

(2021) 10 BOM CK 0034

In the Bombay High Court

Case No : Letters Patent Appeal No .406 Of 2011 In Writ Petition No.5672 Of 2010

Hindusthan Udyog Ltd

APPELLANT

Vs

Assistant Provident Fund Commissioner

RESPONDENT

Date of Decision : 08-10-2021

Acts Referred:

Employees Provident Funds And Miscellaneous Provisions Act, 1952 — Section 2A, 7A, 71, 16(1)(d)

Citation : (2021) 10 BOM CK 0034

Hon'ble Judges : A. S. Chandurkar, J;G. A. Sanap, J

Bench : Division Bench

Advocate : R. B. Puranik, H. N. Verma

Final Decision : Dismissed

Judgement

A. S. Chandurkar, J

1. This Letters Patent Appeal filed under Clause-15 of the Letters Patent Appeal raises a challenge to the judgment of learned Single Judge dated 07/07/2011 in Writ Petition No.5672/2010. By that judgment the writ petition preferred by the respondent herein has been allowed and after setting aside the order passed by the Employees Provident Fund Appellate Tribunal, New Delhi, the proceedings have been remanded to the said Tribunal to consider the matter afresh in accordance with law.

2. The facts giving rise to the present proceedings are that ACC Nihon Castings Ltd. (for short, ANCL) is a Company incorporated under Companies Act, 1956. Pursuant to an order passed on 01/04/2008 by the Calcutta High Court, ANCL stood merged with Hindustan Udyog Ltd., the present appellant. It is the case of ANCL that it is a subsidiary Company of Associated Cement Companies Ltd. (for short, ACCL) which deals in manufacture and sale of cement. ANCL was incorporated on 10/02/1992. ACCL is one of the shareholders in the equity capital of ANCL. ANCL constructed and erected its plant at Butibori in the year

1992-93. The trial production of Alloy Steel Castings started from 24/11/1993 and its commercial production started from 12/04/1994.

3. The Regional Provident Fund Commissioner on 02/12/1996 informed ANCL that the provisions of the Employees Provident Fund and Misc. Provisions of Act, 1952 (for short, the Act of 1952) would be applicable to the establishment from 01/11/1996 on completion of infancy period under Section 16(1)(d) of the Act of 1952. ANCL was accordingly issued a Code number for complying with the provisions of the Act of 1952. On 02/12/1999 the Regional Provident Fund Commissioner issued a show cause notice to ANCL stating therein that being a subsidiary Company of ACCL which was exempted under para 27-A of the Employees Pension Scheme, 1952, it was likely that the subsidiary concern was enjoying unity of ownership, management control, functional integrality and general unity of employment with ACCL. According to the said Authority there was ground to believe that the establishment should be covered from the date of commencement of production which was 24/11/1993 in view of provisions of Section 2-A of the Act of 1952. Hence ANCL was called upon to show cause as to why its establishment should not be covered under Section 2-A of the Act of 1952 from 24/11/1993. ANCL was accordingly called upon to show cause to the aforesaid.

4. ANCL submitted its reply to the aforesaid show cause notice and stated that it was wrong to conclude that ANCL and ACCL would constitute "one establishment" under the Act of 1952. Various factors required for determining the integrality of business were absent. Manufacture of Alloy Steel Castings undertaken by ANCL was not connected with the cement manufacturing activity of ACCL. Recruitment of employees was distinct and separate and so were the terms and conditions of service, amenities and benefits of employees of ANCL. Both establishments were independent and there was no supervisory control nor any functional integrality between the two Companies. It was further stated that ANCL was maintaining separate balance-sheet and books of accounts. It was thus stated that in absence of any unity in the business, management and control, ANCL and ACCL could not be treated to be "one establishment". It was thus stated that the provisions of the Act of 1952 were applicable to ANCL from 01/11/1996 and not from 24/11/1993.

