
(1979) 07 MAD CK 0017
In the Madras High Court

Sri Balaji Enterprise

APPELLANT

Vs

Deputy Regional P.F. Commissioner

RESPONDENT

Date of Decision : 10-07-1979

Acts Referred:

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

Citation : (1980) 2 LLJ 380

Hon'ble Judges : Padmanabhan, J

Bench : Single Bench

Judgement

Padmanabhan, J.—The petitioner has filed the above writ petition for the issue of a writ of certiorari to quash the order of the respondent,

the Deputy Regional Provident Fund Commissioner, calling upon the petitioner to make contributions to the Employees' Provident Fund. The

petitioner is a partnership firm and is represented by its managing partner. The partnership under the name of Sri Balaji Enterprise was formed on

20th October, 1974, the partners being Order Narmada and the managing partner A.M.V. Jayaraman. The partnership was formed for the

purpose of acting as dealers of Messrs. Burmah Shell. The petitioner applied to the Burmah Shell, Cochin Divisional Office, for being appointed as

their dealers. Accordingly Messrs. Burmah Shell appointed the petitioner as a Motor Spirit/High Speed Diesel dealer in respect of their filling

station at Bhavani with effect from 1st November, 1974. Previously the dealership licence had been given by Burmah Shell to one V.S. Murugesha

Mudaliar & Sons. The petitioner firm recruited to its services three workers Ayyasamy, Chandrasekhar and Abdul Hameed since they had

experience in the field by reason of their having worked under V.S. Murugesha Mudaliar and Sons. Thereafter, they recruited two other persons by

name Madheswaran and Sekhar. By the end of March, 1977, Chandrasekharan and Abdul Hameed resigned from the service of the petitioner firm.

2. While so, the petitioner received a notice from the Provident Fund Inspector, Tiruppur, calling upon them to submit the return under the Act for

the period from 3rd November, 1974, onwards. The notice stated that the petitioner had taken over the management of Messrs. V.S. Muruges

Mudaliar and Sons from 3rd November, 1974 and that a mere change in the management due to out-right purchase or lease does not affect the

applicability of the Act This notice was followed by another notice dated 4th October, 1976, issued by the, respondent to the effect that the Act

would be applicable to the petitioner firm as there was only a change in the management by purchase. The petitioner sent a reply on 6th October,

1966. The petitioner explained to the authorities that there is no connection between the petitioner and Messrs. V.S. Muruges Mudaliar and Sons

and that the petitioner had not taken over the management or establishment of Messrs. V.S. Muruges Mudaliar and Sons. The latter who were

dealers of Burmah Shell wound up their business and retrenched their employees as early as August, 1974. The petitioner firm started its business

only from 3rd November, 1974 and the petitioner is entirely a new establishment unconnected with Messrs. V.S. Muruges Mudaliar and Sons.

The petitioner, therefore, is entitled to the infancy protection as provided u/s 16 of the Act. As regards machinery, including the pump, petrol tank

and building, they belong to Messrs. Burmah Shell who had granted a licence to the petitioner to make use of those equipments for the purpose of

vending the MS/HSD supplied to it by them on commission basis. The petitioner denied the fact that it has taken over the management of Messrs.

Muruges Mudaliar and Sons or it has taken a lease of their establishment. The respondent rejected the contentions raised by the petitioner in its

reply by his order dated 25th March, 1977 and called upon the petitioner to implement the provisions of the Act with effect from 1st November,

1974. Consequently, the petitioner filed this writ petition praying to quash the respondent's order dated 25th March, 1977.

3. The respondent has filed a counter affidavit. According to the counter affidavit Messrs. V.S. Muruges Mudaliar and Sons, Erode, along with its

branch unit at Bhavani was covered under the Act. The branch unit of the said company was carrying on business of distribution of petrol and H.S.

D. till October, 1974. The petitioner acquired the dealership of motor spirit and H.S.D. with effect from 1st 1st November, 1974, by entering into

a fresh agreement with Burmah Shell and by taking over the pumps, tanks and other facilities at the Burmah Shell outlet at Bhavani which was

previously utilised by V.S. Murugesu Mudaliar and Sons. It is stated that the petitioner had taken over the petrol outlet as a going concern with the

machineries, pumps, and tanks, etc. The petitioner is said to have employed three ex-employees of V.S. Murugesu Mudaliar and Sons. It is further

stated that once the Act is applied to a firm it continues to apply to the establishment irrespective of the change in the management or ownership. It

is further averred that there is only a change in the dealership and the petitioner establishment is not entitled to infancy protection u/s 16(1)(b) of the

Act. It is stated that since the impact of the Act is on the establishment and not on the employer, the respondent has requested the petitioner to

implement the Act. A case in R.L. Sahni and Co. Vs. Union of India (UOI) and Another, , was relied upon and on the basis of the ratio of the

decision it is clear that the Burmah Shell has chosen to lease the establishment to the petitioner after the lease in favour of V.S. Murugesu Mudaliar

was terminated and consequently the petitioner cannot plead exemption u/s 16 of the Act. It is also stated that the petitioner has a remedy u/s 19A

of the Act and, therefore, the petition is not warranted. The respondent has, therefore, prayed that the writ petition should be dismissed.

