees' Provident Funds Act, 1952 (Act XIX of 1952), hereinafter called "the Act", cannot be enforced against the plaintiffs in regard to the factory established by them in the name of "Sayaji Mills No. 2", at Ferguson Road, Bombay, until the expiry of three years from the 12th November, 1955. The plaintiffs also asked for a declaration that they are not bound to make any contribution to the Employees' Provident Fund either under the Act or under the Em-ployees' Provident Fund Scheme, 1952. The facts Hiving rise to the suit are these:

2. Since about 1931, a Cotton Mill in Bombay run by Hirji Mills Ltd. used to manufacture textile goods. On a petition filed by their creditors, Hirji Mills Ltd. were ordered to be wound up under an order of this Court, dated 17th December, 1954. On 22nd July, 1955, the plaintiffs, Shri Sayaji Mills Ltd., a

public limited company registered under the Indian Companies Act, purchased the assets of the Hirji Mills Ltd. for Rs. 42,80,000/-, from the Official Liquidator. The conveyance in favour of the plaintiffs was executed on the 5th of December, 1955. The break-up of the consideration shows that, Rs. 5,00,000/- was the price of the land, Rs. 10,62,000/-, the price of the structures and the balance viz.. Rs. 27,18,000/-, the price of the plant, machinery and stock-in-trade.

3. The plaintiffs neither acquired the goodwill of the business nor did they purchase the assets of the Hirji Mills Ltd., as a going concern. The manufacturing operations carried on by the Hirji Mills Ltd., had come to an end some time prior to 17th December, 1954 when the winding up order was passed. The Mills had discharged their workers prior to the winding up order.

4. After their purchase, the plaintiffs commenced the manufacturing operations on the 12th November, 1955. On the 28th February, 1956 the Regional Provident Fund Commissioner for this State, who is the defendant to the suit, made certain enquiries of the plaintiffs and called for the relevant information under the Act, The defendant then asked the plaintiffs to make the employers' contribution to the Provident Fund under the Act, but the plaintiffs contended that they were an infant factory within the meaning of Section 16 of the Act and were, therefore, not liable to make contributions to the Provident Fund for a period of three years from the 12th November, 1955 when they commenced manufacturing operations. This contention was rejected by the defendant, who by a letter of 12th December, 1956 called upon the plaintiffs to remit to him contributions payable by them under the Scheme framed under the Act.

5. The plaintiffs thereafter filed a Writ Petition in this Court under Article 226 of the Constitution challenging the right of the defendant to enforce the provisions of the Act against them for a period of three years from the 12th November 1955. That petition was withdrawn and Thereafter the plaintiffs brought the present suit.

6. The learned Principal Judge of the City Civil Court, Bombay, who tried the suit, held by his judgment dated 12th December 1963 that the plaintiffs had not established a new factory on the 12th November 1955 as alleged by them and that the provisions of the Act and the Scheme applied to them from the very date that they commenced manufacturing operations, viz., the 12th November, 1955. The correctness of this judgment is challenged by the plaintiffs in this appeal.

7. For a proper appreciation of the question which arises for our decision, It would be necessary to notice some of the provisions of the Act. Section 1(3) of the Act, as it stood at the material time, provided that subject to the provisions contained in Section 16, the Act would apply (a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which fifty or more persons are employed, and (b) to any other establishment employing fifty or more persons or class of such establishments which the Central Government

may. by notification in the Official Gazette, specify in this behalf. Section 2(g) defines a "factory" to mean any premises including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power. Section 2(h) defines "Fund" to mean Provident Fund established under a Scheme. Section 2(1) defines "Scheme" to mean a "Scheme" framed under the Act. Section 5 empowers the Central Government to frame a Scheme to be called "the Employees" Provident Fund Scheme" for the establishment of provident funds under the Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply. This section further provides that there shall be established as soon as may be after the framing of the Scheme, a Fund in accordance with the provisions of the Act and the Scheme. u/s 6, the employer's contribution to the Fund has to be six and a quarter per cent of the basic wages and the dearness allowance for the time being payable to each of the employees. It is in regard to this contribution that the present dispute has arisen.

