
(2011) 07 BOM CK 0106

In the Bombay High Court

Case No : Writ Petition No. 5672 of 2010

Assistant Provident Fund Commissioner

APPELLANT

Vs

A.C.C. Nihan Castings Limited

RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16(1), 2A

Industrial Disputes Act, 1947 — Section 25E, 25G

Citation : (2012) 1 ALLMR 178 : (2011) 5 BomCR 502 : (2011) 131 FLR 209 : (2012) 1 LLJ 557 : (2011) 5 MhLj 230

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : R.S. Sundaram, for the Appellant; R.B. Puranik, for the Respondent

Final Decision : Allowed

Judgement

R.K. Deshpande, J.—Rule, made returnable forthwith. Heard finally by consent of the learned Counsels appearing for the parties.

2. The question involved in this petition is whether the respondent-Company is entitled to infancy period of three years as per the provision of Section 16(1)(d) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short, "the EPF Act") from 1-11-1993 to 1-11-1996 ? The answer of this question will depend upon the answer of one another question as to whether there is functional integrality, unity of ownership, employment, supervisory, financial or management control in respect of the Respondent-Company, viz. A.C.C. Nihan Castings Limited and one another Associated Cement Company Limited, so as to treat both these units as part of the same establishment u/s 2-A of the EPF Act.

3. The facts in detail are stated below:

The Respondent-A.C.C. Nihan Castings Limited is a Company incorporated under

the Companies Act, 1956 on 10-2-1992 and is engaged in manufacture and sale of alloy steel castings with effect from 1-11-1993. Its factory is located at MIDC Area, Butibori, Nagpur. On 2-12-1996, the Regional Provident Fund Commissioner, Nagpur, informed the Respondent-Company in writing that the establishment/factory of the Respondent-Company is engaged in iron and steel, which is included in Schedule I of the EPF Act and that it has completed infancy period in terms of the provision of Section 16(1)(d) on 1-11-1996 and hence the provisions of the EPF Act and the scheme framed there under have become applicable to the establishment of the Respondent-Company together with the Head Office and its branches. Accordingly, Code No. MH/61875 was also allotted to the Respondent-Company and direction was given to contribute in the EPF Scheme and to comply with the provisions of the EPF Act. It is not in dispute that the Respondent-Company has started contributing to the Scheme of Employees' Provident Fund and to comply with the provisions of the EPF Act, with effect from 1-11-1996.

4. On 2-12-1999, the Regional Provident Fund Commissioner, Nagpur, issued a show cause notice to the Respondent-Company asking to show cause as to why its establishment should not be covered under the EPF Act with effect from 24-11-1993, being an establishment, which is a part and parcel of Associated Cement Company Limited. In the show cause notice, it was alleged that the Respondent-Company is the subsidiary concern of the principal establishment, viz. Associated Cement Company Limited, and, therefore, must be enjoying unity of ownership, management, control, functional integrality and general unity of employment.

5. In response to this show cause notice, the Respondent-Company submitted its reply dated 24-12-1999 specifically denying the allegation that there is unity of ownership, management, control, functional integrality and general unity of employment in between the Respondent-Company and Associated Cement Company Limited, as alleged. It was the stand taken that the Respondent-Company is separately incorporated under the Companies Act on 10-2-1992 along with a copy of Memorandum and Articles of Association and that there was no functional integrality between the two units, as Associated Cement Company Limited is manufacturing cement exclusively in its various factories located all over India, whereas the Respondent-Company is manufacturing iron and steel having its factory located at MIDC Area, Butibori, Nagpur. It was further submitted that mere commonality of ownership is not enough and the terms and conditions of service of the employees working in both the Companies are totally different and independent. It was submitted that there was neither supervisory nor managerial control of Associated Cement Company Limited over the functions of the Respondent-Company. The Central Excise registration, Sales-tax registration and income tax registration in respect of both the Companies are different. Hence, it was prayed that the question of applicability of the provisions of the EPF Act from 24-11-1993, does not arise.

6. The Assistant Provident Fund Commissioner passed an order dated 13-11-2001 holding that there is functional integrality between the two units and there was unity of ownership, management, finance and employment. The reliance was placed upon the annual report of the Company. It was also held that undisputedly the ownership of both the Companies are common and some workers of Associated Cement Company Limited are sent to the employment under the Respondent-Company. It was further held that the Board of Directors of Associated Cement Company Limited have appointed one Shri A.K. Pathak, previously working in Associated Cement Company Limited, as Managing Director of the Respondent-Company, for a period of five years from 1-2-1993. Referring to the Provident Fund Rules of Associated Cement Company Limited, it was further held that the Company Provident Fund dues has been regularly deposited with the Associated Cement Company Limited Provident Fund. It was held that the Respondent-Company is nothing but an expansion of the present activities of Associated Cement Company Limited and hence both the units are covered by the definition of "establishment" u/s 2A of the EPF Act. With these findings, it was held that the Respondent-Company is not entitled to infancy period of three years u/s 16(1)(d) of the EPF Act, but is liable to pay the provident fund dues for the period from 1-11-1993 to 1-11-1996 in respect of all the categories of the employees excluding those who have got exemption u/s 27-A of the EPF Scheme from the Competent Authority.

