

GUJARAT HIGH COURT

New Ahmedabad Bansidar Mills Private Ltd.

Vs.

Union of India

A.F.A.D. No. 1452 of 1960

(A.S. Sarela, J.)

17.03.1966

JUDGMENT

A.S. Sarela, J.

1. In this second appeal by the original plaintiffs the short question which arises for determination is whether the appellant-company known as the New Ahmedabad Bansidhar Mills Pvt. Ltd. Ahmedabad was as claimed by it an infant factory established only on 11-3-1954 and as such entitled to an exemption for a period of three years from the said date namely 11-3-1954 under Section 16(b) of the Employees'Provident Funds Act, 1952 (Act No. XIX of 1952) (hereinafter to be referred to as the Act) in respect of the application of provisions of the employees'Provident Fund scheme framed under Section 5 of the Act. The respondents are the Union of India, the State of Gujarat, the Regional Provident Fund Commissioner State of Gujarat and the Provident Fund Inspector Ahmedabad. The learned trial Judge found in favour of the appellant on this question and gave it a declaration that the appellant company was not under any obligation to implement the scheme framed under the Act before 11th March 1957. In appeal by the respondents against that judgement the learned appellate Judge found against the plaintiffs on that point and dismissed the suit. Against that judgement and decree the plaintiffs have come to this court in appeal.

2. The material facts may first be stated in brief. A proprietary firm in the name Bansidhar Process House was carrying on business of bleaching, dyeing and printing in the compound of Madhubhai Mills at Ahmedabad. On 2-10-53, the appellant company was incorporated under the Indian Companies Act, 1913. In the memorandum of association (Exh. 66) one of the objects for which the appellant company was established is to acquire and take over as a going concern the business carried on in the name and style of Bansidhar Process House situated at Ahmadabad and with a view thereto to enter into an agreement in terms referred to in the articles of the association of the Company. This is stated to be the first among the objects for which the

appellant company was established. On 5-12-1953 the contemplated agreement came into existence between the appellant company and the owner of Bansidhar Process House, one Ravjibhai Matherbhai Patel. Under that agreement, a copy of which is at Exh. 65, the business of bleaching, dyeing and printing carried on at Ahmadabad in the name and style of the firm of Bansidhar Process House was agreed to be sold to the appellant company alongwith goodwill, the tenancy rights, pending contracts, plant and machinery etc. It is not the case of the appellant that any separate document of sale was made thereafter. But it is common ground that the consideration of Rs. 1,87,705-3-0, referred to in the agreement of sale, was paid and possession of the property of the Bansidhar Process House was taken by the appellant company. It is in evidence that the appellant company purchased some more machinery. According to the trial court the value of the new machinery so purchased was Rs. 2,55,000. It appears that the appellant company decided to carry on the business not at the premises where the Bansidhar Process House was situated namely in the compound of the Madhubhai Mills but at a different place namely in the compound of Laxmi Hosierey Mills at Naroda Road Ahmadabad. The factory at the Naroda Road, according to the appellant company, commenced on 11-3-1954. The appellant was asked by the Regional Provident Fund Commissioner to implement the Employees' Provident Fund right from 1st of June, 1953. The appellant did not accept that liability on the ground that its factory was a new factory, a new establishment and a new undertaking having no connection with the factory of Bansidhar Process House. As this stand of the appellant was not accepted by the Regional Provident Fund Commissioner the present suit was filed.

3. In the suit the appellant first asked for a declaration that its establishment was not a factory at all covered by the provisions of the Act and therefore it was not under an obligation to implement the Employees' Provident Fund Scheme. In the alternative the appellant prayed for a declaration that if its factory was so governed by the provisions of the Act or the Scheme it was entitled to an initial exemption from the operation of those provisions for a period of three years under Section 16(b) of the Act. The first prayer was negatived by the trial court but the second prayer was granted. Against that decree the defendant-respondents went in appeal and the plaintiffs-appellants did not file any cross-objections. In appeal the learned appellate Judge held that the appellant was not entitled to an initial exemption under Section 16(b) of the Act. Hence this appeal.