8. Section 16 of the Act as it stood at the material time read as follows together with the marginal note:

"Act not to apply to factories belonging to Government or local authority and also to infant factories.

"16 (1) The Act shall not apply to

(a) any factory belonging to the Government or a local authority,

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

9. Sub-section (1) was substituted by Section 3 of the Employees" Provident Funds (Amendment) Act, 1958 (Act XXII of 1958) and thereafter it reads thus:

"This Act shall not apply to any establishment until the expiry of three years 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".

10. Section 16(1) was further amended by Section 5 of the Employees" Provident Funds (Amendment) Act, 1960 (Act 46 of 1960). Under Clause (a) of the amended Sub-section, the Act does not apply to an establishment registered under the Cooperative Societies Act, The Act does not apply to any registered Co-operative Societies employing less than fifty persons and working without the aid of power. Under Clause (b) of the amended Sub-section the Act does not apply to any other establishment employing 50 or more persons, or twenty or more but less than fifty 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. The explanation to the Sub-section is retained.

11. It shall have been noticed that though Section 16(1) has undergone these amendments, the basis of exemption has remained substantially unaltered in so far as the factories like the one before us are concerned.

12. The question which we have to consider is whether by reason of the plaintiffs having purchased the assets of the Hirji Mills on 22nd July 1955 and by reason of their having commenced manufacturing operations under their own auspices on the 12th of November 1955, the Act will not apply to them until the expiry of 3 years from the date on which the factory was established, i.e., from the 12th of November 1955. It is common ground that the relevant date for the purposes of Section 16(1) is not the date on which the plaintiffs purchased the factory, nor the date on which the conveyance was executed in their favour, but the date on which they commenced manufacturing operations.

13. It is urged by Mr. Jethmalani, who appears on behalf of the plaintiffs, that between the 17th of December 1954, when the High Court passed the winding up order against the Hirji Mills Ltd., and the 12th of November, 1955 when the plaintiffs commenced manufacturing operations, a factory, as defined by Section 2(g) was not in existence, and therefore, a new factory must be held to have been established on 12th November 1955. According to the learned counsel, Hirji Mills Ltd.. which had to suffer an order of liquidation, had stopped manufacturing operations for an indefinite period and the possibility of resumption of those operations within a foreseeable period could not have been envisaged with reasonable certainty. The Mills had discharged all of their workers, and therefore, not only was no manufacturing process carried on, but the workers with whose co-operation alone such a process could have been resumed, were also discharged, and therefore, the identity of the establishment was completely destroyed even prior to the order of winding up. It is finally said that the plaintiffs renovated the mills, brought in new capital, re-employed only 65 to 70 per cent of the old workers and that too on fresh terms and conditions of service, and therefore, the factory established by the plaintiffs on the 12th November, 1955 is an infant factory which would attract the application of Section 16(1).

14. We are unable to accept this argument. In the first place, it is necessary to clarify that no evidence was led by the plaintiffs to show that they had in fact renovated the old Mills or that they had brought in new capital. Mr. Jethmalani says that the averments made by the plaintiffs in paragraph 3 of the plaint, that they had put in their own capital, that they had brought new machinery, that they had renovated the old machinery, that they had employed new staff and workmen, entered into fresh commitments for supply of raw materials, made new arrangements for the sale of finished goods and commenced production of goods of an entirely different type, were not traversed by the defendant in his written statement. Now, by paragraph 7 of his written statement the defendant denied that the factory set up by the plaintiffs on 12th November, 1955 was a new factory within the meaning of the Act. The defendant also denied that on the closure of the Hirji Mills Ltd., the provisions of the Act had ceased to apply to the

factory run by them, because according to the defendant, the Act would apply to the factory irrespective of the closure of the Mills. The burden of establishing that the exemption contained in Section 16(1) applied to the particular establishment was on the plaintiffs. It was not enough for them to say in the plaint that they had brought in fresh capital or had renovated the old machinery or had purchased new machinery. Pleadings are not evidence, and therefore, we cannot assume the existence of the multifarious facts on which the plaintiffs' counsel relies.