7. In Appeal No. ATA 75(9)/2002 preferred by the Respondent-Company before the Employees' Provident Fund Appellate Tribunal, New Delhi, the order passed by the Assistant Provident Fund Commissioner was set aside. It was held that there is no evidence on record to show that the Respondent-Company is the expansion of the present activities of the parent-Company or that there is functional integrality or unity of employment, finance, supervision and management between the two units. It was held that the test of functional integrality has not been satisfied and hence clubbing of the two units by the Assistant Provident Fund Commissioner to deny infancy period of three years u/s 16(1)(d) of the EPF Act, was not in accordance with law. Thus, the order has been set aside. Hence, the Department is before this Court in writ petition.

8. The question is whether there is functional integrality, the unity of ownership, employment, supervisory, financial or management control in respect of the Respondent-Company and its parent-Company, i.e. Associated Cement Company Limited, so as to treat both these units as a part of the same establishment u/s 2-A of the EPF Act. It is the question of factual aspect to be decided on the basis of the material available on record. Before considering such question in the present case, the law laid down by the Apex Court in its various judgments needs to be seen. Hence, the same are discussed below.

9. The Apex Court in its judgment in *The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen*, was considering the question whether the Limestone quarry at Rajanka forms the part of the

establishment known as Chaibasa Cement Works within the meaning of Section 25-E(iii) of the Industrial Disputes Act, 1947. While pointing out that it was impossible to lay down any one test as an absolute and invariable test for all cases, the Apex Court has observed that the real purpose of these tests would be to find out the true relation between the parts, branches, units, etc. Para 11 of the said judgment is relevant for the purpose and hence the same is reproduced below:

(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 unity 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 question 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 tests 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 purpose 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 purpose of these tests is to find out the true relation between the parts, branches, units, etc. If 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, each unit is then a separate unit. How 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 gives the right of unemployment compensation and also prescribes a disqualification therefore. 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; and in still another case, the important test may be the unity of employment. Indeed, in a large number of cases several tests may fall 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 integrality 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 midst of all these complexities it may be difficult to discover the real thread of unity. In an American decision (*Donald L. Nordling v. Ford Motor Company* (1950) 28 ALR 2d 272) there is an example of an industrial product

consisting of 3800 or 4000 parts, about 900 of which came out of one plant; some came from other plants owned by the same Company and still others came from plants independently owned, and a shutdown caused by a strike or other labour dispute at any one of the plants might conceivably cause a closure of the main plant or factory.

It was held, ultimately by applying the aforesaid test, that the Industrial Tribunal had wrongly held that the Limestone quarry at Rajanka and the factory at Jhinkpani were separate establishments.

10. In *Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers' Union and Its Workmen*, , the Apex Court was considering the question whether three different Unions of Press, viz. (i) the Press, (ii) the Vir Arjun, and (iii) the Daily Pratap, were parts of single industry on the ground that the owner of the Press and the Vir Arjun was one of the partners in the Daily Pratap, in deciding the question of oneness. It was ultimately held that the two units were separate and distinct industrial units. Following the decision of the Apex Court in the case of *Associated Cement Company Limited*, cited *supra*, it was held that of all of these tests, the most important appears to be that of "functional integrity" and "unity of finance, employment and of labour". It was held that unity of ownership exists *ex hypothesi*. Where two units belong to a proprietor, there is almost always likelihood also of unity of management. In all such cases, it was held that the Court has to consider with care how far there is "functional integrity" meaning thereby such functional interdependence that one unit cannot exist conveniently and reasonably without the other, and on the further question whether in matter of finance and employment the employer has actually kept the two units distinct or integrated.

11. The Apex Court in its judgment in *Noor Niwas Nursery Public School Vs. Regional Provident Fund Commr. and Others*, , has held that the question whether the two units are one or distinct, is required to be considered in the light of the provision of Section 2-A of the EPF Act which declares that where an establishment consists of different departments or has branches whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment. It has further held that in such cases, the Court has to consider how far there is functional integrity between the two units, whether one unit cannot exist conveniently and reasonably without the other, and on the further question, in matters of finance and employment, the employer has actually kept the two units distinct or integrated. The Apex Court has further held that certain tests are laid down in its earlier judgment in *Management of Pratap Press*, cited *supra*. On facts, it was held that the two institutions, viz. Francis Girls Higher Secondary School and Noor Niwas Nursery Public School, constitute one single establishment.