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4. Section 16, as it stood in 1953-54 which is the period with which we are concerned, reads as under :-

"16. Act not to apply to factories belonging to Government or local authority and also to infant factories :

This Act shall not apply to –

- (a) any factory belonging to the Government or a local authority, and
- (b) any other factory, established whether before or after the commencement of this Act, unless three years have elapsed from its establishment."

There have been subsequent amendments to this Section by Act 94 of 1956, Act 22 of 1958 and Act 46 of 1960. It is not necessary at this stage to refer to these amendments because we are concerned here with the section as it then stood. To earn an exemption under clause (b) of Section 16 it has to be proved when the factory which claims that exemption was established. It is from the date of its establishment that it gets exemption for a period of three years.

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5. Now coming to the merits of this question of fact namely when was the factory with which we are concerned established, Mr. Nanavati relies on the following facts which he says have been proved and which according to him go to prove that the factory was established only on 11-3-1954. The facts relied on by him are these :

- (1) Before the agreement dated 5-12-53 the appellant had purchased some new machinery. This purchase, according to him, took place on 22-10-1953.
- (2) At the time of the purchase of the undertaking Bansidhar Process House from its owner Ravjibhai Mathurbhai Patel the said Bansidhar Process House was closed and was not running.
- (3) The owners of the two undertakings namely the Bansidhar Process House and the appellant are not the same but are different entities, and carry on business under different names.
- (4) The appellant took out a new licence under the Factories Act and a new sales-tax number under the Sales-tax and a new tax-mark when it started the business under the appellant's name.
- (5) The workers employed by the appellant were not the same as the workers employed in the Bansidhar Process House and in fact no worker of the latter was employed by the appellant. And
- (6) The business of the appellant was started in different premises that is in the compound of Laxmi Hosiery Mills at Naroda Road Ahmedabad and was not continued in the premises where Bansidhar Process House was situated that is in the compound of Madhubhai Mills.

These are, therefore, the facts and circumstances which Mr. Nanawati says have been proved and on which he relies in support of his contention that the factory with which we are concerned was established not earlier than 11-3-1954.

6. Now before considering whether these facts and circumstances are established and if so what

is their effect it would be relevant to refer to the memorandum of association under which the appellant was incorporated and to the agreement of purchase dated 5th December 1953, to which reference has been made earlier. The memorandum of association is dated 2-10-1953. The first para states the name of the company, the second the situation of its registered office and the third para sets out the objects for which the company is established. Clauses (1) and (2) of the third para read as under :-

"1. To acquire and take over as a going concern the business carrying on under the name and style of "Bansidhar Process House" situated at Ahmedabad, and with a view thereto enter into the agreement referred to in Clause (3) of the Article of Association of the Company and to carry the same into effect with or without modification. 2. To carry on the said business as a going concern and to develop and extend the said business."

Therefore, one of the objects for which the company is established is to acquire and take over as a going concern the business carried on under the name and style of Bansidhar Process House and to develop and extend the said business. Clause (1) refers to the agreement to be entered into with the Bansidhar Process House. That agreement, Mr. Nanavati concedes, is the same which took shape in Exh. 65 dated 5-12-1953. Now when we turn to that agreement, after reciting that the vendor namely the Bansidhar Process House was carrying on business of bleaching, dyeing and printing processes at Ahmedabad etc. and that the company (meaning the appellant company) was formed with the object among other objects to the acquisition of the said business of the vendor as a going concern together with the rights and benefits of all the existing contracts etc. and after referring to clause (3) of the articles of association under which the company after incorporation is to enter into an agreement therein referred to with the vendor, the terms of the agreement between the parties are set out. Under the first term the vendor agrees to sell and the company agrees to purchase the goodwill of the said business of Bansidhar Process House, the benefits of the tenancy rights of various premises including the premises where the said business is being carried on and the benefits of all pending contracts deposits entered into or made by the said Bansidhar Process House in its name for the purpose of the said business. Under the second term all the plants, machinery, office furnitures, fixtures, and fittings, stock-in-trade, tools, implements and utensils of the value of Rs. 1,87,705-3-0 are to be taken over by the company from the vendor.