4. Before I deal with the respective contentions advanced by Mr. Chidambaram for the petitioner and Miss Radha Srinivasan for the respondent it

will be convenient to refer to certain facts.

5. The partnership deed dated 28th October, 1974, has been filed by the petitioner as document No. 2. That shows that a partnership has been

formed under the name and style of Sri Balaji Enterprise between Order Narmada and A.M.V. Jayaraman. The partnership has been formed for

the purpose of carrying on dealership business under Burmah Shell. Both the partners have contributed Rs. 25,000 each towards capital. Pursuant

to the said partnership they applied to Burmah Shell for being appointed as their dealers at Bhavani. Document No. 1 filed by the petitioner is the

letter dated 21st October, 1974, sent by Burmah Shell to the petitioner firm. By the said letter, Burmah Shell has offered to appoint the petitioner

as a dealer in respect of their filling station at Bhavani with effect from 1st November, 1974. The petitioner firm has been asked to sign the

dispensing pump and selling licence agreement. As per the terms of the agreement the petitioner had to deposit a sum of Rs. 5,000 with the

Burmah Shell. The Burmah Shell agreed to sell the petroleum products to the petitioner at the rates specified by them. The petitioner has to pay the

full value by demand draft at the time they make indents on the Burmah Shell, Erode Depot. The petitioner has also to obtain licence for retail sale

from the proper authorities for retail sale of MS/HSD/lubricants/greases. The management of the dealership will completely rest with the petitioner.

6. From the above it is clear that what has been granted by Messrs. Burmah Shell in favour of the petitioner is only the licence to sell petroleum

products in the filling station. They have been given the licence to make use of the installations for the purpose of the business as a licensee. The

Burmah Shell has no control over the manner in which the petitioner carried on business except to the extent that the petitioner should not exceed

the maximum price fixed by Burmah Shell for the sale of petroleum products and the condition that the dealership should be carried on efficiently

and to the full satisfaction of the motoring public. Therefore, the dealership business which the petitioner commenced to run at the filling station was

an entirely new business started by the petitioner at the filling station, Bhavani, under the dealership licence granted by Burmah Shell. The only

connection which the petitioner had with the Burmah Shell is that under the dealership agreement they had the licence to use the building and other

installations as the filling station. The petitioner had to purchase whatever petroleum products they wanted to store at the filling station for the

purpose of retail sale, on payment of the price in advance by a demand draft for the full value of supplies at the time the indent was made on

Burmah Shell. For the purpose of making use of the filling station the petitioner was charged a licence fee of Rs. 318 per quarter.

7. Mr. Chidambaram contended that the petitioner firm is a new establishment. It has nothing to do with V.S. Murugesu Mudaliar and Sons which

was carrying on business as Burmah Shell dealers at the same filling station. They wound up their business and left the premises lock stock and

barrel. The employees working in the filling station were retrenched by V.S. Murugesha Mudaliar and Sons. Independently of V.S. Murugesha

Mudaliar and Sons the petitioner applied to Burmah Shell for being granted the dealership and were appointed as dealers by Burmah Shell under

an independent licence. The petitioner's business cannot be said to be a continuation of that of V.S. Murugesha Mudaliar and Sons at the filling

station. Equally it is wrong to say that the petitioner had taken over the business of the filling station as a going concern or that the Burmah Shell had

leased out the business to the petitioner. Therefore, in the submission of the learned Counsel, the mere fact that the petitioner had recruited three

persons who were originally employed in the filling station run by V.S. Murugesha Mudaliar and Sons it cannot be said that the Act will be attracted

to the petitioner's firm. The learned Counsel also pleaded that though in the affidavit the petitioner had taken the stand that they are entitled to

exemption u/s 16 of the Act, in view of the fact that the petitioner does not employ more than 20 persons the petitioner's establishment will not

attract the applicability of the Act at all.

8. Miss Radha Srinivasan, on the other hand, contended that for considering the question whether an establishment is entitled to the exemption u/s

16 of the Act it is unnecessary to have regard to the ownership of the establishment. The only test to consider is whether the establishment that has

come into existence is the same establishment as the one that carried on the business at the same place. The learned Counsel stressed the fact that

the impact of the Act is on the establishment and not on the employer and, therefore, the mere change in the employer will not take away the

establishment from the mischief of the Act.