12. In *Regional Provident Fund Commissioner and Another Vs. Dharamsi Morarji Chemical Co. Ltd.*, , the Apex Court was considering the question whether the new concern, which was a factory of manufacturing organic chemicals at Roha

was a part and parcel of the parent factory of the Respondent-Company at Ambarnath, which was being run since 1921. The authorities under the EPF Act did not treat the new concern at Roha as a new and infant industry entitled to the benefit u/s 16(1)(d) of the EPF Act. It was a decision in a case before the Apex Court coming from this Court. This Court had taken a view that the new factory at Roha was a separate industry and only because it was owned by the same Respondent-Company, which was established in 1921, it could not be said to be a part and parcel of the Ambarnath factory or that it was not entitled to any infancy benefit as new establishment u/s 16(1)(d) of the EPF Act. This Court had considered that the products manufactured in both the factories were distinct, the workers were separate, and merely because about 5 to 6 employees of the Ambarnath factory were sent to the Roha factory to take advantage of their expertise and experience and help to set up the Roha factory, this circumstance by itself has hardly any significance in deciding as to whether in law the two factories constitute one or separate establishments. In fact, the two units of the factory - one at Roha and the other at Ambarnath - were being run by the same Respondent-Company.

13. In the light of the above findings, the Apex Court has dismissed the appeal holding that nothing could be pointed out to contraindicate the finding recorded by this Court. It has held that merely because both the factories were owned by a common owner and the Board of Directors was common, that by itself would not be sufficient unless there is clear evidence to show that there was interconnection between these two units and there was common supervisory, financial or managerial control. The factory unit at Roha was held entitled to infancy benefit u/s 16(1)(d) of the EPF Act.

14. In *Isha Steel Treatment, Bombay v. Association of Engg. Workers, Bombay and Anr.*, reported in 1987 I CLR 232, the Apex Court was considering the question as to whether it was a case of bona fide closure of an independent unit of business so that the applicability of Section 25-G of the Industrial Disputes Act was excluded. The Apex Court has held that on consideration of the entire material before it, the Tribunal had reached the conclusion that the closure of one unit was bona fide, that it did not have any functional integrality with the two units, that there was no common seniority list of the workmen of the two units, and that there was no rule or practice of transferring workmen from one factory to the other. The Apex Court has further held that the High Court had committed an error in reversing the findings recorded by the Tribunal in exercise of its jurisdiction under Article 226 of the Constitution of India. Thus, it has restored the decision of the Tribunal.

15. From the judgments pointed out above, it is apparent that in order to determine the question as to whether two different units of the establishment run by a common owner can be treated as a part and parcel of one single establishment, as defined u/s 2-A of the EPF Act, the principles laid down by the Apex Court in the cases of *The Associated Cement Companies, Ltd.* and

Management of Pratap Press, cited supra, can be taken into consideration, though the same are rendered on the provisions of the Industrial Disputes Act (See: Noor Niwas Nursery Public School's case, cited supra). Unity of ownership, unity of management and control, unity of finance, unity of labour, unity of employment and unity of functional integrality were the tests, which have been applied. In the case of The Associated Cement Companies, Ltd., it has been held that in one case the unity of ownership, management and control may be the important tests, in another case functional integrality or general unity may be an important test, and in still another case the unity of employment may be an important test. In the case of Management of Pratap Press, it has been held that of all these tests, the twin test, i.e. one of functional integrality and the other of unity of finance, employment and labour, has been held to be an important test. The "functional integrality" means such functional interdependence that one unit cannot co-exist conveniently and reasonably without the other. On the question of unity of ownership, it has been held that there is almost always likelihood also of unity of management. On the further question, whether in the matters of finance and employment, the conduct of the employer himself has been considered to find out whether the employer has actually kept the two units distinct or integrated. No doubt, it has been held in the case of Dharamsi Morarji Chemical Co. Ltd., cited supra, that mere common ownership and shifting of 5 to 6 employees from one establishment to the other establishment is not enough to satisfy the test whether both the establishments can be treated as a part and parcel of one establishment for the purpose of entitlement of infancy period u/s 16(1)(d) of the EPF Act.

16. In view of above, what should be the dominant and real test to be adopted to hold that two or more units form part and parcel of the same establishment, will depend upon the facts and circumstances of each case. It is not necessary that in all cases, the dominant test would be of functional integrality. Where the admitted position is that there is no functional integrality or there is unity of ownership, the other tests of unity of management and control, unity of finance, unity of labour and employment would gain more significance. The Court will also have to find out as to whether the employer has expanded the existing business under different name or whether he has treated two units as different or integrated. Apart from this, the object and purpose of the provision for which such exercise is being carried out will have to be kept in mind. The Court will have to proceed cautiously and balance the conflicting interests. While doing this, it will have to be seen that neither the real and genuine units are deprived of the exemption nor such exemption is made available to undeserving and ineligible units.

