
(1996) 02 MAD CK 0112

In the Madras High Court

Case No : Writ Petition No. 2596 of 1986 with W.M.P. No. 3912 of 1986

Senthilnathans Pharmaceuticals

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 07-02-1996

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16, 16(1), 17B

Industrial Disputes Act, 1947 — Section 25FF

Citation : (1996) 74 FLR 2304 : (1997) 1 LLJ 71

Hon'ble Judges : T. Jayarama Chouta, J

Bench : Single Bench

Judgement

1. The prayer in this writ petition is to issue a writ of certiorarified mandamus, call for the records of the proceedings of the respondent, quash his orders passed in No. B-11/TN/3257 C/Enf/Regl. of 1986, dated February 25, 1986, and direct the respondent to treat the petitioner's establishment as a new establishment entitled to the infancy protection u/s 16 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, and demand contribution under the above said Act only after the employment strength has reached the statutory minimum.

2. In support of the said writ petition one Tr. Subbiah, one of the managing partners of the new partnership firm called as Senthilnathans Pharmaceuticals who is the petitioner running a pharmaceutical business has sworn to an affidavit. He has stated that the petitioner firm which had not been doing the pharmaceutical business hitherto being a new partnership came into existence in about December, 1982, and that the R. R. Pharmaceutical Distributors, a renowned firm in that line of business having a vast net work of business at Madras, Madurai, Vellore and other places was closing down its concern at Tiruchirapalli. This new firm, therefore, entered into an agreement, with it on certain specified matters. As per the said agreement the firm purchased medicines from the said R. R. Pharmaceuticals at cost price and also some of the

furniture and fittings according to its need. The petitioner firm got fresh licences under the Drugs Act and registered with the sales tax and Income Tax authorities and new numbers have been allotted to the petitioner by these authorities. As the premises occupied by R. R. Pharmaceuticals were available, the petitioner got a fresh tenancy from the owners of the building. The petitioner has taken some former employees on fresh appointment basis since they have been retrenched by the previous management during the closure of the said business at Tiruchirapalli on January 31, 1983, after giving suitable compensation to all of them.

3. In March, 1984, the Provident Fund Inspector inspected the petitioner's premises and advised the petitioner to remit provident fund in respect of the employees working. The petitioner replied by letter dated March 23, 1984, that the firm did not fall within the purview of the Provident Fund Act, and also brought to the notice of the Inspector that it is newly established firm and the provisions of the said Act are not applicable. It also pleaded to extend the benefit of exclusion from the applicability of the Provident Fund Act to their employees. However, the petitioner received a letter from the Regional Provident Fund Commissioner, Madras, No. B11/TN/3257-E/Reg of 1985, dated August 28, 1985, wherein the Commissioner had asked to implement the scheme, provisions of the said Act with effect from February 1, 1983, that is, from the date of commencement of the business, in respect of the employees by remitting the dues and submitting the respective monthly returns to the Sub-Regional Office, Tiruchirapalli, under the old code No. TN/3257-C given to the R.R. Pharmaceutical Distributors. The petitioner was also informed that if the dues were not paid within 15 days for the period from February, 1983 to July, 1985, in full, legal proceedings will be taken under the Act to recover the dues under the Revenue Recovery Act. The said order of the Regional Provident Fund Commissioner is the subject-matter of this writ petition.

4. On behalf of the respondent one Raghuram, the Provident Fund Commissioner in the Office of the Regional Provident Fund Commissioner, Employees' Provident Fund, Madras has sworn to a counter-affidavit. In the said counter-affidavit he has stated that the petitioner is a partnership firm running pharmaceutical business in the name of Senthilnathans Pharmaceuticals at the premises where the unit of a covered establishment under the Employees' Provident Funds and Miscellaneous Provisions Act 1952, that is, R. R. Pharmaceutical Distributors, was situated upto January 31, 1983. He has stated that the petitioner has purchased the medicines and other stock-in-trade, furniture and fittings left over by R. R. Pharmaceutical Distributors, employed the same old employees of R. R. Pharmaceutical Distributors and continued the same business with fresh licences under the Drugs Act, Sales Tax Act, etc., as per the agreement between the two establishments. The petitioner has started the business on the very next day of the closure of the unit R. R. Pharmaceutical Distributors. It has also employed 11 old employees who were employed by R. R. Pharmaceutical Distributors. He has denied all the other allegations made in the writ petition in the said affidavit.

