

(1993) 02 BOM CK 0037
In the Bombay High Court
Case No : Writ Petition No. 727 of 1988

Ebrahim Currim and Sons

APPELLANT

Vs

Regional P.F. Commissioner and Another

RESPONDENT

Date of Decision : 04-02-1993

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2A

Citation : (1993) 3 BomCR 246 : (1994) 1 LLJ 369 : (1994) MhLj 549

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : L.M. Nerlekar, for the Appellant; R.C. Master, for the Respondent

Final Decision : Allowed

Judgement

D.R. Dhanuka, J.—By this petition filed under Article 226 of the Constitution of India, the petitioner has impugned the validity of Order dated January 25, 1988, passed by respondent No. 1 holding that Messrs. Ebrahim Currim & Sons, the petitioner herein, are bound to comply with the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 with effect from May 1, 1962 in respect of employees working in the factory known as "M/s. National Umbrella Factory".

2. The principal questions which arise for consideration of the Court in this petition are as under: -

(a) Whether National Umbrella Factory is a separate and distinct establishment or is merely a branch or department of M/s. Ebrahim Currim & Sons?

(b) Whether there is a functional integrality between the two units so as to constitute the two units as a single composite establishment?

(c) Whether the respondent No. 1 has applied the relevant tests for purposes of deciding the above referred questions including the test as to whether the National Umbrella Factory can conveniently or substantially exist even if M/s.

Ebrahim Currim & sons (the trading unit) is closed?

(d) If not, whether the impugned order suffers from misdirection in law and the impugned order is liable to be quashed and set aside with liberty to pass fresh order on remand in accordance with law?

3. The relevant facts having bearing on the subject-matter of this petition are briefly summarised as under:-

(a) The petitioner is a partnership firm duly registered under Indian Partnership Act. Since about 125 years, the petitioner firm has been engaged in "trading and commerce activities" having its office at Princess Street, Bombay. The petitioners are duly registered under Bombay Shops and Establishment Act. This establishment can be conveniently described as "trading establishment". The petitioners have been dealing in umbrellas.

(b) In or around 1940, the petitioners set up a factory to carry on manufacturing activities in the name and style of "National Umbrella". The said factory is situated at Reay Road. The said factory is registered under the Factories Act and hold separate licenses. Both the establishments are owned by the same owner. The above referred manufacturing unit is not engaged in activity specified in Schedule I to the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Section 1(3)(a) of the above referred Act No. 19 of 1952 is applicable only to such factories which are engaged in an industry specified in Schedule I in which 20 or more persons are employed. The items manufactured by National Umbrella do not figure in Schedule I to the above referred Act. The manufacturing activity of National Umbrella Factory is a non-scheduled activity.

(c) Section 1(3)(b) of the said Act empowers the Central Government to extend applicability of the said Act to any other establishment employing 20 or more persons by issue of requisite Notification in the Official Gazette. The expression "Any other establishment" used in Section 1(3)(b) of the said Act is interpreted to mean and include non-scheduled factories as well as trading and commerce establishments. On March 7, 1962, the Central Government issued a Notification bearing No. GSR 346 in exercise of powers conferred on it under Clause (b) of Sub-section (3) of Section 1 of the said Act. By the said notification the aforesaid Act was made applicable to "every trading and commerce establishment" employing 20 or more persons engaged in purchase, sale or storage of goods, including establishment of Exporters, Importers, Advertisers, Commission Agents and Brokers and Commodity and Stock Exchanges etc. The said notification is applicable to the trading establishment of M/s. Ebrahim Currim & Sons. The said establishment employs more than 20 persons. Thus with effect from May 1, 1962, the aforesaid Act became applicable to the petitioner. Till about 1985, both parties proceeded on the footing that National Umbrella Factory was not covered by and under the above referred Act, and the trading establishment in the name of petitioner alone was covered thereby.

(d) On August 6, 1985, the Respondent No. 1 for the first time served a notice

on the petitioner u/s 7A of the said Act in order to determine the question as to whether National Umbrella Factory owned by the petitioner was a separate establishment or whether the said factory was merely a branch or department of the petitioners or formed part of a composite unit i.e. integral part of the trading establishment of M/s. Ebrahim Currim & Sons. The petitioner has been complying with the provisions of the said Act w.e.f May 1, 1962 insofar as the employees in their trading establishment are concerned. In reply to the said show cause notice, the petitioner contended that National Umbrella Factory was a separate establishment and the proceedings adopted in the matter by respondent No. 1 were misconceived. The petitioners made written submissions before respondent No. 1 by addressing several letters to respondent No. 1 including letters dated September 1, 1986 and August 11, 1987. By their written submission dated August 11, 1987, the petitioner submitted that M/s. National Umbrella Factory was engaged in manufacturing of umbrella which was a non-scheduled activity of M/s. Ebrahim Currim & Sons. In the said written submission, the petitioner submitted that M/s. National Umbrella Factory was doing manufacturing activity of the petitioner and the petitioners were providing raw materials to the said factory. By the said written submission, the petitioner asserted that National Umbrella Factory was a separate and distinct establishment and both the establishments were not inter-dependent. By the said submissions, it was submitted that the two establishments could not be considered as one merely because the owner of the two establishments was one. By the said letter it was further submitted that the two units could not be clubbed together as the activities of the two units were different, distinct and separate;

