

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9488 of 1998

=====

M/S National Industries(Re-Rolling Mills)
Ramdhari Road, Patna through Sri Moti Lal Khetan, Proprietor,
resident of Mohalla Rajendra Nagar, P.S. Kadamkuan District Patna

.... Petitioner/s

Versus

1. Union of India.
2. Regional Provident Fund Commissioner, 6 Serpentine Road, Patna.1.
3. N.K.Karhail, Legal Adviser, Ministry of Labour and Welfare, New Delhi.
4. Sri S.N. Singh, P.O., Employees' Provident Fund Appellate Tribunal. 5th Floor, 60 Skylark Building, Nehru Place, New Delhi.
5. Ghazanfar Nawab, General Secretary, Audyogik Mazdoor Sangh, Kurji, Patna-10.

.... Respondent/s

=====

Appearance :

For the Petitioner/s : Mr. Gautam Kumar Kejariwal, Adv.
For the UOI Mr. Ravinder Kumar Sharma, CGC

For the Respondent/s : Mr. R.S.Pradhan, Sr. Adv.
Mr. J. Kumar, Adv.

=====

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL JUDGMENT

Date: 03.08.2015

Heard counsel for the petitioner and the
respondents.

In this case, petitioner has made a prayer for
quashing the order dated 12th September 1988 (Annexure-1)
passed by the Regional Provident Fund Commissioner whereby
and whereunder he has recorded that the petitioner is not a new
establishment but an old outgoing establishment not entitled to



protection under the infancy period. The said order was challenged under Section 19A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act') before the Central Government as at the relevant time, the Government had jurisdiction to deal with the matter against the order of the Provident Fund Commissioner and in pursuance thereof the Legal Adviser had passed order dated 21st August 1995 affirming the view of the Regional Provident Fund Commissioner, (Annexure-2) and that order was again challenged before the Appellate Authority in Appeal Case No./ ATA No.3(3) of 1998 and the appellate Tribunal vide order dated 28th July 1998 (Annexure-4) rejected the appeal and all the orders passed against the petitioner are under challenge.

In the present case, the basic point that has been raised is that the present establishment is not an old outgoing concern, rather it is a new establishment and, as such, entitled to the benefit of infancy as provided u/s 16(1)(b) of the Act.

Three brothers, namely, Nagarmal Goenka, Ram Niwas Goenka and Ishwar Prasad Goenka formed a firm to run an iron re-rolling mill in the name and style of M/s National Industries, Simli after obtaining huge loan from Bihar Financial Corporations and the State Bank of India. Due to the difference



among the partners, because of continuous loss and mismanagement in the business, the condition of the firm deteriorated and led to non-return of loan amount due to which the State Bank of India, one of the creditors locked the main gate of the establishment and the establishment remained under lock upto 11.7.1989, the same was lifted by the order of the court. However, partners could not run the establishment properly and smoothly.

Looking to the gravity of situation, they decided to sell off the establishment itself and in pursuance thereof Moti Lal Khetan approached the Goenka brothers and placed before him the proposal to sell his firm. All the partners agreed to the offer of purchaser and decided to sell all the movable and immovable assets of the establishment, accordingly Moti Lal Khetan purchased all the assets of movable and immovable property by the sale deed dated 21st July 1982 for Rs.7,55,000/- by two registered sale-deeds.

It appears that on account of non-payment of electric bills, the Electricity Board had also disconnected the electric supply and the establishment came to grinding halt on 30th June 1980.

After purchase of the assets of the establishment, the present establishment applied for fresh electric connection and



paid a fresh security of Rs. 52,000/- accordingly the power was restored on 11th September 1982. While in process of revival of the unit, the new management of the establishment obtained fresh sales tax registration and Central Excise licence provided under the law for establishing the new establishment.

It will be relevant to mention here that the consideration amount was paid to the vendor. The old management was manufacturing mild plain steel, the new management invested money and installed new machines, changed the line of production to TOR steel bars .

The new management started the factory on 11th September 1982 appointing all the fresh employees except four employees were taken in service by the new management.

After revival of the establishment, the new management treated the revived establishment being a new and fresh establishment did not pay the contribution as provided under the EPF Act. The Regional Provident Fund Commissioner issued notice for not filling proper return as well as the contribution for the period 12th December 1989 to 9th September 1982, a proceeding of 7 A of EPF Act was started.