5. I heard the learned advocate for the petitioner and the learned advocate on behalf of the respondent. The main grounds of attack of the learned advocate for the petitioner were that the Provident Fund Commissioner was not justified in not granting exemption as required u/s 16(1)(b) of the said Act. He pointed out from the order of the first respondent that to refuse the said exemption the first respondent has considered the following points :

- (1) The business is one and the same.
- (2) The business is started in the same premises where R. R. Pharmaceutical Distributors was being run.
- (3) The petitioner has purchased the stock and furniture from the said old management.
- (4) Few old employees are being continued with the petitioner and it is only a continuation of the old business.

6. According to the learned advocate, these grounds are quite contrary to the proposition laid down by number of authorities including the Supreme Court. He brought to my notice that the erstwhile establishment was having nine partners, whereas the present firm is having all new six partners and the petitioner has obtained fresh licences under the Drugs Act, fresh sales tax licence, Income Tax. Just because the establishment was commenced on the next day of the closure of the erstwhile establishment, it does not mean it is the same establishment which is being continued. He has also pointed out that the previous establishment's is still continuing to do the same business at Madras, Vellore, Madurai and other places in Tamil Nadu and they are contributing towards the provident fund as covered establishment under the Act. He has invited my attention to a decision of this court in *Shambhudayal Sarju Prasad Tiwari v. Regional Provident Fund Commissioner*, 1977 LIC 1131. He placed reliance on the following passage of the said decision.

"A distinction has to be made between a similar establishment and the same establishment. If the subsequent establishment is similar it would not be on that account a continuation of the earlier establishment. If a business of catering is carried on in one room given by the Railway under a licence regulating terms and conditions of such business and, thereafter, the licence is terminated and someone else sets up an organisation of his own on fresh terms and conditions it could not be said that the prior establishment continued even when the business was similar and the establishment is run on similar terms and conditions. The servants employed by the petitioner served under the new terms and conditions as agreed with the petitioner. Therefore, merely by running a canteen on railway premises, the establishment would not be old one or one that had been continued from time to time by different contractors."

7. The other decision on which the learned advocate has placed reliance is a case of *Conveyor Equipment Co. (P) Ltd. v. Union of India* 1986 XI LLJ 22 (Mad) and

invited my attention to paragraph 3 of the said decision which is found at page 24.

"In this appeal, the decision of Mohan, J., has been questioned by the appellants. According to the appellants, the learned Judge has proceeded on the basis of an error that there has been a lease of the establishment as such, while in the earlier part of the judgment, the learned judge has himself referred to the fact that the earlier business was closed and that the lease is only as regards the land, building and machinery. Learned counsel for the appellants contends that only in the case of lease of an establishment as such, the lessee should be taken to continue the existing establishment, owned by the lessor and that, on the facts of this case, there is no continuity of the running of the establishment and only in cases where there is such continuity, the benefit of Section 16(1)(b) of the Act could be denied".

8. In *Sri Balaji Enterprise Vs. Deputy Regional P.F. Commissioner*, the learned advocate invited my attention to the headnote found at page 394.

". . . the test to be applied is to find out whether on the entire complex of facts of a given case, it can be concluded that the original legal entity, the establishment, has come to an end and has been succeeded by a fresh legal entity. If the answer is in the affirmative then that fresh entity will be the entity to which the Act will apply as a first impact and that entity is entitled to infancy protection and that protection will have to be granted as a matter of course. Further, if that entity is an entity which does not come within the meaning of the establishment as defined in the Act in view of the fact that it does not employ 20 or more persons, then that entity will not be covered by the provisions of the Act. On the other hand, if, on the facts of the individual case, it is found that the new establishment is not genuinely such but is only an old one formally resuscitated in order to avoid the legal obligation, then 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.