Then there are certain usual clauses of vesting of the business in the possession of the company on the sale price being paid. The sale price is to be paid within a year from the date of the incorporation of the company. But it is specifically provided that at the time of the completion of the sale "adjustments and apportionments" shall be made between the Vendor and the Company on the basis that the purchase of the said business shall be deemed to have been effected as from 1st day of November 1953." These are the material terms of the agreement. Reading the memorandum of association and the agreement together it, is apparent that one of the main objects for which the company was established was to acquire and take over as a going concern the Bansidhar Process House. It is also apparent from these documents that till the date of the

agreement the Bansidhar Process House was a going concern. In fact it is so admitted in para 4 of the plaint itself, because therein it is stated that the plaintiff agreed to purchase the Bansidhar Process House along with goodwill and as a going concern with the benefit of all existing contracts by the agreement dated 5th December 1953. At the time of the agreement, it appears, that the intention was to carry on business at the same place where the Bansidhar Process House is situated in order to develop and extend it and in fact in para 4 of the plaint it is stated that the plaintiffs subsequently changed their idea to continue the business of the Bansidhar Process House which was purchased by the plaintiffs as a going concern by the agreement dated 5th December 1953 and started a new factory in the compound of Laxmi Hosiery Mills at Naroda Road. This is further apparent from the fact that the agreement of purchase is deemed to have been effected from 1st November 1953. It is not clear from the evidence as to when the consideration was paid but as the business under the appellant's name was admittedly actually started in the new premises from 11-3-1954 it may be assumed that the consideration had been paid before that date.

7. It is now convenient to turn to the evidence bearing on the six facts and circumstances on which reliance has been placed by Mr. Nanavati. There is no doubt that the appellant purchased the new machinery which according to the finding of the learned Appellate Judge was of the value of Rs. 2,55,000. In the plaint it was not stated when that machinery was purchased whether before the agreement dated 5th December 1953 or after, but at the hearing of this appeal Mr. Nanavati stated that part of the machinery was purchased on 22-10-1953 and he in support of this relied on the extracts of the account books of the appellant which were produced before the lower court on the date of hearing. As that evidence has been accepted, it may be held to have been established that some part of the new machinery was purchased between the date of incorporation of the company and the date of the aforesaid agreement. It is next contended that at the time of purchase, the Bansidhar Process House was closed and not actually running. Now, it is not clear from the evidence what is the point of time in respect of which this theory has been put forward at the time of the hearing. In the plaint there is no averment that the Bansidhar Process House was closed or had stopped running. The agreement dated 5th December 1953 and the averments in connection with that agreement in para 4 of the plaint would indicate that at least till 5-12-1953 Bansidhar Process House was running and was a going concern. In the deposition of the appellants Manager Mansukhalal Chmanlal (Exh. 72) it was for the first time stated that the factory of Bansidhar Process House was not in working order when they purchased it. No further details were given. In cross-examination when he was questioned on the point all that he could state was that he did not know since when that concern was closed before it was purchased by the appellant. Therefore, the evidence that the Bansidhar Process House, meaning the factory run by it, was closed is not at all satisfactory and is inconsistent with the documentary evidence namely Exhs. 65 and 66 and with the averments made in the plaint. That evidence cannot be accepted. If it was closed the best that could be held in favour of the appellant on the evidence as established was that there was a temporary closure to enable the taking over of the business. This is what the learned appellate Judge has held. As regards the third circumstance relied on by Mr.

