

(1993) 09 KAR CK 0033
In the Karnataka High Court
Case No : Writ Petition No. 10424 of 1993

Wipro Ltd.

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 17-09-1993

Acts Referred:

Constitution of India, 1950 — Article 226, 32

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

Citation : (1994) 68 FLR 347 : (1993) ILR (Kar) 3237 : (1994) 1 KarLJ 174 : (1995) 1 LLJ 120

Hon'ble Judges : A.J. Sadashiva, J

Bench : Single Bench

Judgement

1. The petitioner in this Petition filed under Article 2126 of the constitution, has sought for a Writ of Certiorari to quash the order No. E/4/93 dated nil passed by respondent and communicated to the petitioner vide letter dated 15.12.1993 in NO, KN/PF/ENFV/TMKDVN/1497/KN/14294/93, Produced at Annexure-A.

2 The question in controversy in this petition is

" Whether the petitioner-establishment is branch unit of M/s Wipro Ltd., Bombay a covered and exempted establishment under Code No. MH/948 and hence is not entitled for infancy protection in terms of section 16(1)(d) of the employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter called "the Act") ?

In order to resolve the aforesaid controversy, it is necessary to state a few facts as stated by the petitioner, which are as follows :

That M/s Wipro Ltd., is a Company incorporated and registered under the provisions of the Companies Act, 1956 having its registered office at Bombay, hereinafter called as "the Company". It has set up four independent and different units among other divisions, in different States, to manufacture consumer products. They are -

- (i) Wipro Consumer Products, P. B. No. 12, Amelnar, Maharashtra,
- (ii) Wipro Consumer Products, Wiranal Nagar, Bhagyanagar. Gujarat.
- (iii) Wipro Consumer Products, Plot No. 4, Antharasanahalli, Tumkur Karnataka,
- (iv) Wipro Leather Products, 128/1, Vellanchari Village, Guduyancherry, Tamil Nadu.

The controversy in this petition is in respect unit/establishment in Karnataka, hereinafter called "the establishment".

That sometime in 1986-87, the Company proposed to set up consumer products unit in Karnataka, for manufacture of vanaspathi in flexi packs, Santoor Soap, fatty acids and Glycerine, Original proposal was to establish the factory at Mysore Road in Bangalore. Subsequently, the location of the factory was changed to Tumkur, which was declared to be an industrially backward areas, as the Government of Karnataka offered package of new incentives and concessions to the industrially backward area That, after completing all formalities, the establishment went in for production with effect from 13.4.1988.

That in the year 1985, the Company in order to start a new consume production unit in Karnataka had purchased all the plants and machineries and other assets of M/s Margarine & Refined Oil Co., (p) Ltd., which was under closure, with the intention of setting up a factory in the premises of M/s Margarine & Refined Oil Co., (p) Ltd. Various concessions and incentives offered by the Government of Karnataka, for setting up industrially backward place, like Tumkur, prompted the company to change its mind and set up the establishment at Tumkur. Accordingly the establishment was set up at Tumkur making use of the second-hand machinery, obtained from its Amelnar factory at a depreciated value and those of M/s Margarine & Refined Oil Co. /, (P) Ltd., which had remained closed That the Company after obtaining necessary licences and permits from various authorities and after obtaining loans from various banks to the tune of Rs. 435 lakhs towards modernising and working capital of the establishment in addition to the financial assistance to the extent of Rs. 2.42 crores received from the Company's headquarters at Bombay, has started production with effect from 13. 4. 1988.

It appears that on 10. 8. 1988, the establishment addressed a letter to the Assistant Provident Fund Commissioner, Bangalore requesting for a separate Code number of the establishment, under the provisions of the Act. This was followed by another letter dated 8. 10. 1988 from the Company requesting for allotment of a separate Provident Fund Code number for the establishment, contending that the establishment is entirely a different unit having no linkage or connection with the Company's other unit at Maharashtra.

That, as there was no favourable response from the respondent, the establishment wrote another letter dated 27. 11. 1990 to the respondent requesting for providing a Provident Fund Code number. It is stated in the said

letter that the establishment commissioned the factory at plot No. 4 Antharasanahalli Industrial Area, Tumkur and it has commenced production from 13. 4. 1988. It is further stated therein that, even though the period of three years would expire on 13.4.1991, the establishment, since willing to cover the establishment under the provisions of the Act voluntarily requested for a new Provident Fund Code number. In reply to the said request, the respondent vide his communication dated 18. 6. 1991 allotted a provisional code number for administrative convenience of the establishment. The relevant portion of the said communication reads as under :

" Your request for allotment of separate code number to your establishment/ branch i.e. M/s. Wipro Ltd., Tumkur is carefully examined and it is decided to allot a separate code number namely KN/14294 with effect from 30. 4. 1988 provisionally (and the rate of contribution applicable to your establishment is 10%) only for your administrative convenience with a clear understanding that both the units-that is M/s. Wipro Ltd., Bombay MH/948 and M/s. Wipro Ltd., Tumkur are not separate and independent units. Your establishment will be treated as a branch of M/s. Wipro Ltd., Bombay KN/948 and not as a separate and independent unit and employment strength of both of them will be continued to be reckoned together for all purposes under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the schemes framed there under like rate of contributions, etc.,

Further, notwithstanding the allotment of a separate code number, you are advised to continue to comply with all the instructions contained in original coverage letter No, issued at Bombay under Code No. MH/948 dated and such other instruction issued from time to time.