(e) In the impugned order, the respondent No. 1 recorded his conclusion to the effect that the petitioner was liable to comply with the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 in respect of employees of National Umbrella Factory inter alia on the ground that the raw materials required for the said factory were supplied by the petitioner. The respondent No. 1 recorded his conclusion in the impugned order to the effect that establishment of the petitioner was a composite unit consisting of trading firm as well as factory and the petitioner was thus engaged in the activity of manufacturing and selling of umbrellas under the brand name "STAG".

4. In this writ petition, the petitioner has enumerated several factors in support of their submission that the test of functional integrity is not satisfied in this case and the two establishments are liable to be treated as separate and distinct establishments for purpose of the above referred Act. For the reasons indicated below, I propose to remand the proceedings to respondent No. 1 with liberty to pass fresh order in accordance with law. The respondent No. 1 is enjoined by law to consider all relevant factors before arriving at his conclusion in the matter.

5. Section 2A of the said Act is directly relevant. The said section reads as under:-

"For the removal of doubts, it is hereby declared that where an establishment consists of different departments or has branches, whether situated in the same

place or in different places, all such departments or branches shall be treated as parts of the same establishment."

Provisions contained in Section 2A of the said Act shall have to be kept in mind for purpose of consideration as to whether the test of functional integrality is satisfied in the instant case and as to whether the respondent No. 1 has applied the correct and relevant tests for purpose of deciding the material questions which arose before him.

6 In *Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers' Union and Its Workmen*, the Hon"ble Supreme Court observed as under:-

"In all such cases therefore, the Court has to consider with care how far there is "functional integrality" meaning thereby such functional interdependence that one unit cannot exist conveniently and reasonably without the other and on the further question whether in matters of finance and an employment the employer has actually kept the two units distinct or integrated."

In other words, in this case, the Hon"ble Supreme Court has emphasised two of the important tests required to be applied for deciding the issue of functional integrality including the test i.e. as to "whether the unit sought to be clubbed can exist conveniently and reasonably without the others"? Both these tests have not been applied by the respondent No. 1 in this case. The tests laid down in this case for determining the issue of functional integrality are not exhaustive.

7. In this case, the Hon"ble Supreme Court followed the test laid down in the case of *Associated Cement Companies Ltd. v. Their Workmen*, 1960 I LLJ 1. A question arose before the Apex Court in the *Associated Cement Company's* case as to whether the Lime Stone Quarry and the Cement Factory were separate establishments or one establishment for the purpose of applicability of relevant provisions of Industrial Disputes Act, 1947. S.K. Das, J. speaking for the Bench of the Hon"ble Supreme Court observed that "no one test could be considered as conclusive for purpose of applying the test of functional integrality. In this case, the Supreme Court illustratively referred to several tests like unity of ownership, management and control, proximity of location etc. It is well settled that merely because the two units are owned by the same person or persons, the two units cannot be treated as one establishment.

8. In *Kerula Rubber Company Pvt. Ltd. v. Regional Provident Fund Commissioner*. Special Civil Application No. 198 of 1978 the Hon"ble Division Bench of our High Court consisting of Kanade and Pandse, JJ. decided the similar question. In this case the petitioners were manufacturing rubber goods in their factory at Bombay set up in the year 1942. The petitioner established a new factory at Aurangabad in October, 1973. The said new factory also manufactured Rubber goods. Both the said factories were owned by the same company. The question before the authorities was as to whether the Aurangabad factory of petitioner was liable to be considered as a separate establishment or as part and parcel of the first establishment. The question before the Court was as to whether the Aurangabad

factory was entitled to benefit of infancy period u/s 16 of the Act. After referring to Section 2A of the Act, Pandse, J. speaking for the Division Bench observed as under:-

"Section 2A of the Act, inter alia provides, that where an establishment consists of different departments or branches, all such departments or branches shall be treated as parts of the same establishment. This section was enacted to bring in the sweep of the expression "establishment", all the branches and departments which are ancillary or incidental to the main establishment and are dependent on the main establishment for its survival."

