Jessore Industries (India) Ltd. and Another Vs Regional Provident Fund Commissioner and Others

Court: Calcutta High Court

Date of Decision: Nov. 12, 2010

Acts Referred: Employees Provident Funds and Miscellaneous Provisions Act, 1952 â€" Section 16, 16(1) Income Tax Act, 1922 â€" Section 25(4)

Citation: (2010) 4 CALLT 365 : (2011) 1 CHN 1 : (2011) 128 FLR 620 : (2011) 2 LLJ 535

Hon'ble Judges: J.N. Patel, C.J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Joydip Kar and A. Guha Roy, for the Appellant; Mihir Kundu, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.
This Mandamus-Appeal is at the instance of unsuccessful writ Petitioners and is directed against an order dated

May 14/15, 2009, passed by a learned Single Judge of this Court by which His Lordship dismissed the writ application challenging the order dated

February 28, 2007 passed by the Assistant Provident Fund Commissioner and the Assessing Authority, Employees'' Provident Fund Organization.

By the said order, it was held that the writ Petitioner No. 1 was not entitled to get the benefit of infancy as provided in Section 16(1)(d) of the

Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as ""the Act"").

Being dissatisfied, the writ Petitioners have come up with the present Mandamus Appeal.

2. The facts giving rise to filing of the writ application out of which the present Mandamus Appeal arises may be summarized thus:

(a) One Veegal Engines and Engineering Limited used to run a factory at 8, Jessore Road, Kolkata and produce petrol engines for agricultural

spray, fishing boat, etc. and the provisions of the Act was applicable to it.

(b) The said establishment had undergone lockout and in the year 1986, it went into liquidation. By an order dated June 22, 1992, its assets were

sold to one Gunny Dealers, which emerged as the highest bidder at the court-sale. In the said order, it was recorded that the State Government,

the owner of the land, had at one point of time decided to take over the assets of the company as a going concern. However, subsequently the

State Government changed its decision and decided to lease out the land including the shed and structure erected thereon to the purchaser for a

period to be decided by the Court provided the purchaser would protect the employment of the workers of the company by entering into a

satisfactory agreement with the workers. The purchaser, it was agreed, would also not change the nature and character of the sheds or structures

without its prior consent in writing. It was further recorded in the order that the agreement between the Gunney Dealers and the workers of the

Veegal dated June 14, 1992 would form part of the order and the workers would be free to enforce the said agreement, if necessary.

(c) In the above agreement dated June 14, 1992, it was stipulated that the new promoters would be at liberty to diversify and change the existing

line of manufacturing motor-machines-parts to jute based processing unit or any other type of manufacture at their sole discretion. It was further

agreed that after renovating the existing factory building, the new promoters would install machinery for running the unit within six months and

engage a maximum number of 150 of the workers of the Veegal. It was further provided in the said agreement that the workers would be given

training before absorption in the service and that the statutory and medical leave of the workers Would be governed by the provisions of the

Factories Act, 1948 and E.S.I. Act, 1948 respectively. It was further specified that the employment of the workers under the new promoters

would be deemed to be a new appointment without any continuity of service under the Veegal and the Veegal should be treated as closed and all

closure benefit would be realized by the workers from the Official Liquidator. It was also agreed that the new promoters would have no past

liability whatsoever for the services given by the Veegal''s workers as such.

(d) Pursuant to the order dated June 22, 1992, State Government leased out the land and other properties to the Jessore Industries, the writ

Petitioner No. 1, as the nominee of Gunny Dealers. On July 1, 1993, Jessore Industries absorbed 150 workers of the Veegal and it started

production with effect from December 6, 1993 by manufacturing spare parts for the jute machines and the plastic products.

(e) On March 18, 1994, the enforcement officers of the Provident Fund Organization visited the establishment and sought to apply the provisions

of the Act from the resumption of production in the factory.

(f) The writ Petitioner No. 1 raised objection dated April 12, 1992 thereby contending that in view of the provisions of Section 16(1)(d) of the

Act, it was entitled to the benefit of infancy as a newly setup establishment launched on July 1, 1993 when it started providing employment to the

workers.

(g) The Provident Fund Organization did not accept the aforesaid contention of the writ Petitioner No. 1 and directed it to comply with the

provisions of the Act with effect from July, 1993 as a going concern. Being aggrieved, the writ Petitioners, in the past, moved another writ

application before this Court. The said application was disposed of by a learned Single Judge vide order dated June 6, 2006 by directing the

Assistant Provident Fund Commissioner to treat the writ application as the representation of the writ Petitioners and to consider whether the

establishment was entitled to the benefit mentioned u/s 16(1)(d) of the Act.