Please note that the allotment of separate code number will not in any way affect the continued applicability of the /Act to all the units."

The petitioner, having received the aforesaid communication and having not satisfied with the decision of the respondent to allot an independent Provident Fund Code number for the establishment, made a representation in detail vide their letter dated 5th June 1992 explaining the facts and circumstances, which entitles the petitioner-establishment for infancy protection u/s 16(1)(d) of the Act. The respondent, after receipt of the representation held an enquiry u/s 7A of the Act and passed the order holding that the petitioner-establishment is a branch of Amelnar in Maharashtra and hence is not entitled for infancy protection u/s 16(1)(d) of the act. The said order is impugned in this Writ Petition.

3. Sri B. C. Prabhakar, learned counsel for the petitioner, would submit as follows :

(a) The conclusion of the respondent that the petitioner establishment is a branch of Amelnar unit in Maharashtra is without any basis. The order is contrary to the findings recorded by the respondent. There is no functional integrality nor commonness between the petitioner-establishment and the unit at Amelnar, and

hence the order is unsustainable both on law and on facts.

(b) The respondent has fallen into an error in holding that the petitioner is a branch of Amelnar unit in Maharashtra on the ground that it is a continuation of M/s Margarine & Refined Oil Co., (P) Ltd., a closed unit without considering the material in their proper perspective. It is his further submission that sufficient opportunity of being heard was not given on this point.

4. Sri D. V. Shylendra Kumar, learned Senior Standing Counsel for the Central Government, appearing for the respondent, argued that the Act is a beneficial enactment for the employees. Therefore, it must receive strict construction to advance the objects of the Act. It is his further contention that even if there is any defect in the order, since it is a curable defect this Court shall refuse to interfere in the exercise of its jurisdiction under Article 226 of the Constitution in order to preserve the objects of the Act.

5. Sri D. V. Shylendra Kumar would further argue that, the petitioner suffers no legal injury and hence this court shall refuse to interfere with the order keeping in view of the larger interest of the employees, even though the order is technically defective. Elaborating his arguments, he would submit that the impugned order, though unsustainable on one ground being contrary to the reasons assigned by the respondent, it is sustainable, on an alternate ground that the establishment is the continuation of M/s Margarine & Refined Oil (P) Co., Ltd. In this context he brought to my notice the decision of the Supreme Secretary to the Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, and asked this Court not to interfere with the order under Article 226 of the Constitution as the impugned order though technically defective has achieved the object of the Act and as the same could be sustained for alternate reasons. The supreme Court in the aforesaid case dealing with the extent and scope of judicial review under Article 226 and 32, has observed as follows :

"12. This is not to say that the jurisdiction of the High Court and the Supreme court under Article 226 and 32 respectively has no role to play once the detention-punitive or preventive-is shown to have been made under the law so made for the purpose. This is to point out the limitations which the High Court and the Supreme Court have to observe while exercising their respective jurisdiction in such cases. These limitations are normal and well known, and are self-imposed as a matter of prudence, propriety, policy and practice and are observed while dealing with cases under all laws. though the constitution does not place any restriction on these powers, the Judicial decisions have evolved them over a period of years taking into consideration the nature of the right infringed or threatened to be infringed, the scope and object of the legislation or of the order of decision complained of the need to balance the rights and interests of the individual as against those of the society, the circumstances under which and the person by whom the jurisdiction is invoked, the nature of relief sought etc. To illustrate these limitations : (1) in the exercise of their