The Hon'ble Division Bench of our High Court considered the test of dependency of the subsequent unit on the first unit as an important test for purpose of deciding and applying the test of "functional integrality". The relevant criteria formulated by the Hon'ble Division Bench for consideration of the issue involved was as to whether the second unit could survive on first unit being closed? After referring to the judgment of the Hon'ble Supreme Court in the case of Associated Cement Co. and Management of Pratap Press and several other cases, the Division Bench of our High Court observed that the question required to be determined was as to whether the Aurangabad unit was a separate establishment or merely a branch or department of an earlier establishment and whether the said unit could survive if the earlier unit were to close.

9. In the case of Metazinc Pvt. Ltd. Vs. R.M. Gandhi, Regional P.F. Commissioner and others, Daud, J. of our High Court was seized of the similar problem. The learned Judge observed that the test of functional integrality was relevant for application of Section 2A of the Act. The learned Judge quoted passages exclusively from the judgment of the Hon'ble Supreme Court in the case of Management of Pratap Press, New Delhi v. Delhi Press Workers' Union (supra) and the above referred Division Bench Judgment in the case of M/s. Kerala Rubber Company Pvt. Ltd. referred to hereinabove and reached the same conclusion. In para 7 of his judgment, the learned Judge noticed an important submission made on behalf of Regional Provident Fund Commissioner to the effect that both the units were administratively served by an office located at Bombay attending to the purchase of raw materials and the sale of finished products for both and units and the test of functional integrality was, therefore, satisfied. On this aspect, the learned Judge relied on a judgment reported in the case of P.S.N.S. Ambalavana Chettiar and Co. (P.) Ltd., Madras Vs. Regional Provident Fund Commissioner, Madras, and rejected the submission made on behalf of Regional Provident Fund Commissioner in para 8 of his judgment after quoting extensively from the above referred judgment.

10. In the case of Allana Sons Pvt. Ltd. v. Regional Provident Fund Commissioner of Maharashtra (1991) i CLR 743.Daud, J. once again came to the similar conclusion. In this case M/s. Allana Lines was described as a division of Allana & Sons Pvt. Ltd. It was held by Daud, J. that merely because Allana Lines was so described it did not follow that it was a department or branch of Allana & Sons

Pvt. Ltd. and not a separate establishment. The learned counsel for respondent No. 1 informs the Court that an appeal has already been filed against the above referred decision of Daud, J. in the case of Allana & Sons Pvt. Ltd. and the Appeal of Department is already admitted by Division Bench of this Court. The learned counsel also informs that the operation of the order passed in the above referred writ petition by Daud, J. is stayed by the appellate Court.

11. In the case of B. Ganapathy Bhandarkar v. Regional Provident Fund Commissioner, Bangalore (1989) 75 Fac JR 284, the Karnataka High Court emphasised the test of "substantial mutual dependability" as the most relevant test of "functional integrality". One of the questions to be considered by the authorities and the Court in this case is as to whether National Umbrella Factory can reasonably survive even if the trading establishment of the petitioner were to close. I have read and re-read the impugned order passed by respondent No. 1 on January 25, 1988. The above referred important test appears to have totally escaped attention of respondent No. 1. The respondent No. 1 has proceeded on the footing that the petitioner has admitted in the written submissions filed before respondent No. 1 that National Umbrella Factory was a manufacturing unit of the petitioner and that the petitioner was supplying raw materials to the said factory and selling its finished products. The respondent No. 1 appears to have forgotten that in the same very written submission it was further stated that National Umbrella Factory was a separate unit and it could not be clubbed with the petitioner. When the petitioner contended in the said written submission that National Umbrella Factory was a manufacturing unit of the petitioner, all that it meant was that both the units were owned by the same owner. Mere fact of common ownership by itself is not sufficient to satisfy the test of functional integrality. Similarly mere fact of supply of raw materials or purchase of raw materials, for the factory by the petitioner or sale of the finished goods by the petitioner would not be sufficient to satisfy the test of functional integrality. All the relevant tests must be considered and applied before deciding the issue as to applicability of Section 2A of the Act or of functional integrality between the two, units. If the respondent No. 1 would have applied all the relevant tests including the predominant test as to whether the subsequent unit could survive on closure of the first unit or whether the subsequent unit was merely a branch or department of the first unit, the Court would not have interfered with the finding of fact recorded by respondent No. 1. Unfortunately, the finding of fact recorded by respondent No. 1 in the impugned order suffers from mis-direction in law and from crucial omission to apply the relevant test laid down by judicial decisions of the Apex Court and this Court, on this aspect, the submissions made by learned counsel for the petitioner are well founded.