9. The question for consideration is which of these contentions has to prevail.

10. In view of the argument advanced by Miss Radha Srinivasan certain facts will have to be clarified. There is no evidence to substantiate the

contention of the learned Counsel for the respondent that this should be treated as a lease of the business of Burmah Shell. I have already referred

to the terms of the document No. 1 dated 21st October, 1974, which is a letter issued by Burmah Shell to the petitioner which contains the terms

of the dealership agreement. From that it is clear that the right that is granted by Burmah Shell to the petitioner is to sell petroleum products at the

filling station. The buildings and the installations are only to be used as a licensee by the petitioner and for that purpose a licence fee has to be paid.

The Burmah Shell will make the necessary supplies only on receipt of full price at the time of indent. Therefore, it is not at all possible to conclude

that there is a lease of the business by Burmah Shell to the petitioner. The respondent has not placed before the Court the agreement between

Burmah Shell and V.S. Murugesu Mudaliar and Sons on the basis of which the latter has been carrying on the dealership business of the filling

station. The fact that V.S. Murugesu Mudaliar and Sons wound up their business at the concerned filling station is not disputed. It is not pretended

on the side of the respondent that the petitioner has any privity with V.S. Murugesu Mudaliar and Sons, It is not argued that there is a transfer by

V.S. Murugesu Mudaliar and Sons of their dealership business to the petitioner. It is not the case of the respondent that the petitioner is merely a

name lender for V.S. Murugesu Mudaliar and Sons and that the petitioner is really carrying on business of V.S. Murugesu Mudaliar and Sons at

the same filling station. In other words, Miss Radha Srinivasan did not argue before me that there was any sort of connection between the

dealership business carried on by V.S. Murugesu Mudaliar and Sons at the Bhavani filling station and the petitioner firm. Her argument was that the

petitioner having set up the same business or establishment at the said filling station the applicability of the Act must be attracted in view of the fact

that the establishment was subject to the provisions of the Act before the petitioner stepped in.

11. It is now settled that the impact of the Act is on the establishment or the factory in question and not on the owners and that a mere change of

ownership will modify or affect the obligation to make contributions on behalf of the members of the establishment towards provident funds

benefits once the period of infancy protection has expired. It is unnecessary to cite decisions for this proposition.

12. Section 16(1)(b) of the Employees' Provident Funds Act, 1952, reads as follows:

This Act shall not apply 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 the 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.

Therefore, the question that would arise for consideration in applying Section 16(1)(b) of the Act will be when the establishment was set up. If, for instance, in this case it is to be construed that the establishment of the filling station was set up by Murugesu Mudaliar and Sons and Murugesu Mudaliar and Sons had been covered by the Act and the present establishment in the hands of the petitioner is only a continuation of the business of Murugesu Mudaliar and Sons, certainly the date to be considered would be the date when Murugesu Mudaliar and Sons set up the filling station.

13. The test to be applied in such cases is to find out whether an establishment is a new establishment or is a continuation of the old establishment and, therefore, will continue to be governed by the provisions of the Act and this has been discussed in a number of decisions.

14. The first case to be referred to is that of Srinivasan, J., in *Devi Press Vs. Regional Provident Fund Commissioner, Madras and Another*, . In

that case a company known as *Devi Press Ltd.* went into liquidation and its two managing agents purchased the machinery, its accessories and the

furniture of the company and formed a partnership on 25th January, 1957, to carry on the business of printing. The factory and corporation

licences were transferred in the name of the partnership and the partnership obtained lease of the premises also. The reasons for winding up

business of the company were not apparent from the records or even from the resolution passed by the members of the company but the

dissolution took place a week or ten days before the issue of the notification making the Provident Funds Act applicable to the company. On the

closure of the company, the disputes that arose between the workers and management were resolved amicably and the workers, except those in

one department, were paid compensation and re-employed by the partnership as new employees. On the question whether the partnership was

entitled to infancy protection u/s 16(1) of the Act or was liable to pay provident fund contribution in respect of its employees, Srinivasan, J., after

referring to *Regional Provident Fund Commissioner, Punjab and Another Vs.*

Lakshmi Ratten Engineering Works, Ltd., ; M.K. Krishnamurthy,

Ex-proprietor, Photo Litho Press, Madras 1 Vs. Industrial Tribunal, Madras and Another, and In Re: Mahalaxmi Cotton Mills Ltd. (in liquidation),

, held as follows :

These decisions give a clue to the manner in which the controversy in the present case has to be resolved. It has been pointed out that these two

petitioners were the managing agents of the previous company. That business went into voluntary liquidation. The reasons for winding up that

business are not apparent from the records even the resolution passed by the members of that company. But that the dissolution took place a

week or ten days before the issue of the notification making the Act applicable to the printing industry is a patent fact. While in terms the business

was not sold as a going concern to the petitioner firm, in effect that was what was done. The entirety of the machinery, its accessories and the

furniture were taken over. The very factory and corporation licences were transferred in the name of the petitioner partnership. 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. If that is so, the date on which the establishment came into existence is not 25th January,

1957, the date of the formation of the partnership and the carrying on of the business from that date, but the date on which the old Devi Press Ltd.

came into existence.