(h) Pursuant to the said direction given by this Court, the order impugned in the writ application, out of which the present mandamus appeal arises,

has been passed by which the establishment has been held to be a continuing one not entitled to the above benefit.

3. As indicated earlier, the learned Single Judge, by the order impugned in this appeal, held that the establishment presently owned by the writ

Petitioner No. 1 could not be held to be a new establishment, but was really the continuation of the earlier one.

Being dissatisfied, the writ Petitioners have come up with the present appeal.

4. Mr. Kar, the learned Advocate appearing on behalf of the Appellant, has assiduously contended before us that the learned Single Judge erred in

law in refusing to give benefit of Section 16(1)(d) of the Act by not following the well-accepted principles which are required to be applied before

deciding whether an establishment is really a new one.

5. Mr. Kar, in this connection, draws our attention to the fact that it would appear from the order of sale passed by the Company Court that the

salt was not effected as ""going concern"" and in the agreement approved by the Court it is specifically recorded that the employees, who have been

absorbed, should be deemed to be new employees. It is further pointed out that the employees absorbed would not get the benefit of their past

service with the Veegal. It is further emphasized that the employees including the ones appointed afresh should get the dues for past service from

the Official Liquidator. Mr. Kar further contended mat the learned Single Judge did not consider a vital aspect in the matter that the writ Petitioners

after purchase have started manufacturing very different items from the ones earlier manufactured by Veegal from the factory premises. He has also

referred to the fact that his clients have established new machineries for production of totally different items from the ones earlier manufactured by

the company in liquidation. Mr. Kar thus prays for setting aside the order impugned and for declaring the establishment owned by his client as a

new establishment giving benefit of Section 16(1)(d) of the Act. In support of his contention, Mr. Kar relied upon the following decisions:

(a) Provident Fund Inspector v. The Secretary, N.S.S. Co-operative Society, Changancherry 1970(21) FLR 5 .

(b) P.C. Textile Mills Pvt. Ltd. v. The Union of India and Ors. 1976 Lab IC 666 (Gujarat)

(c) Workmen of Brahmputra Tea Estate, represented by Assam Chah Karamchari Sangha, Dibrugarh Vs. The Incoming Management of

Brahmputra Tea Estate and Others,

(d) Sait Nagjee Purushotham and Co. Vs. Commissioner of Income Tax, Madras, ,

(e) Vittaldas Jagannathadas and Another Vs. The Regional Provident Fund Commissioner, Madras and Another,

6. Mr. Kundu, the learned Counsel appearing on behalf of the Respondent, has, on the other hand, supported the order impugned and has

contended that the learned Single Judge on consideration of the entire materials on record rightly arrived at the conclusion that the writ-Petitioner

No. 1 was not entitled to the benefit of Section 16(1)(d) of the Act. In support of his contention, Mr. Kundu relies upon the following decision of

the Supreme Court:

Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner,

7. Therefore, the only question that arises for determination is this appeal is whether the learned Single Judge was, in the facts of the present case,

justified in denying the benefit of infancy to the writ Petitioner No. 1 as provided in Section 16(1)(d) of the Act.

8. After hearing the learned Counsel for the parties and after going through the materials placed before the learned Single Judge, we find that the

Supreme Court, in a case of Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, has approved the following principles adopted by the

High Court in that case to be the guidelines for arriving at the conclusion whether the establishment acquired by the purchaser in a given case is a

new one, where with the assets of a company in liquidation, a purchaser starts a business with some of the employees of the old concern:

If a factory was closed down and after it had gone into liquidation the factory is dismantled by the liquidator and the liquidator sold the various

assets as scrap it would be a different matter but in the present case having regard to the recitals in the Deed of Conveyance dated 5th December,

1955 Ex-A it cannot be disputed that the Plaintiffs have, in fact purchased all the assets (a) lands, hereditaments and premises (b) buildings,

godowns, structures and sheds and (c) the plant and machinery and other movables from Hirji Mills (in Liquidation) and Official Liquidator and

others and what is more after making such purchase they have been utilizing the said same assets particularly same factory premises and same plant

and machinery with a few additions to carry on the same business, namely, manufacturing textile goods which was carried on, by that factory when

it was owned by Hirji Mills Ltd. with 65 to 70 per cent of the old staff and workmen of Hirji Mills Ltd. From these facts it cannot be said that the

intention while effecting the transfer of all the several assets from the former owners to the new owners was that the old factory should become

defunct or non- existent and a new factory was intended to be established. On the contrary these facts affirm the continuity of the established

factory notwithstanding the fact that the Plaintiffs did not purchase it as a going concern.

