

(1980) 10 GUJ CK 0005
In the Gujarat High Court

Dhoraji Engg. Works

APPELLANT

Vs

Regional Provident Fund Commr.

RESPONDENT

Date of Decision : 16-10-1980

Acts Referred:

Employees Provident Fund and Family Pension Act, 1952 — Section 2A

Citation : (1980) 2 GLR 461

Hon'ble Judges : S.H. Sheth, J;G.T. Nanavati, J

Bench : Division Bench

Judgement

S.H. Sheth, J.—This petition has been filed by two partnership firms. Dhoraji Engineering Works is petitioner No. 1. Dhoraji Mechanical Works is petitioner No. 2. Both are carrying on their manufacturing business at Rajkot. Petitioner No. 1 firm was constituted in 1965. It has been manufacturing diesel oil engines and their spare-parts. The petitioners allege that petitioner No. 1 has been employing less than 19 workers. However, with effect from 1st March 1975, petitioner No. 1 was voluntarily adopted the Provident Fund Scheme. Petitioner No. 2, another partnership firm, was constituted in 1968. It is also engaged in manufacturing diesel oil engines. In addition, it is trading in diesel oil engines and its parts. The diesel oil engines and its parts in which petitioner No. 2 has been trading are purchased by it from petitioner No. 1-firm. Both the firms have been separately registered under the Partnership Act, are separately assessed for the purpose of Income Tax and sales-tax and hold separate licences under the Factories Act. The Provident Fund Commissioner issued on 20th November 1974 a notice to show cause why the provisions of the Employees' Provident Funds and Family Pension Fund Act, 1952 (hereinafter referred to as "the Provident Fund Act" for the sake of brevity) should not be applied to them with effect from 1st October 1971. In pursuance of the notice which he issued, he held an enquiry and on 11th February 1977 he made the impugned order. By the impugned order, he declared that both the firms constitute one establishment and that the workmen employed by both the firms exceeded 20. He, therefore, ordered that the provisions of the Provident Fund Act were applicable to both these firms as it they were "one

establishment". It is that order which is challenged by the petitioners in this petition.

2. Mr. Nanavaty who appears on behalf of the petitioners has contended that the Provident Fund Commissioner has applied the wrong test while holding that both the firms constitute one establishment. In order to appreciate the contention which Mr. Nanavaty has raised, it is necessary to turn to sec. 1(3)(a) which reads as follows:

Subject to the provisions contained in Section 16, it applies:

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed.

... ..

Both the firms are running factories which are manufacturing diesel oil engines. They are covered by Entry 3 in the Schedule to the Act which reads: "Any industry engaged in the manufacture of any of the following: Electrical, mechanical or general engineering products." Section 2A which was inserted by Parliament in the Act on 31st December 1960 provides as follows:

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.

The question, therefore, which we are required to decide in this case is whether these two partnership firms constitute two different departments of the same establishment.

3. Before we proceed to examine the impugned order, it is necessary to refer to a few decisions to which our attention has been invited.

4. The first decision is in *The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen*, . It was a case under the Industrial Disputes Act, 1947, and the Mines Act, 1952. The question whether a cement factory and a lime stone quarry situate nearby constituted "one establishment". They were owned by the same persons and by the same management. The lime stone quarry was feeding the cement factory. Mines Act, 1952, does not prescribe any specific test for determining what is one establishment. The Supreme Court has, therefore, evolved the tests to determine whether what appear to be two ostensible industries constitute "one establishment." In that behalf, the Supreme Court has observed as follows. It is 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 or units. If in their true relation they constitute one integrated whole, the establishment is one. If, on the contrary, they do not constitute one integrated whole, each unit is a separate unit. How the relation between the units will be judged will depend

upon the facts proved, having regard to the scheme and object of the statute which gives right of unemployment compensation and also prescribes a disqualification therefor. 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 an important test, in third, unity employment may be an important test. Difficulties often arise in applying these tests because of the complexities of modern industrial organization. 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 such complexities, it often becomes difficult to discover the real thread of unity. It is clear, therefore, that while determining whether two enterprises constitute one establishment, we have to bear in mind three tests: (1) unity of ownership, management and control, (ii) functional integrality or general unity, and (iii) unity of employment. This decision of the Supreme Court indicates that all the three tests need not necessarily be satisfied in order to enable the Court to hold that two enterprises constitute "one establishment". Mr. Nanavaty has indeed argued that while applying these tests, the Court should give weight age to the unity of employment.

5. The next decision to which our attention has been invited by Mr. Mehta is in *The Honorary Secretary, South India Millowners' Association and Others Vs. The Secretary, Coimbatore District Textile Workers' Union*, . The question whether the two undertakings and enterprises of the same company constituted one unit arose in that case. In paragraphs 15 and 17, the Supreme Court has made the following observations. Several factors are relevant in dealing with the problem. However, significance of several relevant factors would not be the same in each case. Unity of ownership, management and control would be a relevant factor. General unity or functional integrality may also be a relevant factor. Unity of finance may not be an irrelevant factor. Geographical location may also be of some relevance. In some cases, the test would be whether one concern forms an integral part of another so that the two together constitute one concern. In dealing with this problem, the nexus of integration in the form of some essential dependence of the one on the other may assume relevance. Similarly, unity of purpose or design, or even parallel or coordinate activity intended to achieve a common object for the purpose of carrying out the business of the one or other may also assume relevance and importance. Referring to their earlier decision in the case of *Associated Cement Companies Ltd.* (supra), it has been observed that while applying the test of functional integrality in dealing with the question of inter-relation between two industries or enterprises, the Supreme Court has carefully pointed out that no test can be precisely decisive and that relevance of different tests should be judged in light of the facts in each cases.

