

(1988) 02 KL CK 0012
In the High Court Of Kerala
Case No : O.P. No. 10460 of 1985-F

Sealord Hotel (P) Ltd.

APPELLANT

Vs

The Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 26-02-1988

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16, 16(1)

Citation : (1988) 02 KL CK 0012

Hon'ble Judges : John Mathew, J

Bench : Single Bench

Advocate : P.C. Chacko and Roy Chacko, for the Appellant; P. Santhalingam, for the Respondent

Judgement

John Mathew, J.—The Petitioner's claim for infancy protection in terms of Section 16(1) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act), was rejected by the Respondent by Ext. P-4 order, dated 31st October, 1985. In this Original Petition the Petitioner is challenging that order.

2. The Petitioner is a company incorporated on 31st December 1980 under the Indian Companies Act, 1956. A hotel named "Sealord Hotel" within the Corporation of Cochin was originally owned by a company, M/s D.C. Johar and Sons Limited. When that hotel was owned by M/s D.C. Johar and Sons Ltd., the employees of the hotel declared a strike and there was complete cessation of business of the hotel. The strike was declared in February, 1980 and it continued for 22 months. The management of the hotel as per notice dated 28th July 1980 declared closure of business with effect from 28th July 1980. With the closure of the business the management also terminated the services of all the employees after paying them all benefits under the Industrial law. The closure of business was intimated to the Respondent also as per notice dated 30th September 1980.

3. The Petitioner-company purchased the building and land wherein Sealord

Hotel was run as per registered document No. 1852, dated 29th April 1981, of the Sub Registry Office, Ernakulam. At that time no employee was on the rolls of the former owner of the hotel. After the purchase the Petitioner incurred considerable expenditure for renovating the building and the hotel was started afresh on 4th November 1981 under the name "Sealord Hotel".

4. The Respondent issued Ext. P-1 notice, dated 16th February 1985 directing the Petitioner to comply with the provisions of the Act and the scheme from the date of restarting of the establishment. The Petitioner filed Ext. P-2 objection as well as Ext. P-3 additional objection. The objections were rejected and the Respondent passed Ext. P-4 order.

5. Section 16(1)(b) of the Act is as follows:

16. Act not to apply certain establishments.-

(1) This Act shall not apply-

(a) Omitted

(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) Omitted.

6. Learned Counsel for the Petitioner placed considerable reliance on the ruling of this Court reported in *United Hotellers, Calicut v. Govt. of India* 1973 Lab. I.C. 135, especially the following passage thereof.

2. I am unable to agree with the decision of the Central Government. Its finding is one which a Tribunal entrusted with the duty of deciding a question on facts cannot arrive at. It is clear from the facts stated in its order that the business of the company was totally wound up after settling in full the claims of all its employees, that the Petitioner did not acquire the company's establishment, and that it started its own business. It is true that the nature of the two businesses was the same and the new business was started in the same premises where the old one was being carried on. These two facts as well as the fact that the new business had acquired the goodwill, licenses and other privileges of the old business are relevant in determining whether the new business is a continuation of the old business. But they do not by themselves establish the link between the two businesses. What is essential for holding that the one is a continuation of the other is the existence of the old business immediately before the commencement of the new business. A closure or a temporary cessation of the old business does not make it non-existent. It may also be possible for persons to make paper

arrangements to show that the old business has been fully wound up. One has to examine the real position; and if the old business has been really wound up, and it ceased to exist before the commencement of the new one, there is no question of any continuity. In the instant case the old business was completely wound up for all purposes; and there was an interval of fifteen days between the winding up of that business and the commencement of the new one. It is also stated that most of the workers employed in the new business are not persons employed in the old business. In these circumstances, it is impossible to hold that the new business is a continuation of the old one, or there is any connection between the two.

7. In Ext. P-4 order the above said judgment was referred to. However, the Respondent did not follow that judgment for the reason that there was a contrary judgment in *Devi Press Vs. Regional Provident Fund Commissioner, Madras and Another*, . The office of the Respondent is situated in Trivandrum within the territorial jurisdiction of this Court and the judgments of this Court are binding on him. He cannot prefer the judgment of any other High Court. More over, the Supreme Court in *The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry*, considered *Devi Press* case in the following words:

One of the prominent facts before the Judge was that the particular business transferred was being run under licences and those licences were also transferred by the seller to the purchaser. In view of this transfer, the learned Judge held that it was a case of sale of a going concern and there was continuity of business. Without expressing any opinion as to whether the learned Judge was correct in holding that there was continuity of business in that case, the very fact that he held the establishment not to have been newly set up on the ground that it was a case of a transfer of a going concern distinguishes that case from the case before us. In the present case, the facts established show that the old business was closed and was re-started as a new business after recruiting new workmen. The principle to be applied in arriving at a decision in such a case appears to us to have been rightly explained in a decision of a learned Single Judge of the Madras High Court in *Vithaldas Jogannathadas and Anr. v. Regional Provident Fund Commissioner and Anr.* (1966) 1 LL.J. 240. The learned Judge held:

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 an 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.