9. The petitioner was a partnership firm. The partnership was formed for the purpose of acting as dealers of *Burmah Shell*, appointed the petitioner as a motor spirit/high speed diesel dealer in respect of their filling station at *Bhavani* with effect from November 1, 1974, previously the dealership licence had been given by *Burmah Shell* to one *V. S. Murugesu Mudaliar and Sons*. *V. S. Murugesu Mudaliar and Sons* wound up their business and retrenched their employees as early as August, 1974. The petitioner firm started its business only from November 3, 1974. The petitioner firm recruited to its services three workers since they had experience in the field by reason of their having worked under *V. S. Murugesu Mudaliar and Sons*. Thereafter, they recruited two other persons. The question was whether the petitioner's establishment was a continuation of the business of *Murugesu Mudaliar and Sons* or a new establishment and whether the petitioner was liable to make any contribution under the Act.

Held, that there was absolutely no proof that the petitioner's filling station is a continuation of the business of Murugesu Mudaliar and Sons. It was an entirely new establishment unconnected with Murugesu Mudaliar and Sons. There was no question of any lease of the establishment which was being run by Murugesu Mudaliar and Sons in favour of the petitioner. It was also not disputed that the petitioner was employing only five persons which is definitely less than the required number of persons to be employed to qualify an establishment to be covered by the provisions of the Act. It follows that the petitioner's establishment was not an establishment within the meaning of the Act and was not liable to make any contribution under the Act.

10. He has also placed sound reliance on the decision of the Supreme Court in *The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry*, in paragraph 4, which is to the following effect (at pages 696-697).

"The burden of proving that the old establishment had continued and that a new establishment was not set up in the year 1961 was on the appellant, as the appellant had filed criminal cases for prosecution of the respondent. The first prosecution witness was the Provident Fund Inspector, Raghunathan, but most of his evidence relates to facts discovered by him and not in his personal knowledge. It is he who made a report for the prosecution of the respondent and in that report itself he admitted that the strength of the establishment was less than 20 till April 16, 1961, when it was purchased by the N.S.S. Co-operative Society. He added that there were only nine employees on the date of purchase. Of these nine employees, six were re-employed by the purchasers. Significance attaches to the word "re-employed" which implies that there was no continuity of employment even of those six employees. That witness also admitted that, the purchase, the press was removed from its original place and additional machineries were purchased and added to the press. According to him, he also received information that compensation due to the workers till the date of sale was disbursed by the previous owner, T.C. Central Co-operative Printers and Publishers. He added that the persons working in the press at the time of his evidence were all persons who had been appointed by the N.S.S. Co-operative Society. Thus, his evidence does not prove that the establishment run by the N.S.S. Co-operative Society was the same as the establishment which was being run by the previous owner of the press. The owner changed, the machinery changed, the location of the press was altered, and even the employees were not the same as before. In fact, none of the employees, according to his evidence, was continued in service. The only witness on whom reliance could be placed on behalf of the appellant to prove continuity of the business was P.W.-2. Sadasivan Nair, who claimed to be one of the employees in this press of the previous employer and who stated that he continued to be employed by the N.S.S. Co-operative Society. His evidence has rightly been criticised on the ground that he is a disgruntled person who lost his service some years later when the press was being run by the N.S.S. Cooperative Society. Further, he stated on oath that the