In the aforesaid decision, the Supreme Court, however, pointed out the exceptions where the aforesaid conclusion should not be drawn by

observing as follows:

This is not a case where the old factory was reduced into scrap and a new factory was erected in its place. Nor can it be said that there was total

discontinuity brought about between the old factory and the factory which was restarted after the Appellant purchased it. The stoppage of

production was brought about temporarily as stated earlier by the winding up order and the factory was restarted after it was sold to the Appellant

by the Official Liquidator. The finding of fact recorded by the Trial Court in this case which is affirmed by the High Court clearly establishes that it

was the same old factory which recommenced production on November 12, 1955. What is of significance is that a substantial number of workmen

and staff who were working under the former management had been employed by the Appellant though it is claimed that they had entered into new

contracts of employment Mere investment of additional capital or effecting of repairs to the existing machinery before it was restarted the

diversification of the lines of production or change of ownership would not amount to the establishment of a new factory attracting the exemption

u/s 16(1)(b) of the Act or a fresh period of three years.

9. According to the Supreme Court:

The Act being a beneficent statute and Section 16 of the Act being a clause granting exemption to the employer from the liability to make

contributions, Section 16 should receive a strict construction. If a period of three years has elapsed from the date of the establishment of a factory,

the Act would become applicable provided other conditions are satisfied. The criterion for earning exemption u/s 16(1)(b) of the Act is that a

period of three years has not yet elapsed from the date of the establishment of the factory in question. It has no reference to the date on which the

employer who is liable to make contributions acquired title to the factory. The Act also does not state that any kind of stoppage in the working of

the factory would give rise to a fresh period of exemption. , The work in a factory which is once established may be interrupted on account of

factory holidays, strikes, lock outs, temporary breakdown of machinery, periodic repairs to be effected to the machinery, in the factory, non-

availability of raw materials, paucity of finance etc. It may also be interrupted on account of an order of Court like the one we are confronted with

in this case. Interruptions in the running of a factory which is governed by the Act brought about by any of the reasons mentioned above without

more cannot be construed as resulting in the factory ceasing to be a factory governed by the Act and on its restarting it cannot be said that a new

factory is or has been established. On the resumption of the manufacturing work in the factory, it would continue to be governed by the Act. In

Chagganlal Textile Mills Pvt. Ltd. v. P.A. Bhaskar Misc. Appln. No. 289 of 1956 disposed of on November 5, 1956. On the file of the Bombay

High Court which is one of the earliest decisions delivered on the above question (which is unreported). Justice Tendolkar observes thus:

The important point to notice about this provision is that the Act is made applicable to factories and not to the owners thereof or, in other words, it

applies to factories irrespective of who the owners from time to time may be

7. The learned Judge proceeds:

The question is whether the order of liquidation and the consequent temporary discontinuance of business until a lease was granted to Kotak and

Company has the consequence of making the factory which was established cease to be established. In my opinion the answer to this question

must be negative. A temporary cessation of the activities of an established factory cannot lead to the result that the factory ceases to be established

for the purposes of the Employees'' Provident Funds Act for if it did, the class of employers who spare no ingenuity in seeking to deprive the

empolyees of all the benefits conferred upon them by statute would have convenient handle whereby the activities of an established factory have to

be discontinued for a few months in order to deprive the employees of the benefits under the Employee''s Provident Funds Act. I take it that the

establishment of a factory involves that the factory has gone into production and no more but once it goes into production, a temporary cessation

of its activities, for whatever reasons that cessation takes place cannot, in my opinion, take the factory out of the category of an established factory

for the purposes of the Employees'' Provident Funds Act.

8. Towards the conclusion of his judgment, the learned Judge says that:

Even a complete change in the whole body of employees cannot make a factory which is established, cease to be established. In any event, the

Employees'' Provident Funds Act is a beneficial legislation for the benefit of the employees and every construction of its provisions which would

defeat the object of the legislation and lead to an evasion must be rejected unless the clear language of the Act leaves no option to the Court but to

accept such an interpretation.