8. More over, a Division Bench of the Madras High Court itself in M/s Conveyor Equipment Co. (P) Ltd. v. Union of India 1986 Lab. I.C. 630 later clarified the position in the following terms:

8. ...In this case, the evidence is that the partnership firm, Messrs Veekay Engineering Industries, the previous owner had closed a part of its establishment, and it is only after such closure, a lease of the land, building and machinery has been given to the Appellants. There was a complete stoppage of work as a result of the closure of the establishment and all the previous employees had been discharged on payment of due closure compensation. Their attempt to challenge the validity of the closure has also failed, the Labour Court holding that the closure was genuine and bona fide. After such closure, a lease of land, building and machinery was given to the Appellants and the Appellants have later started the same business as a new concern.... The learned Single Judge has proceeded on the basis that once there is a lease of the land, building and machinery, the lease should be taken to comprise of the business as well. We are not in a position to accept the said reasoning. It is no doubt true that if the business as such is transferred by way of lease, then it can be postulated that it is only a change of management and not of ownership and that a mere change of management will not give rise to starting of a new business. But in this case, the lease could not have been of the industry or establishment as such as a going concern is clear from the fact that the establishment was admittedly closed earlier to the lease and the terms of the lease also do not indicate that the lease is of the business as such.

9. Learned Counsel for the Respondent relied on the judgment of the Supreme Court in Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, . In that case it was actually found that there was no closure of the old establishment, but there was merely a stoppage or interruption of the business of the establishment as a result of an order of winding up passed against the company which owned the establishment. Later the Official Liquidator who came into the picture after the order of winding up, sold the establishment as a going concern and after purchase the purchaser continued the business of the establishment. It was on those facts that the Supreme Court held that there was a continuity of the establishment. On the facts of the present case it is clear that the earlier decision of the Supreme Court in The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, is applicable and not the judgment cited by the learned Counsel for the Respondent.

10. In Ext. P-4 order it is stated as follows:

On the contrary the sale deed says that the entire business undertaking has been transferred for running the hotel.

However, this do not seem to be the correct position. As per my direction learned Counsel for the Petitioner produced a certified copy of the sale deed in favour of the Petitioner dated 29th April 1981, in court. The relevant portion of the

document containing the portion extracted in Ext. P-4 is as follows:

AND WHEREAS under an agreement executed on the 25th day of April One thousand nine hundred and eighty-one (1981) the Vendor agreed to sell and transfer its entire business undertaking for the running of the hotel known as "Sealord Hotel" to the Purchaser as a closed down concern;

AND WHEREAS the Vendor has already put the Purchaser in possession of the whole of the said business undertaking on the 25th of April 1981;

AND WHEREAS the said business undertaking comprises in three immovable properties viz., (1) a piece or parcel of free-hold land measuring about 3 1/8 cents bearing Survey No. 2291 in Ernakulam Village, Kanayannur Taluk, Ernakulam District and more fully described in Schedule 1 written hereunder (hereinafter referred to as "the first piece of land" (2) a piece or parcel of leasehold land, measuring about 10 cents, bearing Survey No. 2290 of Ernakulam Village, Kanayannur Taluk, Ernakulam District and more fully described in Schedule II written hereunder (hereinafter referred to as "the second piece of land") and (3) the hotel building constructed on the aforesaid two pieces of land;....

AND WHEREAS the Vendor has agreed to convey and transfer all its rights, title and interest in the first piece of land, the second piece of land and all the buildings constructed thereon on the terms and conditions herein mentioned.

NOW THIS DEED OF SALE WITNESSETH as under:

1. In consideration of the amount of Rs. 53,40,000 (Rupees Fifty-three lakhs forty thousand only) made up as above and reserved with the purchaser to be paid to the Vendor on or before 30th May 1981 the Vendor doth hereby sell, convey, transfer and assign all its rights title and interest in the first piece of land, second piece of land and the buildings constructed thereon more particularly described in the first, second and third schedule hereunder respectively, to the purchaser absolutely and for ever.
2. That the Vendor confirms having handed over the possession of the said property to the Purchaser to be held by the Purchaser without any interruption by the seller or any person claiming through or under it and without any disturbance or interruption by any person whomsoever.
3. The Vendor hereby covenants with the purchaser that all the rights, title and interest hereby transferred subsist and it has the power to transfer the same.
4. That the Vendor hereby covenants and assures the Purchaser that the said properties are free of encumbrances and the Vendor will at the cost of the Purchaser execute and do every other assurances or things necessary for further or more particularly assuring the said properties to the purchaser as may be reasonably required.
5. The Vendor hereby agree to the Purchaser to obtain mutation of the relative

records in its name.

6. That the vendor has delivered to the Purchaser all its possession relating to the said property. This sale is effective from the date of execution of this deed.

11. It is clear that the transfer was only of two item of landed property and the building thereon. It was specifically stated that the business was closed down. The former owner D.C. Johar and Sons gave a closure notice as well as the termination notice to the workers. Respondent was also given notice in July 1980. The sale was on 29th April 1981 for Rs. 53,40,000. However, the Petitioner had to do considerable renovation work and make arrangements for starting the business. Therefore the starting of the business was delayed till 4th November 1981. It is clear that the business was closed by the former owner. Business was closed down on 28th July 1980, the sale deed in favour of the Petitioner was only on 29th April 1981. The Petitioner started business only on 4th November 1981. What was sold was the landed property and building. None of the former employees was taken in by the Petitioner. Applying the test enunciated by the Supreme Court in *The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry*, as well as by this Court in *United Hotellers, Calicut v. Govt. of India* 1973 Lab. I.C. 135 it is clear that the Petitioner set up the business only on 4th November 1981 and that it was not a continuation of the old business. There was no link between the Petitioner's business and the business run by the earlier owners of the building. Accordingly the Petitioner is entitled to infancy protection envisaged by Section 16 of the Act, Ext. P-4 is therefore quashed. The Original Petition is allowed as above. No. costs.