

(1999) 10 KAR CK 0039
In the Karnataka High Court
Case No : Writ Appeal No. 2586 of 1997

The Regional Provident Fund Commissioner	APPELLANT
Vs	
Dev Kiran Paper Mills (P) Limited	RESPONDENT

Date of Decision : 27-10-1999

Acts Referred:

Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 16 (1) (d), 7 A
Karnataka State Finance Corporation Act, 1981 — Section 29

Citation : (2000) 2 KCCR 1114

Hon'ble Judges : Y. Bhaskar Rao, C.J.; A.V. Srinivasa Reddy, J

Bench : Division Bench

Advocate : Harikrishna S. Holla, for the Appellant; B.C. Prabhakar, for the Respondent

Final Decision : Dismissed

Judgement

Y. Bhaskar Rao, C.J.—The Regional Provident Fund Commissioner who was the Respondent in the writ petition, has preferred this appeal assailing the order of the learned single Judge.

2. The brief facts of the case are that the Respondent herein challenged the order passed u/s 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (Hereinafter for short, called the Act). Originally, The Annapoorna Paper Mills was assessed under the Act. The said mill was closed on 28.9.1984. Subsequently, it defaulted the payment of loan which it had borrowed from the Karnataka State Financial Corporation (KSFC). On 1.10.1985, the KSFC, invoking power u/s 29 of the State Finance Corporation Act, 1981 took possession of the assets of the mills and sold the same. The Respondent purchased the same on 18.6.1987 by deploying his own capital and after purchase of machineries, it started production. At that stage, the Appellant initiated proceedings alleging that the Respondent-Management is continuation of the previous management and is liable to pay the contribution u/s 7-A of the

Act. The contention of the Respondent is that it became the owner of the mill after it purchased the mill from the KSFC and is liable for infancy protection for a period of three years. The said contention was rejected by the Appellant and the impugned order was passed, which was challenged in the writ petition.

3. The learned single Judge, after considering the scope of Section 29 of the State Finance Corporation Act and referring to the judgments of the Supreme Court held that Respondent is entitled for infancy protection as contemplated u/s 16(1)(d) of the Act. Assailing that, Appellant has filed the present appeal.

4. The learned Counsel for the Appellant contended that the KSFC which had entered into the shoes of the earlier establishment is deemed to be continuation of the earlier establishment and the sale made by the KSFC in favour of the Respondent is deemed to be made on behalf of the earlier establishment and therefore, there is continuity of the establishment even after the same is purchased by the Respondent herein. Once the previous establishment came under the purview of the Act after completion of infancy period of that establishment, the successor establishment is not entitled for further infancy protection as it is only continuation of the earlier establishment. Therefore the learned single Judge erred in allowing the writ petition.

5. The learned Counsel for the contesting Respondent contended that the Respondent is a purchaser and it invested its own capital and even some of the machineries were purchased by it. The earlier owner stopped the functioning of the factory in the year 1984 and thereafter, only in the year 1987 it was purchased and production was started as a new establishment. Though some of the employees of the erstwhile establishment are re-employed, they are employed as fresh employees, except continuity of service being given for payment of gratuity and pension. The Memorandum of understanding entered into by the Respondent with the workmen clearly shows that there is no continuity of service in other respects, except for the purpose of payment of gratuity and pension. It is further contended that by virtue of Section 29 of the State Finance Corporation Act (SFC Act), as soon as the KSFC takes possession of the property, it becomes the owner for all purposes as it is clothed by the power by virtue of the provisions of the said Act to sell the property as the owner and even suits can be filed by the KSFC against the concern. Therefore, for all purposes, the earlier owner ceases immediately after the possession is taken by the KSFC by exercising power u/s 29(1) of the KSFC Act. Therefore continuity of establishment is not available. When the Respondent purchased and started the factory after a lapse of more than 5 years, continuity of establishment is not available and the new establishment is not available and the new establishment is entitled for infancy protection as providing u/s 16(1)(d) of the Act.

6. In view of the above contentions, the question that arises for consideration is whether u/s 29 of the KSFC Act, the KSFC becomes the owner of the assets of the establishment as soon as power u/s 29 is exercised and possession is taken. To properly appreciate the above point, it is relevant to extract Section 29 of the

KSFC Act:

29 (1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under Sub-section (1), shall vest in the transferee all rights in or to the property transferred as if the transfer had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) Where any action has been taken against an industrial concern under the provisions of Sub-section (1), all costs, charges and expenses which in the opinion of the Financial Corporation have been properly incurred by it as incidental thereto shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) Where the Financial Corporation has taken any action against an industrial concern under the provisions of Sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of the concern.

7. By reading the above provision, it is manifest that when an establishment which has taken loan or made the Corporation to stand as surety, fails to pay the debt, the KSFC will have the right to take over the management or possession or both of the industrial concern, as well as the right of transfer by way of sale and realise the property pledged to the KSFC. Sub-section (2) further provides that the transfer made by the KSFC in exercise of power u/s 29, shall vest in the transferee all rights in or to the property transferred as if the transfer has been made by the original owner. It is to be noticed here that the transfer is made by the Corporation and not by the original owner from whom the properties are taken by virtue of Section 29 of the KSFC Act. Further, the Corporation will have the same rights as the owner of the goods manufactured and produced by the establishment. Sub-section (5) provides that where the KSFC has taken any