discretionary jurisdiction the High Court and the Supreme Court do not, as courts of appeals or revision, correct mere errors of law or of facts; (ii) the resort to the said jurisdiction is not permitted as an alternative remedy or relief which may be obtained by suit or other mode prescribed by statute. Where it is open to the aggrieved person to move another tribunal or even itself in another jurisdiction for obtaining redress in the manner provided in the statute, the Court does not, by exercising the writ jurisdiction, permit the machinery created by the statute to be by-passed; (iii) it does not generally enter upon the determination of questions which demand an elaborate examination of evidence to establish the right to enforce, which, the writ is claimed; (iv) it does not interfere on the merits with the determination of the issues made by the authority invested with statutory power, particularly when they relate to matters calling for expertise, unless there are exceptional; circumstances calling for judicial intervention, such as, where the determination is mala fide or is prompted by extraneous considerations or is made in contravention of the principles of natural justice or any constitutional provisions; (v) the Court may also intervene where (a) the authority acting under the concerned law does not have the requisite authority or the order which is purported to have been passed under the law is not warranted or is in breach of the provisions of the concerned law or the person against whom the order is directed, or (b) where the authority has exceeded its powers or jurisdiction or has failed or refused to exercise jurisdiction vested in it; or (c) where the authority has not applied its mind at all or has exercised its power dishonestly or for an improper purposes; (vi) where the court cannot grant a final relief, the Court does not entertain petition only for giving interim relief. If the Court is of opinion that there is no other convenient or efficacious remedy open to the petitioner, it will proceed to investigate the case on its merits and if the Court finds that there is an infringement of the petitioner's legal rights, it will grant final relief but will not dispose of the petition only by granting interim relief; (vii) where the satisfaction of the authority is subjective, the Court intervenes when the authority has acted under the dictates of another body or when the conclusion is arrived at by the application of a wrong test or misconstruction of a statute or it is not based on material which is of rationally probative value and relevant to the subject matter in respect of which the authority is to satisfy itself. If again the satisfaction is arrived at by taking into consideration material which the authority properly could not, or by omitting to consider matters which it ought to have the Court interferes with the resultant order, (viii) In when some legal or fundamental right of the individual is seriously threatened, though not actually invaded."

Sri D. V. Shylendra Kumar placing reliance on the aforesaid pronouncement of the Supreme court would submit that though the conclusion of the respondent that the petitioner is a branch of Amelnar unit in Maharashtra is contrary to findings, the order that the petitioner is not entitled for infancy protection u/s 16(1)(d) of the Act is on the basis that the petitioner is the continuation of M/s Margarine & Refined Oil Co., (P) Ltd., is unassailable, as admittedly, the company

has purchased the assets of M/s Margarine & Refined Oil Co., (P) Ltd., as a going concern and established the establishment. That this Court in exercise of jurisdiction under Article 226 of the Constitution should take into consideration the nature of the right infringed or threatened to be infringed, the scope and the object of the legislation or of the order or decision complained of and the need to balance the rights and the interests of the individual as against those of society. It is the contention of Sri Shylendra Kumar that since the order has achieved the object of the legislation, keeping in view of the rights and interest of the employees as against an employer, the Writ Petition is liable to be rejected as the order, if defective, it is defective only in form and not in substance.

6. In the light of the aforesaid pronouncement of the Supreme Court, it is necessary to examine whether the respondent had exceeded his jurisdiction or failed or refused to exercise the jurisdiction or in exercising it jurisdiction has applied his mind at all to the facts of the case and the law relating thereto; whether the order impugned in this petition has achieved the objects of the Act in the manner prescribed and established by law and whether the petitioner has made out a case for interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

7. There is no dispute as to the extent of power of this Court to interfere with any order, if such order has resulted in violation of principles of natural justice or refusal or failure to exercise jurisdiction has failed to apply its mind to all the interest of society at large.

8. Sri. B. C. Prabhakar, learned Counsel for the petitioner, submits that the order impugned in this petition is liable to be quashed for the order does not reconcile with the reasons assigned by the respondent. Elaborating his intention he would argue that the respondent has held an enquiry u/s 7A of the Act to determine, whether the petitioner-establishment is branch of the Amelnar unit in Maharashtra belonging to the Company? and the communication provisionally allotting Provident Fund Code number also indicates that the petitioner establishment is a branch of the company's unit at Amelnar. Examining the case in the context, it is held that there is no sufficient material to treat the establishment as a branch unit of M/S Wipro Ltd., Bombay and, therefore, not entitled for fresh infancy protection in terms of Section 16(1)(d) of the Act, is arbitrary. He further submits that the respondent appeared to have relied on the acquisition of plants, machineries and other assets of M/S Margarine & Refined Oil Co. (P) Ltd., Bombay. The acquisition of Plants, machineries and other assets of M/S Margarine & Refined Oil Co., (P) Ltd., by the Company may be a relevant material to consider whether or not the establishment is the continuation of M/s Margarine & Refined Oil Co., and cannot be a material to hold that the establishment is a branch unit of Wipro Ltd., Bombay. It is his further submission that the later question was neither enquired into nor determined and therefore the order suffers from arbitrariness and hence calls for interference. In this context he brought the relevant portion of the impugned order to my notice which reads

as follows :.