The present petitioner took a plea that it is a new establishment, unconnected with earlier one and, as such, as



per provisions of the Act, they are entitled to the benefit of infancy for the period of 5 years, as provided u/s 16(1)(b) of the Act but the Provident Fund Commissioner did not agree and a formal proceeding u/s 7A of the Act was initiated for the period 3 of 1979 to 11 of 1989 and, accordingly, notice was issued for its participation otherwise the ex parte order will be forced to be passed.

The present establishment appeared and took the following pleas:

- a) The old establishment, namely, M/s National Industries, Patna City was a partnership concern, stood closed finally on account of mounting debts and remained defunct, fresh opening after long laps, establishment, is a new establishment.
- b) The present establishment purchased the assets of the old establishment for Rs.7,55,000/- (Annexure-3)



after getting fresh electric connection and other licenses for commencing the work by the present owner afresh itself shows new establishment has come up.

c)

The substantial additions and alternations have been made in the plant and machine by the present owner as the old machines were not workable on account of long closure, machines were not fit for starting the work so much so establishment engaged in manufacturing of the new products.

d)

After purchase at the time of start of production, new set of workers were recruited only four old workers were taken a fresh without attaching any

past liability, on account of being they were highly skilled personnel fit for fresh employment.

- e) The purchase of the establishment was bona fide and that the present owner had no relationship with the earlier partners. The purchase was not made of a going concern and, for all intents and purposes old establishment had ceased to exist in the year 1980 and new establishment emerged, restarted functioning in the year 1982.

In support of his submission, he has placed reliance on two judgments:

Speed Crafts (P) Ltd. (1978 LIC 1480) and

M/s N.S.S. Co-operative Society (AIR 1971 SC 82).

In contra, the Provident Fund Establishment has



taken a plea that it was not a new establishment rather the old establishment. The temporary closure on account of financial liability led to disconnection of electric supply and locking of the main gate of the factory by its creditor, namely, State Bank of India and later on it was sold to the present petitioner which will not mean that it is a new concern rather plea has been taken that the present management has taken over ongoing concern so much so that he has also purchased the good will of the old concern and cannot be treated to be a new establishment created entitled to the benefit of infancy, plea has been taken that the establishment once taken the benefit of infancy, cannot be allowed the same benefit as the subsequent stage merely because of change of ownership/management. The Provident Fund Establishment has also taken a plea of Section 17B of the Act which deals with transfer of the establishment to the another one. In that circumstance, jointly both the establishments are liable for the payment. He has also said that the old employees were not terminated nor were paid any compensation and the materials that were produced did not indicate that the partners of old establishment paid the dues to the old employees.

He has also submitted that the present owner has not purchased the dead establishment and started a new one



rather they have purchased the old ongoing establishing, not to be treated as a fresh one for getting the benefit of infancy. In the order it has also been recorded that the present management has also purchased the good will as well as they have cleared all the liabilities of the old establishment. Reliance has been placed on Sayati Mill Ltd. V. Regional Provident Fund Commissioner, 1988 (4) suppl. SCC 610 1985(1) PLJR 238 P.K.Press v. Regional Provident Fund Commissioner

Being dissatisfied with the order of the Provident Fund Commissioner, an application was filed under Section 19(A) of the Act before the Government. The case of the petitioner was examined and it arrived to a conclusion that the present establishment is not a new establishment, rather it is nothing but the old establishment itself.

The order was challenged before this Court in CWJC No. 11229 of 1995 as by that time the Appellate Tribunal was constituted, vide order dated 12th January 1998, Court disposed of the writ petition with liberty to the petitioner to approach the Appellate Tribunal.

The petitioner filed an appeal before the Appellate Tribunal and the Appellate Tribunal also affirmed the view that has been taken by the two statutory bodies.



In the present case, petitioner has claimed that the old establishment was closed on account of financial crisis that led to non-payment of dues to its creditor, namely, the State Bank of India, had closed the main gate of premises that led to closure of production and closure of the establishment. The lock of the main gate was opened by the order of the Court but it could not run as they could not pay the electric dues which led to power disconnection and subsequently the present management purchased the property and after taking fresh electric connection the production started with the change of line.

It has further been stated that all the workers in the old establishment were paid gratuity amount as per the order of the authority vide its order dated 28th June 1984 and there the Controlling Authority has arrived to a conclusion that the petitioner had not purchased the on-going concern, rather the day he purchased it was a closed establishment and, as such, the present petitioner cannot be made to be successor in interest of the old establishment.