6. Mr. Nanavaty has invited our attention to the decision of the Supreme Court in *The Associated Industries (P) Ltd. Vs. The Regional Provident Fund Commissioner, Kerala Trivandrum*, . In the context of the Provident Fund Act, the

question which arose before the Supreme Court in that case was slightly different. It was this: If one factory carries on more than one industry and if only one of the industries falls under Schedule I to the Act and satisfies the requirement as to the number of employees prescribed by the section, would all the industries fall under Schedule I? The answer which the Supreme Court has given to the question is as follows. If a factory carries on one industry which falls under Schedule I and satisfies the requirement as to the number of employees prescribed by the section, it clearly falls u/s 1(3)(a). If the factory carries on more than one industry, all of which fall under Schedule I and if its numerical strength satisfies the test prescribed in that behalf, it is an establishment u/s 1(3)(a). If a factory runs more industries than one, one of which is the primary and dominant industry and the others are its feeders and can be regarded as subsidiary, minor or incidental industries in that sense, then the character of the dominant and primary industry will determine the question as to whether the factory is an establishment u/s 1(3)(a) or not. If the dominant and primary industry falls under Schedule I, the fact that the subsidiary industries do not fall under Schedule I will not help to exclude the application of Section 1(3)(a). If the dominant and primary industry does not fall under Schedule I but one or more subsidiary, incidental, minor and feeding industries fall under Schedule I, then Section 1(3)(a) will not apply. If a factory runs more industries than one, all of which are independent of each other and constitute separate and distinct industries, Section 1(3)(a) will apply to the factory even if one or more, but not all, of the industries run by the factory fall under Schedule I. The question about the subsidiary, minor or feeding industries will arise only where it is shown that the factory is really started for the purpose of running one primary industry and has undertaken other subsidiary industries only for the purpose of subserving and feeding the purposes and objects of the primary industry. In such a case, the minor industries merely serve as departments of the primary industry, otherwise if the industries run by a factory are independent or are not so integrated as to be treated as parts of the same industry, the question about the principal and dominant character of one industry as against the minor or subsidiary character of another industry does not fall to be considered.

7. Reference has also been made by Mr. Nanavaty to the decision of the Supreme Court in *Union of India (UOI) and Another Vs. Ogale Glass Works*, . It was a case under the Provident Fund Act. In that decision, the Supreme Court has observed that Section 2A has been enacted in order to emphasize that an establishment may consist of different departments irrespective of whether they are situate at the same place and that all such departments or branches shall be treated as parts of the same establishment.

8. Our attention has been invited to two more decisions-one of Mysore High Court and another of Allahabad High Court. In *Mahipal Singh Shankarsing Pawar v. Regional Provident Fund Commissioner, Mysore* 1972 LabI C 1202, a Division Bench of the Mysore High Court has considered the case of an employer having two or more establishments under his control. In each of those establishments

less than 20 persons were employed. It was contended on behalf of the employer that they were independent establishments and that, therefore, the provisions of the Provident Fund Act were not attracted to them. It has been observed in that decision that, on a careful reading of the Act, they were of the opinion that an employer having two or more establishments under his control and employing less than 20 persons in each of them, even though the total number of employees in all the establishments exceeds twenty, would not be liable to pay any contribution under the Act. Reference in that case has been made to the decision of the Supreme Court in the Associated Industries (P) Ltd. v. Regional Provident Fund Commissioner, Kerala (supra) and to another decision of the Supreme Court.

9. In *The Delhi Cloth and General Mills Co. Ltd., Delhi Vs. The Regional Provident Fund Commissioner, U.P.*, the learned Single Judge of that Court has considered a similar question under the Provident Fund Act. It has been observed in that decision that if only one kind of goods is manufactured at one place, the whole shall constitute one factory or establishment and such factory or establishment would be engaged in only one industry. It would be the case of one establishment or factory and shall be governed by the Act and the scheme if that industry is included in Schedule I to the Act and the provisions of the Act are applicable to it. But if the industrial undertaking manufactures goods or articles of more than one kind (as in that case sugar, alcohol and confectionary were manufactured in the same compound) they constitute three establishments or factories if they are from the point of view of employment, complete units by themselves. The learned single Judge has emphasized the unity of employment as a material test for determining whether two enterprises constitute the same establishment.