"Facts reveal that M/S Wipro Limited a Bombay-based company, having multifarious activities, have a consumer product Division too. This Consumer Product Division have two factories, the one located at Amelnar, Maharashtra and the other at Tumkur, Karnataka. It is also revealed that the Karnataka Unit was to have been set up at Mysore Road, Bangalore, in the premises of M/S Margarine and Refined Oil Co., Ltd., which when, it was acquired by this Bombay based Company was under closure. The various concessions and incentives, offered by the Karnataka Government for setting up industrial unit, in industrially backward places, like Tumkur, prompted the company to change its mind and set up its unit at Tumkur, making use of a second hand machinery, obtained from its Amelnar factory at a depreciated value and those of M/S Margarine and Refined Oil Company Limited, which remained closed. The fact that the Tumkur unit had received a second hand machinery from Amelnar factory may have some bearing on fixing the unity of purpose between the two. But that alone cannot decide the issue in the absence of further corroboration from other supporting evidence. It is also an admitted fact that the Tumkur Unit had received financial assistance to the extent of Rs. 2.42 Crs. from the Company's Headquarters of Bombay as evident from the Unit's balance sheet for 1986-87. This too, cannot tilt the balance in favour of the proposition. That the Tumkur Unit is an offshoot of the Company's Amelnar factory. A company which owns more than one industrial unit can always channelise funds to the unit for their growth. Moreover the various financial and banking institutions have, thereafter sanctioned loans of different types to the extent of Rs. 435 lakhs, towards modernisation and working capital, which to an extent, show that the Tumkur unit, mainly depended on the term loan facilities received from the Bank and other financial institutions. The only item which can make some difference was the sanction of Rs. 115 lakhs by the State Bank of India, as per their letter of 6th April, 1988, for modernisation of Vanaspathi Plant at Tumkur. This gives an impression that the Company, after setting up of the Tumkur Unit, making use of the second hand machineries received from Amelnar factory during 1986-87 went in for modernisation in 1988 by taking a loan of Rs. 115 lakhs from State Bank of India for the purpose. Looking at the activities carried on both at Amelnar factory and Tumkur Unit, one can draw the conclusion that there is certain similarity in their activities. While the factory at Amelnar manufactures Vanaspathi, Shikakai (Toilet soap), the factory at Tumkur produces Vanaspathi, toilet Soap, Fatty Acids and Glycerine. It is therefore quite likely that the Amelnar factory, after making use of the machinery in its unit, for sometime, passed on the used machinery to Tumkur Unit as its depreciated value, which making use of it along with the machineries, etc. of M/s Margarine and Refined Oil Company Limited has set up the factory at Tumkur. This establishes between the two some nexus, which again is not conclusive.

Sri Birjay, sought to reinforce his case, by drawing support from the various orders and licences issued by the Central and State Government under different

enactments. The industrial Department of Karnataka Government vide its order dated 5.12.1988 allowed a package of incentives and concessions, which are normally admissible to a new industrial unit. The Director General of Technical Development's letter dated 9.2.1989, allotting registration number for manufacture of fatty acids, glycerine and toilet soap. The-Ministry of Industries" letter dated 28th December 1988, permitting them to manufacture industrial oxygen gas, licence dated 22nd August 1989, issued issued by the Drugs Controller of Karnataka, for manufacture of Cosmetics, etc., etc.,. are cited by Sri Birjay to support his client's case that his case was a new establishment, having been set up for the first time in April 1988. He sought to draw support from the fact that neither the raw materials required for Tumkur Unit are received from the common source of Amelnar factory of vice-versa. On this scope, the submitted that there is neither financial integrality, nor financial unity, nor inter-transfer of employees. In order to buttress his case, he sought to rely on the Karnataka High Court rulings in Mahipal Singh Shanker Singh v. Regional Provident Fund Commissioner (1972 LIC 202) and Ganapaty Bhanderkar v. Regional Provident Fund Commissioner 1989 II LLJ 480 on Bombay High Court rulings in Dharmasi Murarji Chemicals Co. Ltd. v. Regional Provident Fund Commissioner 1985 II LLJ 433 Dharamsi Morarji Chemicals Co. Ltd. Vs. N.G. Desai, The Regional Provident Fund Commissioner and others, on Gujarat High Court ruling in Gujchem Distilleries India Ltd. v. Regional Provident Fund Commissioner (1985 LIC 1714) and on Rajasthan High Court ruling in ILR 1991 Guj 202.

No doubt, all the above rulings of different High Courts by the large, lay down the proposition of law that an individual or a company can own more than one industrial units, each of which can be independent, that clubbing of unit is not permissible if one can survive without the assistance of law. (must be others).

Two things which are prominently discernible in this case and which have bearing on clubbing of Tumkur Unit with Amelnar Unit are the flow of initial capital of Rs. 2.42 crores from the Company, and the transfer of an old used machinery from Amelnar unit to Tumkur unit. Here, again, the company is a jurisdiction person which can always provide funds to individual unit, from out of its own resources, keeping at the same time, the separate identity of each of the units. This is one such case on hand. On the fact that a second hand machinery has come from Amelnar unit to Tumkur unit. we cannot draw a firm conclusion that Amelnar and Tumkur factories are one and the same, since it is only a stray factor which cannot tilt the balance in favour of the proposition that Tumkur Unit is a part of Amelnar factory."