In view of such finding by the Controlling Authority, he has placed the ground that the present petitioner is not a successor in interest and the finding recorded by the Regional Provident Fund Commissioner that the petitioner has



purchased good will which is completely misleading where as it has been pleaded mentioned that the consideration amount was paid to the vendor in different heads for the purpose to make them able to liquidate old liability. It is wrong to infer the petitioner has paid liability rather purchase was made free from all encumbrances and consideration amount was paid in the shape of different dues which was standing against the old establishment.

In view of the above discussion it has to be decided whether the present establishment was a new establishment or the same establishment which started its function after closure for certain period and the present petitioner is a successor in interest of the old establishment and, as such, they are not entitled to the benefit of infancy. If this Court arrives to a finding that the present establishment is the same establishment which remained out of out of production for certain reason such as on account of financial crisis in that condition certainly they will not be entitled to the benefit of claim of infancy, but if the Court arrives to a finding that the present establishment is a new establishment altogether and old establishment has already died and after its closure, properties were sold out to the present management, then in that circumstance, it will be entitled to benefit as claimed.

The question is an entitlement of exemption of three years for infancy period under Section 16(1)(b) of the EPF Act claiming to be a new establishment is dependent on factual finding whether the old establishment that was closed finally and thereafter a new establishment was established.

For deciding this issue it will be appropriate to examine the earlier view and guide line fixed by the Hon'ble Supreme Court as well as by this Court in what would be considerations for holding the closure of the old establishment and of the factors and ingredients to be taken into consideration for arriving to a conclusion of having come of a new industry altogether.

In 1985 1 L.L.J 238 (Sayati Mills Ltd. V. Regional P.R. Commissioner) engaged in the manufacturing of textile the factory was put to a winding up proceeding and on the direction of the Bombay High Court the assets was sold by the Official Liquidator. The Company in appeal before the Hon'ble Supreme Court, namely, Sayati Mills Ltd. purchased the factory. The workmen were discharged and the good will of the company could not be acquired by the subsequent company. There was discontinuation of work of the factory for some time. Claim was made investment of fresh capital in the business, renovated the



machinery and also employed workmen on fresh contract, though 70 per cent of the workmen working with the earlier factory were taken in service by the new factory. Production was started with new type of goods after obtaining new license. The appellant company claimed the exemption of applicability of EPF Act being an infant factory.

The matter went to the Hon'ble Supreme Court in which the Hon'ble Supreme Court has taken the view that a temporary cessation of activity of established factory cannot lead to the result the factory was closed, revival thereafter will not lead to establishment of new factory. It has been held that the work in the factory may be interrupted on account of many factors, such as, holidays, strikes, lockouts 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 order of the court, like one that we are confronted with in this case. The Court has gone to the extent that Section 16(1)(b) of the EPF Act was quite clear that they leave no room for doubt that the period of 3 years should be counted from the date on which the factory was established and the fact that there has been a change in the ownership made no difference in counting that period. The Court

has gone to the extent :

“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.”

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 new factory which was restarted after the appellant purchased it. The stoppage of production was brought 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 12th November 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 contract 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 the new factory attracting the exemption under S.16(1)(b) of the Act for a fresh period of three years.

Again the matter came up for consideration before the Hon'ble Supreme Court in P.F. Inspector v. NSS Co-operative Society (AIR 1971 SC 82). In this case also the question of entitlement of the person claiming to be an infant factory for the purpose of Section 16(1)(b) of the EPF Act came for consideration. In this case criminal prosecution was launched on account of non-submission of contribution, return and violation of other statutory requirements. Claim was made that the NSS Co-operative Society was a new establishment, entitled to exemption



under Section 16(1)(b) of the Act. The E.P.F. Department had taken a plea that the establishment is old one, established in the year 1956. The Court has held that the burden of proving that the old establishment had continued and the new establishment was not set up is on the Department, as the case was related to a criminal prosecution. The Court has recorded that out of nine persons, six were re-employed, there was no continuity of employment even of those employees. After purchase, the Press was removed from its original place and additional machinery was purchased and added to the Press as well as a compensation due to the workers was disbursed. The Court has quashed the criminal case holding that at the time of purchase a new owner came in place of the previous owner, the work of press was stopped, press was restarted after a break of about three years, the machinery in the press was also altered, persons employed previously were not continued in service, while a fresh recruitment of employees took place amongst whom only six persons were taken of previous employee and compensation was paid to the workmen at the time of sale. On the aforesaid facts conclusion was drawn that the old established was completely closed, when the transfer of owner had taken place and entirely new establishment was set up, three months later and held that

entitlement of benefit of exemption for three years u/s 16(1)(b) of the EPF Act was available.