5. The Assistant Provident Fund Commissioner in proceedings under Section 7A of the Act of 1952 and after considering the submissions made on behalf of ANCL held that ANCL was a subsidiary Company of ACCL. The Provident Fund Rules of ACCL were applied to the employees of ANCL. The Annual Report of ANCL for the year 1995-96 indicated that ACCL and NCC Japan had invested an amount of Rs.8 Crore in the equity capital of ANCL. It had also appointed one Shri K. K. Pathak who was earlier associated with ACCL as Managing Director of ANCL for a period of five years from 01/02/1993. After noting the payment of provident fund bills from 1992-93 it was observed that there was unity of ownership, management of control, finance, unity of employment and functional integrality

between ANCL and ACCL. On that premise an order under provisions of Section 7A of the Act of 1952 making the provisions applicable from the date ANCL started its manufacturing process in the month of November 1993. ANCL was accordingly called upon to pay provident fund contribution for the period from November 1993 to October 1996 in respect of employees excluding those who had been exempted under the Scheme by the Competent Authority. The payment was directed to be made within a period of fifteen days.

An application for review preferred by ANCL came to be rejected by the Assistant Provident Fund Commissioner on 20/12/2001.

6. ANCL being aggrieved by the aforesaid order filed an appeal under provisions of Section 7-1 of the Act of 1952 before the Employees Provident Fund Appellate Tribunal. The Tribunal found that the only link found by the Enquiry Officer in Section 7-A proceedings under the Act of 1952 was that ANCL was a subsidiary Company of ACCL. There was no material or evidence discussed to establish the fact of unity of finance or employment between the two establishments. The tests for clubbing two establishments as one under provisions of Section 2-A of the Act of 1952 were not satisfied. On this premise the Tribunal held that the conclusion arrived at by the Assistant Provident Fund Commissioner while clubbing ANCL with ACCL was not in consonance with law and hence not sustainable. On this count the appeal was allowed and the order dated 13/11/2001 passed by the Assistant Provident Fund Commissioner was set aside.

7. Being aggrieved, the Assistant Provident Fund Commissioner challenged this order by filing Writ Petition No.567/2010. The learned Single Judge held that the dominant and real test to be adopted to hold that two or more units form part and parcel of the same establishment would depend upon the facts and circumstances of each case. It was not necessary that in all cases the dominant test would be of functional integrality. In absence of functional integrality the other tests such as unity of management and control, unity of finance, unity of labour and employment would gain significance. Reference was thereafter made to the aspect of entitlement to infancy period as stipulated by Section 16(1)(d) of the Act of 1952. Referring to the order passed by the Assistant Provident Fund Commissioner the learned Single Judge found that reliance had been placed on the contents of the annual report of ANCL and the Provident Fund Rules of ACCL. It was then found by the Assistant Provident Fund Commissioner that ANCL was an expansion of the activity of ACCL and thus covered by the provisions of Section 2-A of the Act of 1952. This disentitled it to any infancy period of three years as such benefit had been availed by ACCL. It was then found that the Tribunal had failed to consider these relevant aspects and its findings suffered from non-application of mind to the material available on record. On that premise the order passed by the Tribunal was set aside and the proceedings were remitted to the Tribunal to reconsider the appeal afresh in accordance with law and in the light of observations made in the order. Being aggrieved by the aforesaid judgment, ANCL which is now Hindustan Udyog Ltd. has come up in

appeal.