9. Sri B. C. Prabhakar, learned Counsel for the petitioner, submits that in order to hold that two or more units of the same employer as one establishment, there must be unity of employment inter-dependency, inter-transfer of employees, unity of finance and functional integrality and none of these conditions exist in the case, to hold that the petitioner-establishment is a branch unit of Amelnar

unit at Maharashtra. In this context, the petitioner, placed reliance on the Decisions of the Supreme Court in the cases of The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen, and Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers' Union and Its Workmen,

In the Associated Cement Company's case (supra) the Supreme Court had an occasion to consider the question, what is one establishment? and what are the relevant material necessary for determining the oneness or unity of an industrial Establishment when it consists of parts, units etc. It reads thus :

"11. The Act not having prescribed any specific tests for determining what is "one establishment", we must fall back on such considerations as in the ordinary industrial or business sense determine the unit of an industrial establishment having regard no doubt to the scheme and object of the Act and other relevant provisions of the Mines Act 1952, or the Factories Act, 1948. What then is "one establishment" in the ordinary industrial or business sense? The questions of unity or oneness presents difficulties when the industrial establishment consists of parts, units, departments, branches, etc. If it is strictly unitary in the sense of having one location and one unit only, there is little difficulty in saying that it is one establishment. Where, however, the industrial undertaking has parts, branches, departments, units etc. with different locations, near or distant, the question arises what test should be applied for determining what constitutes "one establishment". Several tests were referred to in the course of arguments before us, such as, geographical proximity, unity of ownership, management and control, unity of employment and conditions of service, functional integrality, general unity of purposes etc. To most of these we have referred while summarising the evidence of Mr. Dongray and the findings of the Tribunal thereon. It is perhaps, impossible to lay down any one test as an absolute and invariable test for all cases. The real purposes of these tests is to find out the true relation between the parts, branches, units, etc. it in their true relation they constitute one integrated whole, we say that the establishment is one, if on the contrary they do not constitute one integrated whole, such unit is then a separate unit. Now the relation between the units will be judged must depend on the facts proved, having regard to the scheme and object of the statute which given the right of unemployment compensation and also prescribes a disqualification thereof. Thus, in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test; in another case functional integrality or general unity may be the important test; and in still another case, the important test may be the unity of employment. Indeed in a large number of cases several tests may fail for consideration at the same time. The difficulty of applying these tests arises because of the complexities of modern industrial organisation many enterprises may have functional integrity between factories which are separately owned, some may be integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned."

In the case of Management of Pratap Press (supra) the Supreme Court has held :

"Of all these tests the most important appears to us to be that of functional "integrality" and the question of unity of finance and employment and of labour. Unity of ownership exists ex hypothesi. Where two units belong to proprietor there is almost always likelihood also of unity management. In all such cases therefore the Court has to consider with care how far there is "functional integrality" meaning thereby such functional interdependence that one unit cannot exist conveniently and reasonably without the other and on the further question whether in matters of finance and employment the employer has actually kept the two units distinct or integrated."

This view has been reiterated by the Supreme Court in Isha Steel Treatment, Bombay v. Association of Engineering Workers, Bombay & Others 1987 1 CLR 232.

10. To determine, whether different units of one employer constitute, "one establishment" or "separate establishment" various tests. Such as unity of ownership management and control, unity of employment, functional integrality and general unity of purposes will have to be applied. But it is not possible to lay down any one test as the absolute and invariable test for all cases. It depends upon the facts and circumstances of each case. However, if by their relationship with each other the branches, units or parts constitute one integrated whole, it can be said that it is "one establishment". If they do not constitute one integrated whole, it can not be said that it is "one establishment". If they do not constitute one integrated whole each unit is separate. If one unit can exist conveniently and reasonably without the other, they are not one but separate units. The test of integrality or commonness is the basis to hold that several units of one employer is "one establishment." In this context, it is material to restate the relevant portion of impugned order which reads -

"Two things which are prominently discernible in this case and which have some bearing on clubbing of Tumkur Unit with Amelnar unit are the flow of initial capital of Rs. 2.42 crores from the company and the transfer of an old used machinery from Amelnar unit to Tumkur District. Here, again the company is a jurisdiction person which can always provide funds to individual unit, from out of its own resources, keeping of the same time, the separate identity of each of the unit. This is one such case on hand. On the fact that a second hand machinery has come from Amelnar unit to Tumkur unit, we cannot draw a firm conclusion that Amelnar and Tumkur factories are one and the same, since it is only a stray factor which cannot tilt the balance in favour of the proposition that Tumkur unit is a part of Amelnar factory."

The respondent is very specific that the Tumkur unit is to a part of Amelnar factory.