9. The above statement appears to us to lay down the law correctly.

10. We, therefore, find that the learned Single Judge rightly followed the principles, which are required to be applied in arriving at the just

conclusion. The mere fact that different types of items are now being manufactured from the same factory is insignificant for the purpose of arriving

at the conclusion that it is continuation of the old factory. In the self-same factory premises, with the aid of 150 employees of the old establishment

to which the Act applied, with new machineries purchased by the writ Petitioners, the production has started although, there is diversity of the

articles produced, which is also held to be an irrelevant factor.

11. We now propose to deal with the decisions cited by Mr. Kar.

The case of Provident Fund Inspector v. Secretary, N.S.S Co-operative Society was one in which the Secretary of a Co-operative Society, which

owned a press had been acquitted by the Magistrate of the charge of not complying with the provisions of the Act. The High Court had confirmed

the order of acquittal. On appeal, the Supreme Court found that mere was no ground to interfere with the acquittal. The defence of the accused in

that case was that the Co-operative Society of which he was the Secretary had acquired me press in question in March, 1961 and had established

a new press subsequently and hence, the Act was not applicable to the press as the period of three years prescribed by Section 16(1)(b) of the

Act had not expired The evidence in that case indicated that after the purchase, a new owner had come in the place of the former owner, the work

of the press was stopped on the date of its sale and was started again after a break of three months and the machinery in the press was also altered

and the persons employed previously were not continued in service. While a fresh recruitment of workmen had taken place, out of those workmen

only six happened to be the former employees and compensation had been paid to the workmen at the time of the sale by the former owner. On

these facts, it was held that a new establishment had come into existence in the case before us, it is seen that 150 former workmen had been

employed by the Appellant and there was specific understanding that the interest of the former company should be looked into and the agreement

between the worker and the purchaser would be enforceable. Further, this is a case where the interruption of work had taken place owing to the

order in the winding up proceedings and the State Government granted fresh lease of the factory premises on the above condition of revival with

limited number of the old employees. Thus, with the aid of the old factory and 150 old employees, the business stated at the instance of the

purchaser with the active co-operation of the State Government. Therefore, the said decision is factually distinguishable from the facts of the

present case.

12. The decision of the Madras High Court in Vittaldas Jagannathadas and Another Vs. The Regional Provident Fund Commissioner, Madras and

Another, , is also distinguishable in the sense that in the Madras case, there was a finding that in reality the old establishment had come to an end

and there was a new establishment. In the case before us, the finding of fact of the Trial Court is to the contrary. The learned Trial Judge has held

that the intention in this case was to maintain the continuity of the old factory and such finding is supported by the fact that the State Government

had granted a new lease in favour of the Appellant after being assured that 150 old employees would be absorbed and the factory would restart.

We have already pointed out that diversity of production alone cannot be a factor to decide in favour of a new establishment.

Incidentally, the above two decisions were also considered and distinguished by the Supreme Court in the case of Syaji Mills Ltd. (supra).

13. In the case of Workmen of Brahmputra Tea Estates, Appellants v. Incoming Management of Brahmputra Tea Estates and Ors. (supra), the

services of some workmen of a tea Company were terminated cm August 21, 1961 under the instructions from receiver appointed by Court in a

mortgage suit against the Company. By an order dated June 16, 1961, the High Court ordered the winding-up of the Tea Company and appointed

an official Liquidator and on October 5, 1961 appointed a receiver of Tea Gardens and that new receiver was put in possession and management

of the properties. On July 27, 1962, the State Government referred to the Labour Court an industrial dispute relating to justification of the action of

management of Tea Company in terminating the services of the concerned employees and as to whether those workmen were entitled to

reinstatement, or any other relief, in lieu thereof. The Labour Court on receipt of the reference issued necessary notices on August 26, 1962. In

liquidation proceedings, the High Court permitted the Official Liquidator to sell the Tea Gardens and also certain other items of moveable and the