12. Shri R.C. Master, the learned counsel for the respondent No. 1, has submitted that the factory unit and the trading unit form part of one composite establishment. The learned counsel also submitted that the test prescribed by Section 2A of the Act was fully satisfied in this case. I am unable to accept the submissions made by the learned counsel for respondent No. 1. The relevant

issues shall have to be re-examined in light of observation made in this judgment. In my opinion the proceedings shall have to be remanded for fresh adjudication in light of the observations made in this judgment and the respondent No. 1 must hold a detailed inquiry afresh after examining all the facts and circumstances of the case in light of this judgment after applying all the relevant tests.

13. I must now refer some of the authorities cited by learned counsel for the respondent No. 1.

14. The learned counsel for respondent No. 1 relied on an unreported judgment of the Hon'ble Supreme Court dated March 21, 1963, in the case of *Basantlal Jain v. Regional Provident Fund Commissioner* (Writ Petition No. 86 of 1962) noticed in para 747 of the reported judgment of Division Bench of our High Court in the case of *Varjivandas Hirji and Co. Vs. Regional Provident Fund Commissioner (D.T. Ghatpude) and Another*, . The summary of this judgment is undoubtedly helpful to respondent No. 1 to some extent. The summary of the said judgment contained in para 747 of the above referred Bombay judgment does not clarify as to whether the test of a reasonable possibility of survival of the unit sought to be clubbed on closure of the 1st unit was approved or not approved in this judgment. The text of the said judgment is not available. Having regard to clear ratio of the judgment of the Hon'ble Supreme Court in the reported case of *Management of Pratap Press, New Delhi* referred to herein-above, I must hold that the ratio of the judgment, of the Supreme Court in the case of *Pratap Press* must prevail. The ratio of the said judgment appears to have been applied in several subsequent cases including the latest one.

15. The learned counsel for respondent No. 1 relied on Division Bench judgment of the High Court of Gujarat delivered by P.D. Desai, the then acting Chief Justice of High Court of Gujarat and S.B. Majumdar, J., in the case of *Indian Rayon Corporation Ltd. v. Miss K.P. Sarojini*. A copy of the said judgment dated September 23, 1983, in Special Civil Application No. 4617 of 1983 is annexed to the affidavit in reply. I have carefully gone through the said judgment. In my opinion the said judgment does not lay down different test for purpose of deciding the issue of functional integrality i.e. test in any manner different from the test prescribed in the above referred judgment of the Hon'ble Supreme Court in the case of *Management of Pratap Press, New Delhi* or in the judgment of Division Bench of our High Court in *M.S. Kerula Rubber Factory Pvt. Ltd. case (supra)*. Having regard to the facts of that case, the High Court of Gujarat was satisfied that no case for interference was made out and the finding recorded by the Regional Provident Fund Commissioner to the effect that the Unit at Halol was a part and parcel of the petitioner-company was a correct conclusion. In my opinion, this case is of no assistance to the learned counsel for respondent No. 1.

16. The learned counsel for respondent No. 1 has relied on judgment of High Court of Madras in the case of *Messrs P.S.N.S. Ambalavana Chettiar & Co. (P) Ltd., Madras v. Regional Provident Fund Commissioner, Madras*, reported in 1970

1 LLJ 296 Mad 194 and in case of A. Gangadharan Vs. Government of India and Another, . In my opinion both these judgments are clearly distinguishable and do not really assist the learned counsel. In para 11 of the judgment in the case of A. Gangadharan v. Govt. of India (supra) it was in terms held by Ramanujam, J. that the test of functional integrality was satisfied in that case.

17. In the result, the petition succeeds. The impugned order dated January 25, 1988, is set aside with liberty to respondent No. 1 to pass fresh order after holding fresh inquiry and giving an opportunity of hearing to the petitioner in light of the observations made in this judgment The respondent No. 1 must also consider as to from what date, if any, the petitioner is liable to pay provident funds in respect of employees of National Umbrella Factory and whether the alleged liability can now be enforced from May 1, 1962 when the impugned proceedings were started only in the year 1985. Rule made absolute with no order as to costs.

18. At this stage the learned counsel for respondent No. 1 submits that the respondent No. 1 has already quantified the liability of the petitioners in pursuance of the impugned order and the petitioners should be required to deposit at least part of the amount with respondent No. 1 as a condition of participation by the petitioner in the proceedings on remand. It is not possible to accept this submission, as I have reached the conclusion that the impugned order suffers from error of law apparent on face of record, and the relevant tests have not been applied by respondent No. 1.

19. I am not persuaded to pass any order of interim deposit against the petitioner at this stage. All contentions of both sides on merits of the main issues formulated in opening part of this judgment are kept open.

20. Issue of certified copy is expedited.