11. It is thus clear that there is material to hold that the petitioner-establishment and Amelnar unit in Maharashtra constitute one integrated whole. On the other

hand there is material to show that one can exist conveniently and reasonably without the other. In the absence of functional integrality between the petitioner establishment and Amelnar unit at Maharashtra, it is not possible to hold that the establishment is a branch of M/s Wipro Ltd., Bombay and hence is not entitled for fresh infancy protection in terms of Section 16(1)(d) of the Act. The order of the respondent being contrary to its own finding is unsustainable in law.

12. Sri D. V. Shylendra Kumar was brought to my notice a letter addressed by the Company requesting for a Provident Fund Code number describing, the petitioner establishment as a Branch. It is not known in what context the expression "Branch" is used in the said letter. However, in the absence of functional integrality between the two, the petitioner cannot be a Branch just because a reference is made in the letter to that effect.

13. Sri D. V. Shylendra Kumar next submits that, even if the petitioner is not a branch of Amelnar unit in Maharashtra, the order refusing fresh infancy protection to the petitioner, in terms of Section 16(1)(d) of the Act is still unassailable as it is the continuation of M/s Margarine & Refined Oil Co. (P) Ltd. a covered establishment. It is the case of the respondent that M/s Margarine & Refined Oil Co., (P) Ltd., was a covered establishment utilising the plant, machinery and other assets of M/s Margarine & Refined Oil Co., (P) Ltd. therefore it is the continuation of M/s Margarine and Refined Oil Co., (P) Ltd., in a new name. As M/s Margarine & Refined Oil Co., had contained infancy protection the same cannot be extended to the petitioner, which is the continuation of M/s Margarine & Refined Oil Company. In this context Sri Shylendra Kumar, learned Counsel for the respondent, had placed reliance on the judgment of the Supreme Court in *Lakshmi Rattan Engineering Works v. Regional Provident Fund Commissioner, Punjab* 1968 1 LLJ 741. That in the said case the Government of India, Ministry of Rehabilitation started a diesel engine factory at Faridabad in 1952. On 23.5.1955 the appellant therein purchased the said factory from the Government of India. In 1956 the appellant was informed by the respondent that it should deposit the due, on account of contribution and administrative charges under the Act. The appellant contended that it acquired the factory in 1955 and three years for the purpose of Section 16(1)(b) of the Act should be continued from the date on which it acquired the factory. Clause (ix) of the agreement for transfer of the factory provided that -

"The purchaser agrees to take over and to employ all the 168 workers at present working in the said factory whose names and other particulars are mentioned in Schedule 4 annexed hereto on the wages specified therein with effect from the date on which the possession of the said factory is handed over to the purchaser."

Considering all these materials, the Supreme Court has held -

"that there is no force in this contention. The words of Section 16(1)(b) are quite clear and leave no room for doubt that the period of three years should count from the date on which the establishment was first established and the fact that

there has been a change in the ownership makes no difference to the counting of this period of three years, so long as the establishment has continued to work all along. This view is further enforced by the Explanation to 16 (1) which lays down that

"The date of the establishment of an establishment shall not be deemed to have been charged merely by reason of a change of the premises of the establishment."

Sri Shylendra Kumar further submits this view is reiterated by the Supreme Court in *State of Punjab Vs. Satpal and Another*, wherein it is held

"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. It is for this purpose that change of location or change of composition of partners or even a change in the manufacturing process is not considered vital in the application of this law."

Per contra, Sri B. C. Prabhakar, the learned Counsel appearing for petitioner would argue that it is true that M/s Margarine & Refined Oil Company has been described as a going concern in the transfer documents but it is a misnomer. M/s Margarine Company was closed long back, it had stopped its operation, discharged all the employees as long back as on 1980. It was a closed establishment and its purchase by a new and independent company to start a new establishment will not result in the continuity of the closed establishment. The respondent has also admitted that M/s Margarine & Refined Oil Co., was closed. Hence the description of M/s Margarine & Refined Oil Co. as a "going concern" is nothing but a misnomer.

14. It is further contended by Sri B. C. Prabhakar that enquiry u/s 7A of the Act was held on the issue, whether or not the petitioner establishment is a branch of Amelnar unit in Maharashtra and not on whether the petitioner is the continuation of M/s Margarine & Refined Oil Co. Therefore the petitioner had no sufficient opportunity to produce material to show that is not a continuation of M/s Margarine & Refined Oil Co. He further submits that even otherwise the material on record would establish that the petitioner-establishment is not a continuation of M/s Margarine & Refined Oil Co.