Nanavati there is no dispute that the owners of the two concerns are different entities. The owner of the Bansidhar Process House was Ravjibhai Mathurbhai Patel whereas the appellant is a private limited company and in the memorandum of association the only subscribers whose names are given are Champaklal Nanalal Shah and Ramanlal Mathurdas Patel. It is also undisputed that the names of the two concerns are different. Whether that has any significance will be considered later. It is also undisputed that the appellant company took out a new license under the Factories Act, a new sales-tax number under the sales-tax and a new tax-mark. As regards the question whether or not the appellant employed any of the workers of the Bansidhar Process House the evidence is the testimony of Hasmukhlal Chimanlal who stated in his deposition that the appellant had not employed any workers of the Bansidhar Process House. There is no cross-examination on that point. The learned Assistant Government Pleader argued that the best evidence would have been the production of the registers of the workers of the two concerns which are required to be kept under Section 62 of the Factories Act, 1948. That no doubt is true. But as the statement of Hasmukhlal Chimanlal was not challenged an occasion for production of the registers did not arise. As to the last circumstance on which reliance was placed by Mr. Nanavati namely that the factory of the appellant was started not in the premises where the Bansidhar Process House was situated but in other premises namely in the compound of the Laxmi Hosiery Mills at Naroda Road, this position is not disputed.

8. The lower appellate court has considered all these facts and circumstances. The only error which can be said to have been committed by it is that when considering one of the facts namely whether the workers of Bansidhar Process House were continued to be employed by the appellant it misread the evidence but its finding that the factory of the appellant was established much earlier than 11-3-1954 is not solely based on that understanding of the evidence but is substantially based on the lower appellate court's reading of the Exhs. 66 and 65 that is the memorandum of association and the agreement and on the further fact that the same business was carried on and there was no break in continuity because if the work was stopped for a short period it was so stopped for a temporary purpose namely for removing the machines from the old premises and installing them into the new premises. As regards the other circumstances namely the purchase of fresh machinery, the change of ownership, the taking out of new licence etc., the lower appellate court did not consider them of any significance. But Mr. Nanavati says that they are of significance and it would be necessary to examine that argument. Before I do so I should like to turn to the terms of Section 16.

9. What is required to be proved under clause (b) of Section 16 as I have earlier stated is when the factory was established. That takes us to the question as to what is meant by the establishment of a factory. The learned Assistant Government Pleader submits, and I think rightly, that a factory can be said to be established from the date the factory starts working. If we turn to the definition of the word 'factory' this becomes more clear. The definition in Section 2(g) of the Act reads as under :-

" 'factory 'means any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power."

Therefore, the important ingredient is the carrying on of manufacturing process. The factory can, therefore, he said to be established when it begins to carry on manufacturing process or in other words, when it goes into production. Mere erection of the machinery would not be enough to establish a factory within the meaning of Section 16 of the Act. The date of establishment of the factory would be the date on which it starts its manufacturing process. Now, in considering when the factory started its manufacturing process or in other words when it went into production, any change of ownership is of little significance because what we are concerned with is the factory and not the owners thereof. Section 1(3) of the Act which deals with the extension of the Act provides that it applies in the first instance to all factories engaged in any industry specified in Schedule I in which fifty or more persons are employed and then goes on to provide that it may be extended to other factories employing less than fifty persons by a notification of the Central Government in the Official Gazette. The Provident Fund Scheme which is to be framed under Section 5 is to be framed with respect of the employees or class of employees of factories specified. The temporary exemption under Section 16 is with reference to factories and has no relation to owners of the factories. Under Section 17, as it stood before 1956, there was power with the appropriate Government to exempt factories from the operation of the Act or of any scheme. The exemption was either in respect of factories or in respect of class of persons employed in the factories. These provisions indicate that the owners do not come into the picture. If the change of ownership makes no difference to the question of establishment of a factory nor does a change of employees and the reasons are the same. It is true that the provisions of the Act are for the benefit of the employees but merely because an employee ceases to be an employee in a particular factory he does not lose the benefit which he has earned and which is available from the fund created under the Scheme under Section 5 of the Act. If he goes to another factory to which the Act applies he would normally be entitled to similar benefits. The change of employees is a normal incident of running of a factory and it is difficult to see how such a change can be said to affect the question when the factory was established, Temporary closures are also normal incidents of running of a factory. If that were not so then even a closure for a day for repairs or on a holiday would have the consequence that as from that date the factory is newly established. Similarly, overhaul of machinery or addition to machinery or replacement of machinery are also normal incidents of running of a factory and they by themselves can have little bearing on the question as to when the factory was established. These circumstances may, no doubt, be relevant if there is evidence to show that the factory which was once established has ceased to function as a factory. The test is whether the continuity has been so completely broken that for all intents and purposes the factory has become dead and the production has commenced entirely anew.