From the above passage it will be clear that two essential facts mark out this decision. The first is the factory and corporation licences which stood

in the name of the old Devi Press Ltd. were transferred in the name of the petitioner partnership, and secondly Srinivasan, J., found that in truth the

old establishment continued although in a different name.

15. The question came up for consideration before Anantanarayanan, J., (as he then was), in Vittaldas Jaganathadas v. Regional Provident Fund

Commissioner (1964) 28 F.J.R. 262. One Jigannathadas Govindas and two others were proprietors of what is known as Maharani Talkies

consisting of buildings, the projector equipment, furniture and other suitable

fittings designed for the exhibition of cinema pictures. They were leasing out to successive lessees the building known as Maharani Talkies and also the projector equipment and other suitable fittings for the purpose of exhibition of cinema pictures. In or about 1948, M/s. Raja Chetty and Narasimhalu Chetty took Maharani Talkies on lease. The lease got terminated and the lessors obtained vacant possession of the premises, equipment, machinery and furniture. After April, 1953 they gave a fresh lease of the theatre, machinery and furniture to one Munirathnam Naidu on a monthly rental of Rs. 2,450. The latter carried on the business of exhibition of films at the theatre till 1961. The lease in favour of Munirathnam Naidu expired on 31st March, 1962. The lessee thereupon ended his business, discharged all his employees after notice and payment of bonus due, liquidated the business our right and delivered over possession of the leasehold premises and machinery to the owners. The lessors then gave a fresh lease in favour of M/s. Lakshmibai Jagannathadas and Co. A fresh case deed was executed with different condition of lease. The new lessees recruited about 19 persons who had been discharged by the previous lessee Munirathnam Naidu. The Regional Provident fund commissioner issued a notice to lessees and called upon them to make continuous on behalf of the employees under the Act. The new lessees, viz., V(sic) Jagannathadas and another filed a writ petition for the issue of a writ of certiorari to quash the order of the Regional Provident Fund Commissioner. Ananthanarayanan, J. (as he then was), quashed the order of the Regional Provident Fund Commissioner and allowed the writ petition. On behalf of the Regional Provident Fund Commissioner it was contended before the learned Judge that the impact of the Act was on the establishment or the factory as such and not on the owners. Therefore, the mere fact that there was a change of the lessee and that a new lessee started conducting the exhibition of films at Maharani Talkies cannot justify the conclusion that the establishment was set up only on the date on which the new lease came into existence, but it must be deemed that the new lease was a continuation of the old establishment and the relevant date would be the date on which the first of the lessees started exhibition of films in Maharani Talkies. It was, therefore, urged that the writ petitioners would not be entitled to infancy protection as provided u/s 16(1)(b) of

the Act on the ground that their establishment has been newly set up, The learned Judge observed as follows (at pages 267-268):

...After reference to several authorities and "Words and Phrases Judicially Defined" by Burrows, volume 2, I find that the most helpful definition of

"establishment", at least in the context of the usage of that word in the present Act 19 of 1952, is that available in the Oxford Dictionary, namely,

"Organised body of men maintained for a purpose". Once we have this definition in perspective, and also keep in mind the principle that the Act

really applies to the factory or establishment or industrial organisation, whichever it might be termed, and not to changes in ownership, or to the

history of the organisation, which might include temporary closures, it seems to me that the true way of looking at the liability becomes fairly clear.

On the entire complex of facts of a given case, can we conclude that the legal entity, "the establishment" came totally to an end, and was

succeeded by a fresh legal entity? If that is the case, 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.

The learned Additional Government Pleader has only one argument to urge in this connection. He pleads that it might be possible for any

"establishment" to be maintained up to the verge of the expiry of infancy protection, to be formally dissolved, and then for an establishment

apparently different in semblance though not really so, to come into existence again, claiming the benefit of infancy protection; if such a stratagem, is

to be recognised, it will mean a permanent evasion of the Act. Obviously, this will be akin to benami, and everything will depend on the facts of the

individual case. 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 won right, even if it happens by coincidence to have employed a large

part of the personnel of the previous establishment. Actually, if the writ petitioners are entitled to the claim that their establishment is a new one, as

the learned Additional Government Pleader concedes, they would escape liability on another ground also, since they claim to employ only less than

20 persons : that claim has not been controverted in the counter affidavit.