15. The importance of considerations such as those referred to by the plaintiffs in paragraph 3 of the plaint is that whether the exemption u/s 16(1) of the Act can apply, i.e., 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.

16. Section 1(3)(a) makes it clear that subject to the provisions contained in Section 16, the Act applies to every establishment which is a factory engaged in any Industry specified in Schedule I and in which fifty or more persons are employed. It was conceded by Mr. Jethmalani before us that the requirements of Section 1(3)(a) are satisfied in this case, that is, that the establishment run by the plaintiffs is a factory, that the factory is engaged in an industry specified in Schedule I and that fifty or more persons are employed in the factory. Section 16(1) creates an exemption in favour of infant factories, not in favour of new or infant owners. In terms, the exemption is created by the statute in favour of factories and not in favour 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(1).

17. The fact that Hirji Mills went into liquidation does not mean that the factory had ceased to function for all time or that by reason of the winding up order the prospect of the resumption of the manufacturing process by the factory could not be envisaged. It is well known that despite a winding up order the Liquidator can be empowered to run the business and even after the winding up order is passed, instances are not lacking, particularly in regard to textile Mills, where the manufacturing process is permitted to be resumed in pursuance of a Scheme framed by the Court in consultation with the creditors of the Company. In the first place, therefore, the plaintiffs have failed to establish that they either brought fresh capital or new machinery or that they renovated the machinery so as to justify the conclusion that the identity of the old establishment was destroyed. Secondly, the old establishment cannot be deemed to have been closed for an indefinite period.

18. There are a series of decisions of various High Courts on the point which arises before us. The decisions are so uniform that one can risk the proposition that it is settled law that the exemption u/s 16(1) cannot apply merely be reason

of a change in the ownership of a factory.

19. The starting point of almost all of these decisions is an unreported decision of Justice Tendolkar of this Court, in Misc. Appln. No. 389 of 1956, D/-5-11-1956 (Bom). There, a Company called the Chalisgaon Shri Laxminarayan Mills Co. Ltd. carried on business of manufacturing textiles in their mills known as the Chalisgaon Shri Laxminarayan Mills. The Company was ordered to be wound up at the instance of the creditors in August 1951. In March, 1952 the Liquidator gave a lease of the Mills to Messrs. Kotak and Co. for a period of three years from 1952 till 1955. On the termination of the lease, the lessee discharged all the employees and paid them their dues fully, including the provident fund standing to their credit. On the 28th February, 1955 the Liquidator granted a lease to Babulal Shrivallabh for a period of one year from the 1st of March, 1955 to 29th February, 1956. The lease, inter alia, provided that the lessee shall not be liable in respect of any liabilities of the Mills incurred prior to the 1st of March, 1955 and that they shall work the Mills as a new concern and not as successors of either the lessors or of Messrs. Kotak and Co. The new lessees, viz. Messrs. Babulal Shrivallabh, entered into possession on 13th of March, 1955 and announced by a notice that workers would be recruited on a new and purely temporary basis and that no worker will be entitled to any benefit that may have accrued to him for his previous service in the Mills. The lessees applied for and obtained a licence under the Factories Act for working the Mills. Pending their contention before the Regional Provident Fund Commissioner that the Act will not apply to them for a period of three years after the date on which they started the manufacturing process, the Liquidator sold the Mills to them on the 4th of September, 1956. Thereafter they floated a private Limited Company and transferred the Mills to that Company. The correspondence with the Regional Provident Fund Commissioner was continued by the Company and when the Regional Provident Fund Commissioner finally intimated to it that it would not be entitled to the exemption u/s 16(1), it filed a Writ Petition which was heard by Tendolkar, J.

20. The learned Judge rejected the contention of the Company that the Mills ceased to be established when the liquidation order was passed, that they ceased to be established for a second time when the lease of Kotak and Co. expired or that the new establishment was set up when Messrs. Babulal Shrivallabh obtained a fresh lease. After referring to the provision contained in Section 1(3) of the Act, the learned Judge says:

"The important point to notice about this provision is that the Act is made applicable to factories and not to the owners thereof; or, in other words, it applies to factories irrespective of who the owners from time to time may be".