8. Shri R. B. Puranik, learned counsel for the appellant submitted that the learned Single Judge was not justified in setting aside the order passed by the Appellate Tribunal and remanding the proceedings for fresh adjudication to it. According to him the Tribunal had found from the record that except the fact that ANCL was a subsidiary Company of ACCL, there was no further material on record to establish the fact of unity of finance or employment between the two. The requirements as prescribed for clubbing both the establishments under provisions of Section 2-A of the Act of 1952 were also found to be absent and hence the order passed by the Assistant Provident Fund Commissioner was rightly set aside. Referring to the material considered by the Assistant Provident Fund Commissioner it was submitted that said material would not establish unity of ownership or functional integrality between ANCL and ACCL. Merely because both establishments shared a common registered office with the same address or the fact that employees of ANCL were members of the Provident Fund Scheme with ACCL, it would not lead to a conclusion that there was unity of ownership or functional integrality between them. On the contrary both the establishments were independent entities and had separate existence. ANCL was not dependent upon ACCL in view of the fact that ANCL was engaged in Alloy Steel Castings while ACCL was in the business of cement. Placing reliance on the decision in Regional Provident Fund Commissioner and ors. vs. ABS Spinning Orissa Ltd. And anr 2008 III CLR 580 it was submitted that ANCL despite being a subsidiary Company had an independent existence and that aspect would be of no relevance in the present proceedings. He referred to the tests that were required to be satisfied for determining the true relationship between ANCL and ACCL by relying upon the decisions in The Associated Cement Companies, Ltd., Chaibasa Cement Works, Jhinkpani, vs. Their Workmen AIR 1960 SC 56, Management of Pratap Press, New Delhi vs. Secretary, Delhi Press Workers's Union Delhi Air 1960 SC 1213 and Isha Steel Treatment, Bombay vs. Association of Engg. Workers, Bombay and Anr. 1987(1) CLR SC 232. Both the establishments being independent and separate they could not be termed to be different departments of the same establishment which was a material fact as held in Sunder Transport and ors. vs. The Regional Provident Fund Commissioner 1992 (2) CLR 977. He also placed reliance on the decisions in Regional Provident Fund Commissioner and anr. vs. Dharmasi Morarji Chemical Co. Ltd. (1998) 2 SCC 446 and Noor Niwas Nursery Public School vs. Regional Provident Fund Commissioner and ors. (2001) 1 SCC 1. It was thus submitted that no useful purpose would be served by remanding the proceedings for fresh adjudication before the Tribunal. He also referred to the order passed in the Letters Patent Appeal on 18/11/2011 by which liberty was granted to the respondent to hold a fresh enquiry under Section 7-A of the Act of 1952 and the fact that despite that liberty the respondent on 24/07/2012 did not proceed further with those proceedings. Thus it was submitted that taking an overall view of the matter the order passed by the Appellate Tribunal ought to be restored by setting aside the judgment of the

learned Single Judge.

9. On the other hand Shri H. N. Verma, learned counsel for the respondent supported the judgment of the learned Single Judge. According to him no prejudice was caused to the appellant by the order passed by the learned Single Judge in view of the fact that the proceedings had been remanded to the Tribunal and the contentions now sought to be raised by the appellant could be raised before the Tribunal. He referred to the memorandum of appeal preferred before the Tribunal to indicate various points raised by the respondent in the said appeal as well as the material available on record. According to him the fact that ANCL and ACCL had a common registered office and the fact that an amount of Rs. 8 Crore was invested by ACCL and NCC, Japan in ANCL indicated a unity of ownership. The fact that contribution towards provident fund was made by ACCL was also reflected in the Annual Report of the year 1995-96. This indicated that despite availability of sufficient material on record the Tribunal failed to examine that material and allowed the appeal. This aspect was noticed by the learned Single Judge and hence the proceedings were remanded for fresh adjudication. In that regard the learned counsel placed reliance on the decision in M/s L. N. Gadodia and Sons and Anr vs Regional Provident Fund Commissioner AIR 2012 SC 273 and submitted that no interference with the judgment of the learned Single Judge was called for.

10. In reply it was submitted by the learned counsel for the appellant that the notice issued under Section 7-A of the Act of 1952 did not make any mention to contribution being made by some employees of ANCL to the provident fund account with ACCL. The notice was also silent on the aspect of preponement of applicability of the provisions of the Act of 1952 to ANCL. Mere fact that the two establishments shared a common address for their registered office did not make any difference nor did the Annual Reports show financial inter dependence between the two.