The learned Judge in the end allowed the writ petition.

16. An identical situation as the one which arose before Ananthanarayanan, J., arose before Chandra Reddy, C.J. and Natesan, J., in R.L. Salmi

& Co. v. Union of India 1964 II L.L.J. 169 : (1965) 28 F.J.R. 279. It may be stated at the outset that this was a writ appeal which had been filed

against the judgment of Srinivasan, J., in R.L. Sahni and Co. v. Union of India, (supra). The owners of Rajakumari Theatre had at the first instance

leased out the building with equipment known as Rajakumari Theatre to Om Prakash Gupta. On the expiry of the lease, the owner obtained

possession of the property by instituting proceedings in the High Court. Thereafter, the lease of the theatre was granted to M/s. R.L. Sahni and Co.

in June, 1960. The Regional Provident Fund Commissioner informed the lessees M/s. R.L. Sahni and Co. that on and from 15th June, 1960, the

date on which they started the cinema shows in the theatre, they got covered by the Act and, therefore, called upon them to pay the contribution.

The lessees contended that in view of the fact that they started business only on 16th June, 1960, they were entitled to protection for five years u/s

16(1)(b) of the Act. This contention was rejected by the Regional Provident Fund Commissioner whereupon the lessees filed a writ petition before

this Court for quashing the order of the Regional Provident Fund Commissioner and Srinivasan, J., dismissed the writ petition. Against that the

lessees filed Writ Appeal No. 122 of 1964, which came up for consideration before Chandra Reddy, C.J. and Natesan, J. The learned Chief

Justice, speaking for the Bench, observed as follows (at page 285):

It follows that what is established by the statutory provisions of the decided cases is that the exemption is available to the organisation or

establishment itself 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 has been set up. A mere change of hands would not clothe the establishment with newness. That being so, we do not

think that any exception could be taken to the order under appeal.

Before the learned Judges, the judgment of Ananthanarayanan, J., in Vittaldas

Jagannathadas v. Regional Provident Fund Commissioner. (supra)

was relied upon, for the lessees. The learned Chief Justice, referring to the judgment of Ananthanarayanan, J., observed as follows (at page 283):

It is true that the judgment of Ananthanarayanan, J., lends support to the contention raised by Sri Raghavachari. But, with great respect, we are

unable to share the view of Ananthanarayanan, J., in W.P. No. 1018 of 1964 (1964) 28 F.J.R. 262.

The learned Chief Justice also followed *Bharat Board Mills Ltd. Vs. The Regional Provident Fund Commissioner and Others*, ; *Jamnadas*

Agarwalla v. Regional Provident Fund Commissioner AIR 1963 Cal. 513 and *Kunnath Textiles Vs. Regional Provident Fund Commissioner*, .

17. Bhargava, J., of the Supreme Court, sitting with Hedge, J., had occasion to consider the question in *Provident Fund Inspector v. N.S.S. Co-*

operative Society (1970) 40 F.J.R. 310. On 21st March, 1961, the N.S.S. Co-operative Society purchased a press from Travancore-Cochin

Central Printing and Publishing Co-operative Society Ltd. As a matter of fact, the Travancore-Cochin Central Printing and. Publishing Co-

operative Society Ltd. had set up the press as early as 1946 and continued it till March, 1961, when the press was purchased by the N.S.S. Co-

operative Society. Previously, there were only nine workmen employed. After the N.S.S. Co-operative Society started working the press the

number of workmen increased beyond 20, with the result the Act became applicable to the press. But the N.S.S. Co-operative Society did not

comply with the requirements of the Act and pay contributions and send the various returns to the authorities concerned. Therefore, the Provident

Fund Inspector, Trivandrum, instituted prosecutions against the Secretary, N.S.S. Co-operative Society, for offences punishable under the

Employees' Provident Funds Act for contravention of the *Employees' Provident Funds Science*. After observing that the burden of proving that

the old establishment had continued and that a new establishment was not set up in 1961 lay on prosecution and after referring to the evidence in

the case, the learned Judge summed up the factual conclusions thus (at page 315):

...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 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 was

available to the respondent from June or July, 1961, when the new establishment was set up.