10. Turning now to authorities, reference may first be made to the decision of the Bombay High

Court in *Chhagan Lal Textile Mills Private Ltd. v. Regional Provident Fund Commr*¹. in (unreported) to which my attention has been invited by the learned Assistant Government Pleader. That was a case of a textile mill at Chalisgaon under liquidation known as the Chhagan Laxminarayan Mills Co. Ltd. The Liquidator leased out the mills to M/s Kotak and Company from first of March 1952 for a period of three years. The lease expired on 28th February 1955. With effect from 1st of March of that year the lease was given by the Liquidator to another party namely M/s Babulal Shrivallabh and in that lease it was specifically provided that the lessee shall not be liable in respect of any liabilities connected with the mills prior to 1st of March 1955 and that they shall work the Mills as a new concern and not as successors either of the lessors or of M/s Kotak and Company. The workers were discharged by M/s Kotak and Company at the end of their period of lease. M/s Babulal Shrivallabh entered into possession and on 13-3-1955 and recruited workers on a temporary and entirely new basis. Thereafter M/s Babulal Shrivallabh floated a private limited company called the Chhaganlal Textile Mills Private Ltd. and they transferred to the said company the said mills which in the meanwhile they had purchased from the Liquidator. The transfer took place on 25-2-1956. When the Regional Provident Fund Commissioner called upon them to implement the provisions of the Act, they filed this petition. After examining the scheme of the Act Tendolkar, J. who decided that matter stated that the Act applied to factories and not to the owners thereof and if that is so the starting of the mills as a factory was from sometime prior to 1951 and it was at that time that it can be said to have been established. It was urged before him that the order of liquidation and the consequent temporary discontinuance of business until a lease was granted to Kotak and Company had the consequence of making factory which was established cease to be established. He negated that submission holding that 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 Fund Act, for if it did, the class of employers who spare no ingenuity in seeking to deprive the employees of all the benefits conferred upon them by statute would have a 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 Act. He pointed out that the establishment of the factory involves that the factory has gone into production and no more and a temporary cessation of its activities for whatever reasons that cessation takes place, cannot take the

¹ Misc. App. No. 389 of 1956 (Bom)

factory out of the category of an established factory for the purposes of the Act. The fact that the workers were discharged by M/s. Kotak and Company was pressed before him and he held that that fact cannot make the factory which was established at the time M/s Kotak and Company ceased to be lessees cease to be established for if it did, every change of ownership of a factory which may well result in the old employees being discharged by the old employer and re-employed by the new employer deprive the employees of the benefits conferred upon them by the Act. He then went on to observe that even a complete change in the whole body of employees cannot make a factory which is established, cease to be established. He concluded that the factory in that case must be held to have been established prior to 1951, and in any event not later than 1st of March 1952. This case was followed by the Punjab High Court in *Robindra*