10. Mr. Mehta has invited our attention to the decision of the High Court of Bombay in *The State v. Hathiwala Textile Mills* 59 BLR 184. It was a case under the Provident Fund Act. In that decision, a paragraph from the unreported decision of the High Court of Bombay in *Jayantilal Ganpatram Vakharia v. The Regional Provident Fund Commissioner*, decided by Chagla, C.J. and Dixit, J., on June 28, 1956, has been reproduced. The quotation states that in case of a social legislation, the canon of construction is very different from the canon of construing a taxation law. In case of a social legislation, the Court must not countenance any subterfuge which would defeat its provisions and it must, even if necessary, strain the language of the Act in order to achieve its purpose which the Legislature had in placing the legislation on the statute book. The Court should not only disapprove all subterfuges to defeat a social legislation but must actively try to prevent such subterfuges succeeding in their object.

11. Bearing in mind the three-fold test which the Supreme Court has laid down, we proceed to examine the facts of the present case. So far as the finding recorded by the Provident Fund Commissioner is concerned, it is as follows:

... out of 13 partners of Engineering Works at the relevant time, 4 partners were

common to both the engineering as well as mechanical works. 5 partners of engineering works were closely related to those of mechanical works and only in case of remaining 4 partners such a relationship with partners of mechanical works is not clearly brought out though it is not completely ruled out either.

Mr. Nanavaty who appears on behalf of the petitioners has challenged this finding as perverse. We are not convinced by his argument at all. We are required to examine the constitution of these two firms as it was on 1st October 1971. A statement showing the constitution of the two firms has been annexed to the petition. On that day, indisputably four partners were common to both the firms. They were Trikamlal Jivraj Parsania, Mulji Bhurabhai Patel, Gordhan Becharbhai Patel and Mohanlal Ravjibhai Patel. In 1971, petitioner No. 2 had 10 partners and petitioner No. 1 had 13 partners. Out of them, as stated above, four were common. Jivraj K, Parsania who was a partner of petitioner No. 2 and Keshavlal Jivraj Parsania who was a partner of petitioner No. 1 were respectively father and son. Vijayaben Premjibhai Patel who was a partner of petitioner No. 2 and Shri Premji Rajabhai Patel who was a partner of petitioner No. 1 are wife and husband respectively Jayantilal Laxmanbhai Patel who was partner of petitioner No. 2 and Mohanlal Laxmanbhai Patel who was a partner of petitioner No. 1 are brothers. We, therefore, find that out of 10 partners which petitioner No. 2 had, 4 were common to both and 3 were related to some of the partners in petitioner No. 1 firm and only 3 partners in petitioner No. 2 firm appear to be different. It is clear, therefore, that so far as the unity of ownership, management and control was concerned, both the firms were owned, managed and controlled by the same or related set of partners who constituted the majority. Therefore, the test of unity was largely satisfied.

12. So far as the functional integrality is concerned, both the firms have been manufacturing diesel oil engines. They are, therefore, engaged in the same industrial activity. Secondly petitioner No. 2 purchases and sells diesel oil engines and their spare parts which petitioner No. 1 manufactures. It is immaterial whether petitioner No. 2 is the sole vendor of the diesel oil engines and its parts manufactured by petitioner No. 1. There fore, the test of functional integrality is also satisfied. It cannot be gainsaid that there was no unity of employment in both these firms. The workmen employed by both these firms were altogether different. It is also noteworthy that both the industries have been situated in the neighbourhood of each other. They are situate at Sheri No. 6 in Bhaktinagar Station area in the city of Rajkot. Indeed the premises of petitioner No. 1 are known as Vijay Kunj, whereas the premises of petitioner No. 2 are known as Parmar House. It cannot be gainsaid, therefore, that the geographical proximity in their situations also lands support to our finding that they are complementary and supplementary to each other. It is also necessary to note, so far as financial relations are concerned, that, in 1971, petitioner No. 1 was the largest debtor of petitioner No. 2. The Provident Fund Commissioner, was, therefore, justified in drawing the inference that petitioner No. 2 had been working for petitioner No. 1. The affidavit-in-reply filed on behalf of the Provident Fund Commissioner shows

that in 1969 A.D., petitioner No. 2 carried out for petitioner No. 1 job work of the value of Rs. 12,876/-as against the job work worth Rs. 444.51 P. carried out by it for others. In 1970 petitioner No. 2 carried out such work for petitioner No. 1. It commanded the value of Rs. 24,983/-as against the work worth Rs. 444.51P. done by it for others. In 1971 it carried out such work for petitioner No. 1 worth Rs. 81.691.64P. in so far as its Secunderabad Branch was concerned and worth Rs. 24,352.SOP. in so far as its Rajkot factory was concerned. These facts clearly show that both there industries-petitioner No. 1 and petitioner No. 2-not only have in broad terms the unity of ownership but have functional integrality and financial unity. They are working for each other. It is clear, therefore, that they are the departments of each other. It is only for the purpose of convenience that two firms have been separately constituted and are separately assessed for the purpose of Income Tax and sales-tax and are holding separate licences under the Factories Act.

13. In our opinion, therefore, the Provident Fund Commissioner was eminently justified in holding them as one factory and taking into account the combined strength of their workmen and applying the provisions of the Provident Fund Act to them. We therefore find no infirmity in the impugned order.

In the result, the petition fails and is dismissed. Rule is discharged with no order as to costs in the circumstances of the case.