Then the learned Judge discussed certain decisions and expressly stated that the decisions in *Jamnadas Agarwalla v. Regional Provident Fund*

Commissioner, West Bengal, AIR 1963 Cal. 513 and *Bharat Board Mills Ltd. Vs. The Regional Provident Fund Commissioner and Others*, ,

were inapplicable to the facts before them. In this context, it will be pertinent to state that in *Jamnadas Agarwalla v. Regional Provident Fund*

Commissioner, West Bengal, AIR 1963 Cal. 513, the writ petitioners had purchased from the trustees of the registered debenture trust of the

United Rubber Works Private Ltd., on October 18, 1958, all the machinery, plants, tools, implements, equipments, furniture and other movable

articles belonging to the said limited company for a sum of Rs. 2,50,000. The business of the United Rubber Works Private Limited was closed at

the time of the purchase by the petitioners and they alleged to have started, after their purchase, a new business, in the same site, on or about

February 13, 1959. They pleaded that inasmuch as three years had not elapsed since the establishment of their factory, they were not liable, under

the Provident Fund Scheme, to contribute. That was not accepted. The learned single Judge of the Calcutta High Court observed:

Where a factory, which was sold, was closed at the time of sale and subsequently the new owners started business under a new name the date of

the setting up of the establishment for the purposes of Section 16(1)(b), shall not be the date on which the new owners started business but the

date on which the factory originally started the manufacturing process. The fact that a new company or concern subsequently takes over or

acquires the factory does not shift the date of establishment of the factory to the date of its taking over or acquisition nor does the fact matter that

the factory had ceased to produce goods for a certain time before acquisition and resumed production, under a new name, as a result of the

acquisition. Therefore, this is a case of a purchaser taking over the old establishment by purchase.

18. Bharat Board Mills Ltd. Vs. The Regional Provident Fund Commissioner and Others, , was also a case of a new incumbent acquiring the

factory from the previous owners. Bose, J., observed in paragraph 15 of the judgment as follows (at page 203 of 15 F.J. R.):

Now it is an admitted fact that the company, India Paper and Board Mills Ltd., started production after the establishment of the factory sometime

in the year 1936. There is nothing to show that the production stopped at any time prior to 12th May, 1950. It appears from the counter-affidavit

of the Senior Provident Fund Inspector that the petitioner-company is running the factory since 12th May, 1950, although the actual sale in its

favour took place in October, 1950. After the purchase by the petitioner there were no doubt some breaks in the continuity of the production but

there is no doubt that this factory ran into production in 1936 and it is this identical factory which is still manufacturing goods though the ownership

of the factory has changed hands in the meantime. The petitioner is, of course, a new concern since 29th June, 1950, but the factory continues to

get the same. In my view, 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.

Naturally, therefore, this case was distinguished by the Supreme Court in Provident Fund Inspector v. N.S.S. Co-operative Society (1970) 40

F.J.R. 310. The facts in Kunnath Textiles Vs. Regional Provident Fund Commissioner, , are also entirely different. There, in 1942 one K.T. Paul

and his six brothers started a hand-loom textile factory which they ran until about March, 1948. In January, 1949, the seven brothers formed a private limited company with one of the brothers, by name Cherukutty, as the managing director. This company took the factory on lease and worked it until 1st November, 1953, when it surrendered the lease. The provision of the Employees' Provident Funds Act were applied to the factory while it was being run by the Eastern Agencies Ltd., and that company was contributing to the Employees' Provident Fund as required by the Act and the scheme framed there under. On the termination of the lease of the company, the seven brothers formed themselves into a partnership which they called the "Kunnath Textiles" and they took over the factory which they continued to run with the same employees (although they now choose to call them new workers) making the same goods and with no change whatsoever as to its character. They however, discontinued sending the returns and making the contributions required by the Act, and when called upon by the Regional Provident Fund Commissioner to comply with the provisions of the Act contended that theirs was an infant factory within the meaning of Section 16 of the Act having been established only on 1st November, 1953, and that the provisions of the Act were not applicable to the factory until it came of age on 1st November, 1956. This contention was overruled by the Commissioner by his letter dated 27th August, 1954, on the ground that what had happened was only a mere change in management and not the establishment of a new factory. Thereupon, the firm filed a writ petition for quashing the order of the Regional Provident Fund Commissioner. The writ petition was dismissed by a single Judge and a writ appeal was filed. The learned Judges found the factual position as follows (at page 65):

...Although in strict legal theory the Kunnath Textiles is a different legal entity from the Eastern Agencies Ltd., the ownership of the factory was throughout vested in the seven brothers, and, as remarked by the learned single Judge, it is significant that the licence for working the factory has throughout remained in the name of Cherukutty who was the managing director of the Eastern Agencies Ltd., and is now the managing partner of the Kunnath Textiles. The so-called surrender of the lease was only a notional transaction by which the seven brothers in the garb of the Eastern

Agencies Ltd., made over the factory as a working concern to themselves in their new garb of the Kunnath Textiles. The factory continued to work

as before, with, it is admitted, practically the very same employees and there was no interruption in the existence, not even a notional death and rebirth.