*Textile Mills v. Secretary, Ministry of Labour, Govt. of India*², and by the Calcutta High Court in *Vegetable Products Ltd. v. Regional Provident Fund Comnir., West Bengal*³, It is not necessary to refer to the facts of these two cases. They lay down the same propositions. In the Punjab case the factory was closed for more than seven months. There was also a change of ownership and there was a change in employees and there was addition of machinery. The addition to or subtraction from a factory it was stated, however large, cannot change the date of its establishment. The emphasis in the Scheme, the Punjab High Court pointed out, is on the factory which carries on manufacturing process and not on the employee who benefits under the Act. The Calcutta High Court took the same view and stated that the factory may from time to time change hands. The fact that it does change hands cannot give rise to its being newly established. The test, it was said, was whether the change or the alterations are of such magnitude that it cannot be said that the same factory was continuing; then indeed the continuity can be said to have been broken.

11. Therefore, if the facts and circumstances relied on by Mr. Nanavati are examined in the light of these principles it is apparent that nothing turns on the several facts and circumstances on which reliance was placed. The change of ownership, the temporary cesser of work, the addition of machinery and the change of employees have already been dealt with. The fact that new licenses were taken or a new tax-mark was taken, did not make any difference. The learned appellate Judge has pointed out that partly this may be due to the fact that the sales-tax number had been cancelled and the old license of the factory may have expired particularly during the period that the factory was temporarily closed between December 1953 and March 1954. But Mr. Nanavati argues that there is one distinguishing feature in the present case and that feature is that whereas in the rulings earlier referred to there was no change in the premises which the factories occupied, in our case there has been a change in the premises. According to him when there is a change in the premises the old factory dies and a new factory is born. This, he submits, is the necessary result of the definition of the expression 'factory' in the Act. I have referred to that definition earlier. I shall examine that definition presently. But the argument if accepted would so completely defeat the provisions of the Act, as the provisions can then be easily evaded by a change of location every three years, that unless the language compels that construction it cannot be accepted as a reasonable construction. All that the definition means is that if in any premises a manufacturing process is being carried on or is ordinarily so carried on it is a factory. Mr. Nanavati says that once the premises have changed the factory ceases to be the old factory because one of the existing

² AIR 1958 Pun 55

³ AIR 1959 Cal 783

ingredients of the factory namely the premises disappears or takes a different shape. If, he argues the premises are changed, it is not the same factory because under the definition premises are part of a factory. The argument overlooks the fact that the expression used is 'any premises' and not 'the premises'. The essence of the factory is not a particular location or particular premises as suggested by Mr. Nanavati, but the carrying on of a manufacturing process in any premises. When the location of the factory is shifted, manufacturing process is still carried on in premises. In my opinion, therefore, the definition of the expression 'factory' does not lend support to the

construction which Mr. Nanavati urges or to his argument that as from the date the premises were changed, a new factory must be deemed to have been established. The learned Assistant Government Pleader referred me to the explanation that was added to Section 16(b) of the Act by Act 22 of 1958. It appears that in 1956 by Act 94 of 1956 the word factory throughout the Act was substituted by the word establishment. By Act 22 of 1958, clause (a) of Section 16 was recast so as to confine the exemption to establishments registered under the Co-operative Societies Act and employing less than 50 persons and working without the aid of power. To clause (b) an explanation was added in the following terms :-

"Explanation : For the removal of doubts, it is hereby declared that an establishment shall not be deemed to be newly set up merely by reason of a change in its location."

The learned Assistant Government Pleader states that this explanation brings out the intention underlying Section 16. It is, however, not necessary to go to this explanation for the purposes of interpreting Section 16 as it stood before it was so amended for even if it has to be interpreted as it then stood in the light of the definition of the expression 'factory' the result, in my opinion, is the same.

12. For these reasons the lower appellate court was, in my opinion, right in coming to the conclusion that the factory run by the appellant cannot be said to have been established only on 11th March 1954 as contended by the appellant. It is nobody's case that the Bansidhar Process House was entitled to any exemption under Section 16 of the Act or that such exemption was continuing at the time the appellant took it over. In the result therefore the appeal was rightly dismissed.

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Appeal dismissed.