press was taken over with all its workers which is clearly a wrong statement and is contradicted by P.W.-1, the Provident Fund Inspector himself. It is also significant that, according to the Provident Fund Inspector, compensation was paid to the previous employees by the previous employer which clearly shows that the previous employees were not continued in service, and that they were paid compensation for termination of their services on transfer of the press presumably in accordance with the provisions of Section 25FF of the Industrial Disputes Act. The prosecution could have easily produced the accounts of the previous owner to show that there were at least some employees who were continued in service and who were not paid compensation, but no such attempt was made on behalf of the appellant. Even the sale deed in favour of the N.S.S. Co-operative Society has not been put in the paper-book before us and its absence is significant in view of the statement made by D.W.-1, one of the directors of the N.S.S. Co-operative Society, who stated that the N.S.S. Co-operative Society neither purchased the establishment as a going concern, nor did it continue to run the same establishment. According to D.W.-1, after the purchase of the press, there was a closure for a period of about three months and a new business was started in June or July, 1961, when a new establishment was set up. The workmen employed by the previous owner were not taken over on their old conditions of service. Fresh appointments were made and all workers were newly recruited, though, at the time of this recruitment, some of the old employees were also taken in service. This evidence would clearly show that a new establishment was set up by the N.S.S. Co-operative Society after the purchase of the press by it from the previous owner and that there was no continuity of the old establishment. As we have said earlier, the appellant could have summoned the accounts of the previous owner to show that these facts alleged by D.W.-1, are not correct. Even the N.S.S. Co-operative Society is maintaining accounts and registers; and no attempt was made on behalf of the prosecution to seize or summon those registers. It is true that the respondent himself, on his own initiative, did not produce those registers in defence, but, in a criminal case, such a circumstance cannot justify raising a presumption that the registers would have contradicted the evidence of D.W.

-1. D.W.-1 also stated that there was a specific provision in the sale deed that none of the workers, who were working in the press purchased, were to be taken in service and nobody was, in fact, taken. This statement could easily have been challenged before us if the sale deed had been included in the paper-book. In the absence of the sale deed which has not been brought to our notice, we see no reason to disbelieve the statement of D.W.-1 and we consider that his evidence is decidedly preferable to that of P.W.-2 whose evidence we have mentioned above."

11. Placing reliance on these decisions, the learned advocate submitted that the present case clearly comes within the purview of these decisions and the respondent was not justified in refusing to grant exemption u/s 16 of the Act.

12. On the other hand, the learned advocate appearing for the respondent

countering the above submissions of the petitioner's counsel submitted that the court has to take into consideration the totality of circumstances while considering whether exemption should be granted or not u/s 16 of the Act. He has pointed out that the Provident Fund Commissioner after considering all these aspects has given six reasons to refuse the exemption as required u/s 16 of the Act. According to him, all these reasons are valid reasons so as to refuse the prayer of the petitioner. He also stressed that this being a social welfare legislation strict compliance need not be insisted. The very fact that the establishment is started in the old premises, old employees have been taken into service and the petitioner has purchased the stocks, furniture and on the very next day the business was started clearly go to show that it is not new establishment, but it is the same establishment being continued.

13. He took me through the detailed counter affidavit filed by the Commissioner in this regard.

14. After hearing the rival submissions and after perusing the relevant records, I am of the opinion that there is considerable force in the submissions made by the learned advocate for the petitioner. According to me, the present case clearly comes within the purview of the decisions which I have referred earlier. However, the learned advocate for the respondent invited my attention to Section 17B of the Act which speaks about liability in case of transfer of establishment and also to the provisions of Explanation to Section 16(1)(d) which says, 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, placing reliance on those sections. The learned advocate for the respondent submitted that the present establishment is not a new establishment, and it is an old establishment being continued. I am unable to agree with the said argument of the learned advocate for the respondent. A careful analysis of the present case clearly goes to show that the establishment is a new one started by the petitioner and it has nothing to do with the old establishment which was closed. The ratio of the decisions referred supra will fully cover the present case.

15. Under the circumstances, I am of the opinion that the respondent was not justified in passing the impugned order.

16. For the reasons stated above, I allow this writ petition and quash the order passed in No. B-II/TN/3257/C/Enf/Regl. of 1986 dated February 25, 1986. However, there will be no order as to costs. Consequently, W.M.P. No. 3942 of 1986 is dismissed.