15. In this context, Sri. B. C. Prabhakar placed reliance on a number of Decisions, including *Punjab National Bank Vs. Ghulam Dastagir*, and *Gammon India Ltd. v. Regional Provident Fund Commissioner* 1990 II CLR 646. In *P. G. Textile Mills (P) Ltd.*, case wherein the facts are almost similar to the facts of this case, the High Court of Gujarat has held -

"6. The grounds which have been relied upon by the Central Government made no reference to this settled legal position even though admittedly this decision was cited at the hearing before the authority which decided this matter. The first reason given in the impugned order is that the old establishment which was

restarted on February 3, 1970 had continued to function when it was taken over by the petitioner-company. That is ignoring all realities. So far as the old company was concerned, not only the establishment was closed but the entire business was wound up and that is why even the Central government had recognised that fact by giving infancy benefit to the Corporation when it had run the mill under the lease from this Court. It is true that after the lease expired, time was given under the order of the Court to the Corporation to enable it to clear the goods in the process. But that was not a cessation of work. That was a complete closure of the business of the lessee Corporation which went out of the picture leaving no trace behind. Even for the period they remained in possession for thus clearing out the goods in process, the Corporation had to pay the compensation amount at the rate of Rs. 15,000/- every month for use and occupation as agreed in the solemn agreement which had the seal of this Court. Therefore to treat this as sale of going concern is a complete misnomer. It proceeds from a confusion of all legal concepts. The second ground given is that fresh infancy benefit could not be granted because the infancy benefit was once granted to the Corporation. This reasoning is surprising. The infancy benefit is granted to the new establishment to give them breathing time and therefore whenever the old establishment dies giving rise to a new establishment the question of a fresh infancy benefit would always arise and it is wholly irrelevant in that context that infancy benefit would always arise and it is wholly irrelevant in that context that infancy benefit was granted to the Corporation which ran the concern under a lease from the liquidator. The same infancy benefit would be available if the purchaser from the liquidator sets up his own new establishment in place of the old establishment of the old company or of the Corporation. therefore, this ground is totally irrelevant and misconceived and proceeds on a confusion that this was a mere change of ownership and management when really it was a change in the entire identity of the employer, who had not continuity with the old employer, and which would therefore give rise to a totally new establishment. The third ground of temporary cessation of work from February 3, 1972 to May 15, 1972, is equally misconceived and proceeds from the same confusion of thought as earlier pointed and by making no difference between a cessation or a closure of work and complete closure of business. The present case was nor one of cessation of work but was of a complete closure of business both of the old company and of the Corporation. The last ground which is, relied upon is that the establishment is being run practically with the same machinery on the same site with the same employees barring a few fresh recruits. This ground could be considered in isolation ignoring the eloquent solemn agreement which speaks for a itself. The solemn agreement recites the salutary fact that continuity of the employees was completely broken. It also recites the fact that it was a new employer who was coming in existence or purchase of all movables and immovable assets of the company. The purchase was not only of the assets, which were leased to the Corporation but even of other land which was of the old company. the old establishment of the old company was almost a scrap and it is the petitioner company which sunk almost

18 lakhs of rupees and turned it into a viable unit. The old hands have been employed of course, but that is to fulfill the obligation of this solemn collective agreement. Therefore merely because on the same site with some of the old machinery and with the old hands, this new employer has set up his new establishment, it would never introduce any continuity of the old establishment. The whole continuity in the process of the change was identity of the establishment could never be preserved. Therefore, if the tests of continuity and identity as propounded by Their Lordships were applied by the Central Government, the conclusion is inescapable on the undisputed facts of the present case that the company was entitled to the benefit of infancy protection u/s 16(1) (b). Even the suggested new ground that the factory licence was the same could hardly make any difference in the context of the undisputed facts."

In Gammon India Ltd. case Supra this Court after considering the judgment of the Supreme Court in Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, has held -

15. "One thing is clear from this case. The cessation of activities was for a period of hardly eleven months from 17.12.1954 to 12.11.1955. Secondly substantial number of workmen and staff who were working under the former management, had been employed though new contracts of employment were entered into with them. Factually, therefore this case is clearly distinguishable. the reason why we hold this is, in paragraph 3 of the judgment the factual position had been analysed and it was found that the continuity of the old factory had not been broken and therefore, the appellant there was liable to make contribution under the Act. But here it is not the case of the Regional Provident Fund Commissioner that the new factory is an alter ego of fertiliser company. Nor again is it the case that the managements of the old and the new companies are one and the same. There is no continuity at all except the continuity in the building and the same machinery. This we do not consider to be the proper test. Then again, this is not a temporary cessation of activities. There has been a long cessation, even prior to 1972 practically for eight long years. Of course, we are not for a moment stating mere investment of additional capital of Rs. 30,00,000/- would alone enable the appellant to claim infancy protection."

16. It is clear from the aforesaid Decisions that where a new industrial establishment is started by a new owner/company having purchased and utilising the plants and machineries and other assets of a closed establishment, with new employees, at different place with additional expenditure, it cannot be said that the new establishment is the continuation of the closed establishment.