Official Liquidator conveyed by a registered sale and in favour of R the equity of redemption in Tea Gardens and other moveables for a certain

amount. Thereafter R on his own claim by virtue of purchase from the Official Liquidator became the sole proprietor of Tea Gardens and also got

actual possession of Tea Gardens on September 21, 1962. After considering the written statement of parties, the Labour Court held that no relief

could be granted, as against R and that the reference itself had become infructuous. In such a situation, the Supreme Court held that R was not

liable to answer any of the claims of the workmen concerned as he was not in picture upto the date when dispute was referred to the Labour Court

and that having due regard to various recitals contained in the sale deed and considered in the light of principles laid down in Anakapalla Co-

operative Agricultural and Industrial Society Limited Vs. Workmen, , R could not be considered to be a successor-in-interest of the Tea

Company, nor could he be considered to have claimed through the receiver, or Liquidator. Even on the basis that R was considered to be a

person, to whom the ownership of the undertaking had been transferred, the claims of the workmen would have to be considered, as against the

Tea Company, in accordance with Section 25-FF of the Act when its proviso could not be invoked.

14. We fail to appreciate how the principles laid down in the said decision can have any application to the facts of the present case where

applicability of the Act does not depend upon the change of ownership of the factory.

15. Sait Nagjee Purushotham and Co. v. C.I.T. (supra), is a case where the Supreme Court was considering the scope of Section 25(4) of the

Income Tax Act (11 of 1922). In the said case, the Assessee firm was carrying on business since the year 1918. The said Business of the firm split

into two in the year 1932 and carried on by two. independent firms. Subsequently, there was amalgamation of two partnerships into one in the year

1943 and there was transfer of business to limited liability company in the year 1947. In such a situation it was held that the Assessee firm was not

entitled to relief u/s 25(4) for the assessment years 1948-49 and 1949-50. According to the Supreme Court, before a claim to relief u/s 25(4) of

the Income Tax Act, 1922 can be made by an Assessee firm, the following four conditions have to be fulfilled: (i) business must have been charged

to tax under the Indian Income Tax Act, 1918 i.e. the business must have been in existence sometime between 1918 and 1922. (ii) The business

must have been carried on at the commencement of the Amendment Act of 1939, i.e. April 1, 1939 by the person claiming relief. (iii) The person

carrying on the business on April 1, 1939 has to be succeeded by another person as the owner carrying on the business that is the succession must

be later than April 1, 1939. (iv) The succession was not merely a change in the constitution of the firm. The succession contemplated in Sub-

section (4) again, must have taken place before the discontinuance, for if the business is discontinued it ceases to exist and cannot be succeeded to.

16. In our opinion, the principles laid down in the said decision cannot have any application in dealing with the provisions of the Act, which is

unconcerned with the transfer of ownership of an establishment and the change of ownership does not mean creation of a new establishment under

the Act.

17. The case of P.C. Textile Mills Pvt. Ltd. (supra), was decided prior to the decision of the Supreme Court in the case of Sayaji Mills Ltd.

(supra). After the said decision, the decision in the case of P>C. Textile Mills Pvt. Ltd. cannot be said to be a valid precedent even as far as the

Gujarat High Court is concerned. It appears from paragraph 2 of the judgement in the case of Sayaji Mills Ltd., the Appellant therein restarted the

factory with 70% of the old employees of the wound up company on fresh contract with fresh investment of capital and after renovating the factory

and machineries. The Appellants even commenced new types of goods in the factory with new licence to run the same. Nevertheless, the

establishment was refused the benefit of infancy. The facts of the present case are almost similar to those involved in the said case of Sayaji Mills

Ltd. where 150 workers of the wound up company were engaged on fresh contract and the purchaser started producing new type of goods in the

renovated factory. We are therefore unable to accept the said decision in the case of P.C. Textile Mills Ltd. as a valid precedent.

18. We thus find that the decisions cited by Mr. Kar are of no avail to his clients.

On consideration of the entire materials on record, we, therefore, find no reason to interfere with the most reasonable findings arrived at by the

learned Single Judge.

This appeal is thus devoid of any substance and is consequently dismissed.

In the fact and circumstances, there will be, however, no order as to costs.

J.N. Patel, C.J.

19. I agree.

F.M.A. No. 14 of 2010

(Later) After the above judgment is delivered, Mr. Kar, the learned Counsel appearing on behalf of the Appellants, prays for stay of operation of

this judgment on the ground that his client intends to move the higher forum and that throughout the entire period of this litigation, right from the

stage before the learned Single Judge till the disposal of this appeal, the Appellants were enjoying the interim order.

In view of the above fact, let there be a stay of operation of the judgment for a period of four weeks from the date.

Xerox certified copy of this judgment, if applied for, be given to the learned Counsel for the parties within a week from today.