Dealing with the contention on behalf of the lessees that the lease was only of the premises and the equipment, the learned Judge has observed (at page 65):

...Assuming that the lease was only of the premises and the equipment, and that the surrender was not notional but real, the firm being a different entity from the company, what actually happened as a result thereof was undisputedly that the appellant firm-took over the factory as a working concern. That in law the surrender of a lease is not, strictly speaking, a transfer does not alter the position.

Therefore, the learned Judges found that the old establishment continued in the garb of a new name.

19. Per Bhargava, J., in *Provident Fund Inspector v. N.S.S. Co-operative Society*, (1970) 40 F.J.R. 310, stated that 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 *Vittaladas Jagannathadas v. Regional Provident Fund Commissioner*, (1964) 28 F.J.R. 262". The following observations of Ananthanarayanan,

J., in the above case have been extracted verbatim by Bhargava, J. (at page 316 of 40 F.J. R.):

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 wherein, 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".

Ultimately, the Supreme Court found that the N.S.S. Co-operative Society had set up a new establishment and that the provisions of Section

16(1)(b) of the Act would apply to that establishment, and that, therefore, there was no liability to pay contribution or to file various returns. The

Supreme Court also referred to *Devi Press Vs. Regional Provident Fund Commissioner, Madras and Another*, and distinguished the same on the ground that it was a case of a transfer of the company concerned.

20. In view of the fact that the ratio of *Ananthanarayanan.J., in Vittaldas Jagannathadas V. Regional Provident Fund*, (1964) 28 F.J.R. 262, has

been quoted verbatim and considered to lay down the correct principle to be applied in such cases, the decision of the Bench in *R.L. Sahni and*

Co. v. Union of India (1965) 28 F.J.R. 279, disapproving the principle enunciated by *Ananthanarayanan, J.*, loses its force. No doubt, the above

Bench decision was not cited before the Supreme Court. However, that does not in any way alter the situation in view of the fact that *bhargava, J.*,

had, after quoting the observations of *Ananthanarayanan, J.*, stated that they contain the correct principles to be applied in such cases.

21. It is unnecessary for me to express any opinion whether the decision in *R.L. Sahni and Co. v. Union of India* (1965) 28 F.J.R. 279, must be

deemed to have been impliedly overruled by the decision of the Supreme Court in *Provident Fund Inspector v. N.S.S. Coperative Society* (1970)

40 F.J.R. 310. For my present purpose, it is sufficient to state that the facts of the case in *R.L. Sahni and Co. v. Union of India* (1965) 28 F.J.R.

279 and the facts of the present case are entirely different and distinguishable from each other.

22. *Miss Radha Srinivasan* has placed before me a decision of *Mohan, J.*, in *Writ Petition No. 627 of 1976*. The facts of that case are also entirely

different. There, originally *M/s. Veekay Engineering industries* was carrying on the business of rendering services as technical Consultants and

designers, as a partnership. On 26th November, 1969, *M/s. Conveyor Equipment Company (P) Ltd.* the petitioners before *Mohan, J.*, took on

lease from *M/s. Veekay Engineering Industries* a site of an extent of 14 grounds together with some buildings thereon, besides some items of

second hand machinery for a period of 11 months with a provision for renewal. They commenced their business by separate registration and also

with the help of a licence issued under the Factories Act. They also recruited new employees. *Mohan, J.*, observed : "Now the old establishment of

M/s. Veekay Engineering Industries had already been closed. Admittedly, a part of its business, the site, building and the machinery were leased out in favour of the petitioners by a lease deed. Therefore, there is no new establishment, nor can such a new establishment arise merely because the petitioners enlarge their manufacturing activities by having additional machines or again by employing new personnel altogether. The reason is a lease contemplates a lease of an establishment for the purpose of the section". Therefore, the case before Mohan, J., is distinguishable from the facts of the present case.

23. Somnath Ayyar, J., of the Mysore High Court sitting with Kalagate, J., had to consider a similar situation in Sandara Rao v. Regional Provident

Fund Commissioner (1967) 33 F.J.R. 34. The Bangalore Bar Association called for applications from persons who were willing to operate a

canteen in the bar association premises for the supply of food and refreshments to its members on terms and conditions prescribed by the

Association for a period of one year commencing on 20th April, 1964. One Sundara Rao was granted the right by the Bangalore Bar Association

to commence the canteen in the Bar Association premises on 20th April, 1964. It is necessary to mention that prior to the commencement of the

canteen business by Sundara Rao, 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. The Regional Provident Fund

Commissioner, Bangalore, called upon the petitioner to remit provident fund contribution and administrative charges on the ground that the canteen

was covered by the Employees' Provident Funds Act. Therefore, Sundara Rao filed a writ petition before the High Court of Mysore to quash the

order of the Regional Provident Fund Commissioner and to direct him to desist from enforcing his order. The writ petition was allowed by the

Bench of the Mysore High Court. Somnath Ayyar, J., speaking for the Bench, observed as follows (at pages 36-37):

It is quite plain that if the process by which the petitioner commenced conducting a canteen in the Bar Association premises is that specified in the

affidavit of the petitioner, that canteen was a canteen established by him for the first time on 20th April, 1964. 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 established 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.