17. It is seen from the records produced by Sri D. V. Shylendra Kumar, that M/s Margarine and Refined Oil Co. (P) Ltd., had stopped its operation, it had discharged all its employees except two, as long back as on 12.4.1980. Production was stopped it was a closed unit. That in 1985, the company purchased the assets of M/s Margarine and Refined Oil Company excluding lands and buildings as a going concern for a sum of Rs. 21 lakhs agreeing to continue

two employees. The petitioner-establishment secured all the incentives and concessions from the Government purchased second hand machineries at a depreciated value from Amelnar unit and installed the factory at Tumkur, utilising the machineries purchased from M/s Margarine and Refined Oil Co. and their Amelnar unit secured financial assistance to the tune of Rs. 2.42 crores from the Head Office with a further loan of Rs. 435 lakhs from various banks towards modernisation and working capital. The employees are all new employees. In these circumstances it is not possible to hold that the petitioner establishment is the continuation of M/s Margarine and Refined Oil Co. Ltd.

18. The respondent appeared to have come to the conclusion that the petitioner-establishment is a continuation of M/s Margarine and Refined Oil Company Ltd. on the basis of the description of M/s Margarine and Refined Oil Co. Ltd., as a "going concern" in the transfer documents. It is true that M/s Margarine and Refined Oil Co. Ltd., was described in the transfer documents between the Company and M/s Margarine and Refined Oil Company as a "going concern. In this context, the contention of Sri B. C. Prabhakar is that even though M/s Margarine and Refined Oil Company Ltd., is described as a going concern in the documents. It was actually not a going concern. The expression going concern is only a misnomer. The closure of the company is also admitted by the respondent. That M/s Margarine and Refined Oil Co. was closed long back and it was not functioning at all. Therefore the purchase of the closed establishment in order to start a new establishment by a new company will not result in the continuity of the establishment. The judgment of the Supreme Court in Lakshmi Rattan Engineering Works (supra) and Satpal (supra) cases are not applicable to this case as the facts are distinguishable from one another. That in the said cases the industrial undertakings which were in operation were taken over by the appellants therein, whereas M/s Margarine and Refined Oil Co. (Ltd.) was a closed concern.

19. Sri D. V. Shylendra Kumar, learned Counsel for the respondent would submit that M/s Margarine and Refined Oil Co. Ltd., was admittedly purchased by the company as a going concern. When it was purchased as a going concern it is now not open to the petitioner to contend that it was a closed unit contrary to his own document and hence the establishment started from and out of the resources of M/s Margarine and Refined Oil Co. Ltd., shall be held to be the continuation of the said establishment. Per contra Sri B. C. Prabhakar, submits that the description of M/s Margarine and Refined Oil Company Ltd., in the documents as a going concern was only a misnomer. "Going concern" according to Mr. Prabhakar, who gets support from Mitra's Legal Dictionary, is a business in actual operation and working order, in which the transfer of ownership would effect no interruption of business. A valuation of business on the basis of a going concern is higher than on a break up value. In this connection it is also useful to notice the meaning of the word "going concern". Black's Legal Dictionary, page 622, gives the following meaning -

"Going Concern" is an enterprise which is being carried on as a whole or with some particular object in view. The term refers to an existing solvent business, which is being conducted in the usual and ordinary way for which it is organised. When applied to Corporation it continues to transact its ordinary business. A firm of Corporation which though financially embarrassed, continues to transact its ordinary business."

20. Hence the description of an undertaking, which is not in actual operation and working order and which has discharged its workmen and stopped production and whose work has come to a grinding halt for over a period of years as a "going concern" is complete misnomer.

21. It is not the case of the respondent that M/s Margarine and Refined Oil Co. Ltd., was in actual operation and working order as on the date of the transfer. On the other hand the respondent has stated in the order that it was a closed company. It is seen from the records that all the employees were discharged as long back as on 12.4.1980, 5 years thereafter the factory was sold. Therefore the contention of Sri B. C. Prabhakar that the description of M/s Margarine and Refined Oil Co. Ltd., as a going concern is a misnomer commends acceptance. Even the sale of registration certificate and employment of two persons will not change the nature of transaction. In these circumstances it is possible to hold that the petitioner establishment is the continuation of M/s Margarine and Refined Oil Co. (P) Ltd., and hence continued to be an establishment in operation and not entitled for infancy protection in terms of Section 16(1)(d) of the Act. the petitioner-establishment on the other hand, is a new and independent establishment and hence entitled for infancy protection in terms of Section 16(1)(d) of the Act. The impugned order is therefore liable to be quashed.

22. In the result -

(a) The petition is allowed. Rule made absolute.

(b) The order passed by respondent in No. E/4/93 dated nil and communicated to the petitioner through letter No. KN/PF/ENF-V/TMK-DVN/147/KN/14294-93 dated 15.2.1993. Annexure-4 is hereby quashed.

(c) In the circumstances of the case, no order as to costs.