11. We have heard the learned counsel for the parties at length and we have perused the material placed on record in the proceedings. At the outset it may be noted that by the impugned judgment, the learned Single Judge after finding that the Tribunal in exercise of appellate jurisdiction had failed to take into consideration various relevant factors and had also failed to consider the material on record concluded that the findings of the Tribunal suffered from non-application of mind to the material available on record. It is on that premise that the order passed by the Tribunal has been set aside and after keeping all questions open including the question as to whether ANCL was part and parcel of ACCL remanded the proceedings. While examining the correctness of the order of remand, the reasons for remanding the proceedings would be required to be kept in mind. If the reasons that prompted the Court to remand the proceedings are found to be justified coupled with the fact that the order impugned is one of open remand, the appellate Court would be slow to interfere with such order. On the other hand if it is found that the Court was not at all justified in remanding the

proceedings in view of the fact that the material on record was already considered by the Court to which the proceedings have been remanded, there would be scope to interfere with such order of remand. Further, only if it is found that the order of remand was unwarranted would the question of examining the merits of the dispute arise. Keeping these broad aspects in mind we have perused the material on record in the light of the observations made in the judgment of the learned Single Judge. We are satisfied that remand of the proceedings to the Tribunal was justified in view of the fact that the material placed on record of the Tribunal was not considered by it thus warranting re-consideration of the matter.

12. The order passed by the Assistant Provident Fund Commissioner in proceedings under Section 7-A of the Act of 1952 indicates that it was found that ANCL was a subsidiary Company of ACCL. ANCL and ACCL had a common registered office, the Provident Fund Scheme of ACCL as per its Provident Fund Rules was applicable to the employees of ANCL and the Annual Reports of ANCL indicated deposit of provident fund bills with ACCL. It is on the basis of aforesaid material that the Assistant Provident Fund Commissioner while upholding the applicability of the provisions of the Act of 1952 to ANCL directed payment of provident fund dues from November. In the appeal preferred by the appellant the aforesaid material was referred to to urge that ANCL was a distinct establishment and it was not liable to be clubbed with ACCL. When the order of the Tribunal is perused it can be seen that in paragraph 4 thereof the only observation made was that ANCL was a subsidiary Company of ACCL. It has thereafter been observed that there was no material or evidence on record considered by the Assistant Provident Fund Commissioner to establish the facts of unity of finance or employment between ANCL and ACCL. Except this observation the material available on record and relied upon by the Assistant Provident Fund Commissioner has neither been referred to and therefore not considered. The grounds now raised in appeal by the appellant were also raised before the learned Single Judge and after considering the same it was found that relevant material was not considered by the Tribunal thus vitiating its order. We find that the learned Single Judge was justified in holding so and thereafter remanding the proceedings to the Tribunal for fresh consideration. It is a clear case of non-consideration of material on record by the Tribunal while deciding the statutory appeal. We therefore find that there is no reason to interfere with the order of remand.

13. Though the learned counsel for the appellant by relying upon various decisions of the Honourable Supreme Court sought to urge that the order passed by the Assistant Provident Fund Commissioner was even otherwise not sustainable in law, we find that as the learned Single Judge while remanding the proceedings has kept all questions open including the question as to whether ANCL was a part and parcel of ACCL, all aspects can be considered by the Tribunal in the statutory appeal. We have therefore not examined the applicability of the ratio of the decisions relied upon by the learned counsel for

the parties and that effort can be made before the Tribunal. We also find that nothing much would turn on the fact that despite liberty being granted to the respondent to hold a fresh enquiry under Section 7-A of the Act of 1952, the respondent decided to wait for the outcome of the present proceedings. In any event the said aspect would not resurrect the order of the Tribunal.

14. In view of aforesaid we do not find any reason to interfere with the order of remand passed by the learned Single Judge. By clarifying that observations made in the order passed by the learned Single Judge or in the present appeal would not come in the way of either of the parties while pursuing the proceedings before the Tribunal and keeping all questions open, the Letters Patent Appeal stands dismissed. The parties shall bear their own costs.