In AIR 1965 Mad. 508 (Vittaladas Jaganathadas v. the Regional Provident Fund Commissioner) the Hon'ble Madras High Court held that where in reality the old establishment has gone to an end and new establishment has taken its birth, the new establishment is entitled to infancy protection in its own rights.

The judgment rendered in Speed Craft Ltd. (supra) is not applicable to the fact of the facts of the present case as in that case M/s Hindustan Bicycle Manufacturer Corporation, manufacture bicycle became sick, the management was taken over by the Central Govt. but the factory could not continue its production and finally factory was closed and the company was sold. In this present case, the facts are quite different. But in the case, a significant fact that has to be taken into consideration is that the Court has not taken into consideration its earlier judgment in Sayaji Mills (supra) and it appears that both the judgments run in counter to each other. This Court in Ranchi Bench in 2000(4) PLJR 754 (P.K.Press Metal (P)Ltd. V. Reg. Pro. Fund Commissioner) had an occasion to decide facts and circumstances the case whether establishment would be treated



to be a new establishment, will not have any liability to pay the dues of the old establishment. In this case machinery of establishment was auction sold by the Corporation which was purchased and the new establishment came for production later on. The question cropped up for deciding of granting benefit under the EPF Act. There the court placed reliance on the Sayaji Mills case (supra) held, it cannot claim exemption from the liability under the EPF Act.

The judgments cited by the petitioner of (1998)2 SCC 446 (RPF Commissioner v. Dharmasi Morarji Chemical Co. Ltd.) is not applicable to the facts of the present case as in that case claim was made, the factory which was later on established was new factory, the court consideration arrived to a conclusion that Roha Factory was altogether a different and fresh factory was established having no concern previous one and arrived to the finding that the evidence collected does not indicate having connection between the two units and there was no common supervisory and managerial control so much so that no material has come to suggest that Roha Factory was part of Ambar Nath Factor and held that it was a new company and entitled to exemption under Section 16(1)(b) of the EPF Act. The Court has to examine whether the present one is a new

factory or it is continuation of old factory.

In the present case, brothers were running the industry, premises was locked by the SBI on account of default of return of loan amount, the Board had disconnected the electricity, by sale deeds Mr. M..Khetan purchased the factory without any past liability, fresh supply of electricity, fresh registration, fresh excise registration, change of line of production, as earlier was manufacturing steel rod, was diverted for production of TOR steel bars.

It appears that claim has been made of fresh appointment of workers so much so that submission has been made of purchases of closed factory not an ongoing factory. The Regional Provident Fund Commissioner has recorded a finding that all liability of the workers including gratuity has been paid by the new Management as well as other past liabilities were also paid by the new establishment which the petitioner has denied. It has been submitted that the consideration amount was paid in such a manner that the liabilities of old Management was liquidated. The entire liability was paid from the consideration amount of the old Management. The finding recorded by the Regional Provident Fund Commissioner is completely illegal. From the facts it emerges the factory did not work for certain

period closed, later on the old management sold the same.

It appears that the new Management has continued with the good will and the employees lost their services on account of purchase of the factory by the new establishment. The important question is whether the person purchased the ongoing factory or a closed factory. It is a fact that the old management has never declared closure of the factory. Even presuming that the new management has taken the new electric connection as well as the license, it will not make the factory as a new factory or its character will remain the old one. The name of the factory remained the same, good will of the old establishment remained attached with new establishment, investment of capital and change of line of production does not prove closure of earlier industry. Taking the judgment of Sayaji Mills (supra) the strict criteria that has been provided by the Hon'ble Supreme Court in what circumstances the subsequent industry will be taken to be a new one, the present petitioner does not satisfy those criteria for holding the same being a fresh and new industry, gives entitlement to claim of exemption of contribution as provided under Section 16(1)(b) of the EPF Act.

In the facts and circumstances of the case, this

Court holds that the present establishment is not a new one, but the continuation of old, not entitled to an exemption under Section 16(1)(b) of the EPF Act.

Accordingly, this petition is dismissed.

Jay/-

U			
---	--	--	--

(Shivaji Pandey, J)