17. Now, coming to the case in hand, Section 16(1)(d) of the EPF Act, as it stood prior to its amendment on 22-9-1997, provided exemption from applicability of the EPF Act to a newly set up establishment until the expiry of a period of three years from the date on which such establishment is, or has been, set up. Section 2-A of the EPF Act being relevant is reproduced below:

2-A. Establishment to include all departments and branches.--For the removal of doubts, it is hereby declared that where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment.

Clause (4) in the Statement of Objects and Reasons of the EPF Act is also relevant and hence the same is reproduced below:

(4) To avoid any hardship to new establishments, a provision has been made for exempting them for a period of three years and similar exemptions are given to other establishments which are less than three years old till they have been in operation for a period of three years in all. The rate of contribution will be 61/4 per cent. of the total emoluments of the worker, the worker and the employer each contributing these amounts. Further, the Scheme could empower payment of a higher subscription by the workers at their option.

While interpreting the provision of exemption u/s 16(1)(d) of the EPF Act, the Court will have to keep in mind that it is a beneficial piece of social welfare legislation aimed at promoting and securing the well-being of the employees and the Court cannot adopt narrow interpretation, which will have the effect of defeating the very object and purpose of the Act. It is the question of entitlement to an infancy period, as stipulated u/s 16(1)(d) of the EPF Act, which is available strictly speaking to an infant industry or unit. It is available to every such establishment or unit only once in its life-time and it cannot be availed of repeatedly at different stages. If a newly set up unit or industry is nothing but a part and parcel of or an expansion of the business of another unit or industry, which is already set up, and has availed the benefit of such exemption at the time of its setting up, then such newly set up unit or industry will not be entitled to an exemption, as provided u/s 16(1)(d) of the EPF Act. If such an industry is granted benefit, then it would not only defeat the purpose of granting exemption, but would amount to extending such benefit on repeated occasions to the same establishment, which is not intended by the legislation.

18. Keeping in mind the object, purpose and interpretation as above, the dominant tests in this case would of unity of ownership, unity of management and control, unity of labour and unity of employment, unity of finance, transferability of employees, maintaining of seniority list, promotions, etc. It is also necessary to find out whether the establishment of the Respondent-Company is the extension of the business activities of Associated Cement Company Limited under different name. It will also have to be seen as to how the employer has conducted himself, whether he has in fact and really intended to keep the two units distinct or integrated, and whether projection by the employer to treat two units as distinct and independent or unconnected is real, bona fide and genuine. For this purpose, the Annual Reports, the Memorandum and Articles of Association, the Service Regulations, the Provident Fund Regulations, etc., of both the Companies shall play a vital and significant role.

19. The Assistant Provident Fund Commissioner, in the present case, had placed reliance upon the contents of the annual report of the Company and the Provident Fund Rules of Associated Cement Company Limited. He had also taken into consideration the fact that the employees of the Respondent-Company are entitled to the benefit of Provident Fund Scheme formulated by Associated Cement Company Limited. It has been held that the Respondent-Company is nothing but an expansion of the present activities of Associated Cement Company Limited and hence it is covered by the provision of Section 2-A of the EPF Act, which has disentitled it to infancy period of three years u/s 16(1)(d) of the EPF Act, as such benefit has already been availed by the parent-Company, i.e. Associated Cement Company Limited.

20. The Appellate Tribunal has failed to take into consideration all these relevant factors. There is neither any reference to the annual report nor any reference to the Provident Fund Rules of Associated Cement Company Limited. In view of this, the findings of the Appellate Tribunal suffers from non-application of mind to the material available on record. Merely because the Respondent-Company is separately incorporated under the Companies Act and having separate Central Excise, Sales-tax and income tax registration, that by itself is not enough. As observed by the Apex Court in the case of Management of Pratap Press, where two units belong to a proprietor, there is almost always likelihood also of unity of management. The Appellate Tribunal will have to take into consideration all such aspects as are pointed out and to record its findings. In the absence of such application of mind to the evidence on record, the order passed by the Appellate Tribunal cannot be sustained. The same will have to be quashed and set aside with a direction to the Appellate Court to consider the matter afresh in accordance with law, keeping in view the observations made above. It is, however, made clear that this Court has not commented on the merits of the controversy and all the questions, including the question whether the Respondent-Company is a part and parcel of the existing establishment, are kept open to be decided in accordance with law.

21. In the result, the petition is allowed. The order dated 7-10-2008 passed in Appeal ATA No. 75(9)/2002 by the Employees' Provident Fund Appellate Tribunal, New Delhi, is hereby quashed and set aside. The matter is remitted back to the Appellate Tribunal to consider it afresh in accordance with law, keeping in view the observations made above.

22. Rule is made absolute in above terms. No order as to costs.