The learned Judge proceeds:

"The question is whether the order of liquidation and the consequent temporary discontinuance of business until a lease was granted to Kotak and Company has

the consequence of making the factory which was established cease to be established. In my opinion the answer to this question must be in the negative. 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 Employees' Provident Funds Act, for if it did, 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. I take it that the establishment of a factory involves that the factory has gone into production and no more but once it goes into production, a temporary cessation of its activities, for whatever reasons that cessation takes place, cannot, in my opinion, take the factory out of the category of an established factory for the purposes of the Employees' Provident Funds Act."

Towards the conclusion of his judgment, the learned Judge says that:

"..... even a complete change in the whole body of employees cannot make a factory which is established, cease to be established. In any event, the Employees' Provident Funds Act is a beneficial legislation for the benefit of the employees and every construction of its provisions which would defeat the object of the legislation and lead to an evasion, must be rejected, unless the clear language of the Act leave no option to the Court but to accept such an interpretation."

We are in respectful agreement with this view.

21. This decision has been uniformly followed by various High Courts and we must briefly notice those decisions. In *Bharat Board Mills Ltd. Vs. The Regional Provident Fund Commissioner and Others*, the learned Single Judge observed:

"The date of establishment of a factory is the date when the factory starts its manufacturing process. The fact that a new company or concern subsequently takes over or acquires the factory does not shift the date of the establishment of the factory to the date of its taking over or acquisition; nor does the fact that the factory had ceased to produce goods for a certain time and resumed production after certain brief intervals result in extinction of the old factory and establishment of a new factory".

In this case Messrs. Bharat Board Mills Ltd., had purchased machinery from another Company, viz. India Paper and Board Mills Company under an agreement dated 12th October 1950. Under a sale dated the 13th October, 1950 Messrs. Bharat Board Mills Ltd. also purchased a structure along with some lands. They obtained a certificate of incorporation and commenced business on 31st July, 1950. They had not purchased the goodwill of the India Paper and Board Mills Company. They did not take over the liabilities of that Company and what was more, the awards of the Industrial Tribunal which decided certain disputes between the factory and its employees and between the previous and present

owners thereof, treated the purchasers as a new concern. In spite of these facts, the contention that the purchasers were entitled to the benefit of exemption contained in Section 16(1) of the Act was rejected by the learned Judge.

22. The same view has been taken in *Vegetable Products Ltd. Vs. Regional Provident Fund Commissioner and Others*, which also relies on the judgment of Tendolkar, J. and in *Jamnadas Agarwalla v. Regional Provident Fund Commr. W. B.* AIR 1963 Cal 513, which follows the earlier decision in the *Bharat Board Mills*" case. In the *Vegetable Products*" case, the business of manufacturing vegetable oils was carried on by a company prior to December, 1951. In February, 1952 the Company was ordered to be wound up. In December, 1953. the Official Liquidator sold the factory. The contention of the purchasers that they had established a new factory after their purchase when they started manufacturing operations was rejected by the learned Judge even though there was a time-lag of nearly two years between the cessation of its business by the old company and the commencement of their business by the purchasers.

23. Justice Tendolkar's Judgment has been followed consistently by the High Court of Punjab also. In *Robindra Textile Mills Vs. Secretary, Ministry of Labour, Govt. of India, New Delhi* and Another, Bishan Narain J. says:

"Neither the Act nor the scheme provides tests for determining when a factory can be said to have been established and it is therefore, necessary to examine the provisions of the Act and the Scheme to find out the intention of the legislation".