* * *

The test is whether there was an existing establishment the operations in which were continued by the petitioner, or whether the petitioner erected a new establishment for the first time. We have no doubt in our mind that the agreement between the Bar Association and the petitioner makes it abundantly clear that the canteen which was commenced by the petitioner under the agreement, was set up by him for the first time since it had no manner of association whatsoever with an old canteen, which might have been established by someone else under some other agreement to which the Bar Association was a party.

24. In *Shambudayal Sarju Prasad Tiwari Vs. Regional P.F. Commissioner and Others*, , a certain person was running a non-vegetarian restaurant in a railway station. On the expiry of his licence period, the petitioner in that case became a new contractor. The railway provided a room. The new contractor had his paraphernalia, his own cook and he had his own organisation and everything associated with his establishment came into being with the new licence in his favour. The question was whether the contractor was entitled to infancy protection u/s 16(1)(b) of the Act. The

question that fell for consideration was whether the establishment of the writ petitioner which was started on 8th January, 1969, came into being for

the first time or it was a continuation of business, and whether he was entitled to infancy protection u/s 16(1)(b) of the Act. The learned Judges

observed as follows (at pages 458-459):

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 the terms and conditions of such business and thereafter, the licence is terminated and some one 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 new terms and conditions as agreed with the

petitioner. We do not, therefore, think that by merely running a canteen in the railway premises, the establishment was regarded as an old one or

one that had been continued from time to time by different contractors. In *State of Punjab Vs. Satpal and Another*, , there was devolution of

interest and the establishment as such continued. There is no such devolution of interest in the present case.

In the result, the learned Judges of the Madhya Pradesh High Court held that the writ petitioner was entitled to the benefit u/s 16(1)(b) of the Act.

25. In *P.G. Textile Mills (Pvt.) Limited, Baroda Vs. Union of India and Others*, , the Gujarat High Court laid down the test in the following terms:

Where 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. While deciding this question,

whether a new business had come into existence or not the Court was not concerned with the law of partnership but with the Provident Funds Act.

The law takes into account only the existence of establishment and the employment of a certain number of persons in factories over a given period

of time.

The change of location, or change of composition of partners or even a change in

the manufacturing process is not vital in the application of law as they arc changes without affecting continuity and that is why it was held that what was continuing could not be new. If the continuity is broken, what emerges is an entirely new concern. The nexus being the establishment which is an organised undertaking where employer and employee co-operated to produce these textile goods, to find out whether there is a continuity of the old establishment with the new establishment, all the aspects of this entire organisation of the establishment will have to be taken into account, 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 employees are the old employees. The correct test is that there must be the 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.

"If, however, the case is one as in the present case, where the old company's business was completely wound up after it was finally closed in 1966

and the new purchaser came in on the Court's sale of the assets of the old company, there could never be any continuity of this new employer with

that old company which was wound up and whose business establishment had finally closed down.

If the test of continuity and identity were applied by the Central Government, the conclusion is inescapable on the undisputed facts of the instant

case that the company was entitled to the benefits of the infancy protection.

26. Gujarat High Court in this case has followed the ratio in Provident Fund Inspector v. N.S.S. Co-operative Society (1970) 40 F.J.R. 310 and

the test laid down by Ananthanarayanan, J., in Vittaldas Jagannathadas v. Regional Provident Fund Commissioner (1964) 28 F.J.R. 262.

27. To sum up, the test to be applied in such cases 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.

28. I have already narrated the facts of the case and also the factual contentions of the petitioner's filling station is a continuation of the business of

Murugesu Mudaliar and Sons, but that it is an entirely new establishment unconnected with Murugesu Mudaliar and Sons in favour of the present

petitioner, nor was any such contention put forward before me. It is also not disputed that the petitioner is 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. I,

therefore, hold that the petitioner's establishment is not an establishment within the meaning of Employees' Provident Funds Act and is not liable to

make any contribution under the Act. In the circumstances, the writ petition is allowed, and the rule nisi is made absolute. There will be no order as

to costs.