action against an industrial concern u/s 29(1) of the KSFC Act, the financial corporation is deemed to be the owner of such concern for the purpose of suits by or against the concern, and shall sue and be sued in the name of the concern. Thus, it is evident that all the powers, rights, ownership and power of right to lease, sale or mortgage the property to recover debts from any third party including power to file suits vests in the KSFC. Thus the KSFC becomes the owner for all purposes. The original establishment will have no right whatsoever to exercise, once power u/s 29(1) of the KSFC Act is exercised by the KSFC. When once the Corporation has got right to transfer the assets, the transferee will get all the rights in such transfer as if the assets are transferred by the owner himself. Therefore, for all practical purposes, the Corporation becomes the owner. The defaulting industry is entitled to only the excess amount, if any remaining, after the sale of the property, after satisfying the debts, sureties and other expenditure. It has no other right. Furthermore, the establishment cannot exercise any right as the ownership u/s 29 comes into operation once the power is exercised.

8. The learned Counsel for the Appellant relied upon the judgment of the Supreme Court in the case of Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, for the proposition that where a property is purchased in a winding up proceedings, the purchasing establishment is deemed to be continued in the old establishment. The facts of that case are that the establishment was started prior to 1954 and thereafter it became defunct and therefore the Official Liquidator was appointed and a public limited company purchased the said factory and factory also re-employed most of the employees and work was started within a period of three months. Considering those circumstances of the case, the Supreme Court held that as the factory was stopped functioning only for a period of three months and after purchase, the functioning started with same machinery and staff for production, no new factory comes into existence. In those circumstances, it was held that it is an old establishment continuing and the benefit of infancy u/s 16(1)(d) of the Act is not available. The facts of the present case are quite different from the facts stated in the above case.

9. It is relevant to refer to the judgment of the Apex Court rendered in The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, . The facts of this case are similar to the present one. The Supreme Court in the case of Union of India and Ors. v. A.S. Amarnath 1997 (I) LLJ 1365- has considered the question whether a firm's business was bonafide closed, a new firm of different partners utilising licence and name of closed firm, employing some of the workmen and using machinery, is deemed to be a new establishment or continued as old establishment. The Supreme Court, after considering the judgment in Sayaji Mill's case (Supra) held that the facts of the case are quite different and distinguished that judgment and held that it is a new establishment which came into existence with new partners and the benefit of infancy provided u/s 16(1)(d) of the Act is available to such partnership firm. This judgment squarely applies to the facts of the present case.

10. The sale is defined u/s 54 of the Transfer of Property Act. For constitution of a valid sale where the property is worth more than Rs. 100/-, there must be a owner who is intending to sell for a consideration the immovable property to the intending purchaser. Therefore the requirements are that there must be immovable property to sell for a consideration and the owner of the property must sell the property to an intending purchaser. Then only it becomes a sale. In the present case, as per Section 29 of the KSFC Act, it is only KSFC which executed the sale-deed conveying all title and rights of the property to the purchaser. The defaulting industry has no right to execute any deed. Therefore, the property of the defaulting establishment vests in the KSFC and KSFC in turn sold it to the present Respondent. As such, there is no transfer from the defaulting establishment to the present Respondent. Even testing on this aspect also, it cannot be said that there is continuity of the establishment. Further, the clauses of the Agreement entered into between the present Respondent and employees clearly provide that the employees are only re-employed as fresh employees, except continuity of service for purpose of payment of gratuity and pension. The clauses further provide that Respondent is not deemed as a successor or a transferee of the earlier establishment. Relevant clauses of the said agreement are extracted as follows:

1) Employment of Ex-workmen: It is agreed to employ all permanent willing workmen whose services stood terminated w.e.f 28.8.1984 consequent to the closure of the establishment by the erstwhile Management and who report for duty within one month from the date of starting the Establishment. It is further agreed to provide employment to 7 (seven) disabled workmen referred to in para 2 of the settlement of 17th July, 1985.

2) Continuity of service: (a) In respect of continuity of service of workmen, though there is no legal obligation on the part of the Management to re-employ them in view of the High Court's decision in MFA 3025 c/w 3113 of 1987, the Management agreed to give continuity of service to the workmen for the purpose of considering eligibility for payment of gratuity and retrenchment.

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9) New Unit: It is agreed between the parties that in view of the judgment of Honourable High Court of Karnataka in MFA No. 3025 C/W 3113/1987 relating to clause one of the settlement deed dated 17.7.1985, the present management is neither a successor, assignee, heir nor a transferee. Accepting the verdict of the Court, parties agreed to treat the establishment as a new unit except for the purpose of continuity of service of workmen as mentioned in Clause 2 supra.

11. By reading the above clauses of the agreement, it is manifest that the present Respondent is neither a successor, assignee or heir, nor a transferee as per the verdict of this Court in the appeals referred to above. Therefore, the above clauses make it clear that there is no continuity between the old establishment and the present Respondent.

12. The learned Counsel for the Appellant relied on the judgment of the Delhi High Court reported in In the matter of: M/s. Disco Electronics Ltd., (In Liquidation), . The acts of that case are quite different and in view of the latest judgment of the Supreme Court in Union of India and Ors. v. A.S. Amarnath (supra) we are not able to agree with the said proposition. Similarly we are not able to agree with the proposition laid down by the Patna High Court in 1995 (1) Lab 801.

13. In view of the above stated facts and in the circumstances of the case, we hold that the Respondent-establishment is entitled for infancy protection as provided u/s 16(1)(d) of the Act. We do not see any ground to interfere with the order of the learned single Judge. Appeal is dismissed.