The learned Judge refers to the definition of the "factory" in Section 2(g) and concludes that the change of ownership cannot start a fresh date of the establishment of a factory, nor even the fact that subsequently, the original machinery was reconditioned. According to the learned Judge, the emphasis in the Scheme is on the factory which carries on manufacturing process and on the employees who are the beneficiaries under the Act, and the exemption cannot apply merely because the factory has changed hands. The same view has been taken by Mr. Justice Grover. as His Lordship then was, in *Hindustan Electric Co. Ltd. Vs. Regional Provident Fund Commissioner and Another*, . In that case the Government of India sold a factory belonging to it on the 17th February, 1955. The Regional Provident Fund Commissioner called upon the purchasers to contribute to the Provident Fund but they contended that they established the factory after their purchase in October, 1955 and, therefore, they would be entitled to the protection available to the "infant factories" u/s 16(1) of the Act This contention was rejected on the ground that the date of the establishment of a factory is the date when the factory starts its manufacturing process and the fact that a new company or concern subsequently takes over acquires the factory, .does not shift the date of the establishment of the factory to the date of its being taken over. The period of three years u/s 16(1) was held to begin from the date of the original establishment of the factory and not from the date when the purchasers started manufacturing operations.

24. This judgment went in appeal in Regional Provident Fund Commissioner, Punjab and Another Vs. Lakshmi Ratten Engineering Works, Ltd., where a Division Bench, consisting of Dulat J. and Dua, J. (as His Lordship then was) affirmed the view of Grover, J. In regard to the interpretation of Section 16(1) of the Act. The learned Judges held that what was exempted by Section 16 was only the factory which was not established for more than three years. If the factory was being used for manufacturing purposes long before the new purchasers acquired it, it could not be said that the factory was not established for more than three years.

25. The only decision which has struck a discordant note is that of Anantanarayanan, J. In Vittaldas Jagannathadas and Another Vs. The Regional Provident Fund Commissioner, Madras and Another, in which it was held:--

"that an establishment means an "Organised body of men maintained for a purpose" Where, therefore, on the entire complex of facts of a given case, it can be concluded that the legal entity "the establishment" had come totally to an end. and was succeeded by a fresh legal entity, then that fresh entity is the entity to which the Act applies as a first impact and, if that entity is entitled to infancy protection, that protection will have to be granted as a matter of course; even if it happens by coincidence to have employed a large part of the personnel of the previous establishment".

That was a case of a lease of a cinema house and the learned Judge held that on the termination of the old lease of the talkies a new establishment must be deemed to have come into existence so as to attract the exemption of Section 16(1). With respect we are unable to agree with this decision. In the case of a lease of a cinema house, it would, in our 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(1). 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.

26. The decision of Anantanarayanan, J. was overruled by a Division Bench in R.L. Sahni and Co. Vs. Union of India and Another, , while hearing an appeal in another matter R.L. Sahni and Co. Vs. Union of India and Another, Justice who delivered the Judgment of the Bench says that the exemption u/s 16(1) is available to the establishment as such and not to the owner or the lessee or the manager thereof. It cannot be postulated that each time there is a change of hands, a new establishment comes into existence. In taking this view, the Division Bench has followed the decision of the High Courts of Calcutta and Punjab, to which we have referred earlier,

27. A Division Bench of the High Court of Kerala in Kunnath Textiles Vs. Regional Provident Fund Commissioner, , a Division Bench of the High Court of Andhra Pradesh in Nazeena Traders (P) Ltd. and Others Vs. Regional Provident Fund

Commissioner, Hyderabad and Others, and a single Judge" of the High Court of Gujrat in The New Ahmedabad Bansidar Mills Private Ltd. Vs. The Union of India and Others, , have taken the same view. The decision of the Kerala High Court is not apposite to the point before us because there the existing owners had resorted to a subterfuge for evading their liability under the Act. The Judgment of the Andhra Pradesh High Court does not refer to previous authorities, but the learned Judge of the Gujrat High Court has relied on the judgment of Tendolkar, J. and on Robindra Textile Mills Vs. Secretary, Ministry of Labour, Govt. of India, New Delhi and Another, , to which we have already referred.

28. In the result, we hold that the provisions of the Act and the Scheme are applicable to the plaintiffs. They are, therefore, liable to make their contribution to the Employers' Provident Fund. The decree passed by the learned Judge is accordingly confirmed and the appeal is dismissed with costs

29. Appeal dismissed.