
(2002) 06 BOM CK 0031
In the Bombay High Court
Case No : A.S.W.P. No. 756 of 1990

Nandinee Travels Pvt. Ltd.

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 26-06-2002

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2A, 7A

Citation : (2003) 2 LLJ 810

Hon'ble Judges : V.G. Palshikar, J;P.V. Kakade, J

Bench : Division Bench

Advocate : D.G. Bhanage, for the Appellant; M.S. Kamik, for the Respondent

Judgement

P.V. Kakade, J.—The petitioner has preferred this writ petition seeking to set aside and quash the enquiry and order dated November 29, 1989 held u/s 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the said Act), on the ground that it is illegal and invalid in law.

2. The facts involved in the dispute in brief are thus -

The petitioner Company constituted under the Companies Act, 1956 was established in August, 1979 and is engaged in the business of travelling agency. One Kiran Deochand Shah and his wife are the Directors of the said Company. Ashish Enterprises is a proprietary concern established in the year 1980 dealing in trading of constructional steel and cement and proprietor thereof is the son of the petitioner and is located at 13, Cosmos Commercial Complex, Station Road, Kolhapur. Rakhee Associates is also a proprietary concern established in December, 1984 and deals in the trade of welding rods and industrial accessories and proprietary thereof is the daughter of the petitioner and the office is located at Shop No. 6, Cosmos Commercial Complex, Kolhapur. Kiran Corporation is another proprietary concern established in January, 1986 and the proprietor thereof is the petitioner himself dealing in the trading of gunny bags and

structural steel and is also located in the same complex i. e. Shop No. 7, Cosmos Commercial, Kolhapur.

The petitioner has submitted that the Company i.e. Nandinee Travels Pvt. Ltd. and the said other three proprietary concerns are four independent and distinct legal entities engaged in independent business activities which have no nexus with each other. All the four concerns have been registered independently under the Bombay Shops Act and though the petitioner Company is not required to have registration under the Sales Tax Act, the other three proprietary concerns have independent Sales Tax Numbers and are also independently registered for income Tax purposes having independent Income Tax registration numbers and are independently assessed under the Income Tax Act. The offices are also situated independently of each other in various shops at Shop Nos. 5, 13, 6 and 7 though in the same complex i.e. Cosmos Commercial Complex, Kolhapur. According to the petitioner, since the proprietors of Ashish Enterprises and Rakhee Associates were minors at the time of establishment of those concerns, petitioner K.D. Shah was looking into the affairs purely in his capacity as a guardian, however, when they became major, they are looking after the concerns independently. Their operation of business is also different and independent of each other and are having independent staff, Offices and all establishments as well as other administrative arrangements including telephone numbers, telex numbers, muster rolls, salaries and wages accounts, balance-sheets, markets, so on and so forth. In substance, except to the extent that the petitioner K.D. Shah looked after the affairs of the business of all his concerns as a guardian, when his 2 children were minor there was nothing in common in all the said units.

3. Sometimes in the year 1988, an Inspector under the said Act visited all these concerns and called for certain documents, such as, balance-sheets, profit and loss account, Income tax assessments, statements giving number of employees, etc. The said Inspector also inspected the godown of Ashish Enterprises and some statements were taken from certain persons. The Enforcement Officer under the said Act, vide letter dated May 4, 1988 also called for certain documents from all the said units which were duly submitted. It is submitted by the petitioner that, following this exercise, the petitioner received a notice dated July 15, 1988 from Regional Provident Fund Commissioner, Bombay, informing the petitioner that the petitioner Company alongwith three companies were clubbed together for the purpose of Provident Fund Act and were covered under the said Act and that the common code number was allotted to the petitioner. The petitioner protested against this move and in response thereof the surprise visit was made by the Inspector of the concerned authority on October 12, 1988 and further inspection of records was made.

4. Thereafter the petitioner received a show cause notice dated May 15, 1989 stating that the petitioner had failed to pay E.P.F., Family Pension and employees deposit linked insurance fund contribution for the period February 1, 1988 to April 30, 1989 and failed to submit prescribed returns and administrative charges

and that it was an offence under the Act. Therefore, the petitioner immediately wrote a letter to the Regional Provident Fund Commissioner, Goa reminding him of his earlier correspondence addressed to Bombay office and clarified the position in respect of independence of the four units. However, thereafter, the Regional Provident Fund Commissioner issued notice dated June 22, 1989 and initiated proceeding u/s 7-A of the Provident Fund Act to investigate as to whether the Act was applicable to all these concerns or not. The enquiry was held u/s 7-A on November 29, 1989. According to the petitioner, he came to know that the Provident Fund Inspector had also submitted a report on the applicability of the provisions of the Act to the Regional Provident Fund Commissioner, however, the copy of the said report was not served to the petitioner on the ground that it was confidential. In fact, it is submitted that the respondent declined to furnish copies of various documents of the proceedings to the petitioner in the course of the said enquiry on the ground that those were confidential. After recording of certain statements in the course of the said enquiry on November 29, 1989 the authority of the respondent immediately passed an order on the same day holding that the provisions of the said Act were applicable to the petitioner Company i.e. Nandinee Travels Pvt. Ltd. by clubbing other three units and that all these units had functional integrality.

5. Being aggrieved by the entire slipshod arbitrary and unilateral approach of the office of the Regional Provident Fund Commissioner, Inspector and Enforcement Officer of the Department and having been aggrieved by a similar hasty, arbitrary order passed by the Regional Provident Fund Commissioner dated November 29, 1989, the petitioner has approached this Court by this petition seeking relief to set aside the said order or in the alternative praying for remand of the matter with directions for holding an enquiry as contemplated u/s 7-A of the said Act by giving him an opportunity to participate in the enquiry.

6. We have heard the learned counsel for the petitioner as well as respondents and perused the documents annexed to the petition. No affidavit in reply has come forth even though sufficient opportunity was provided to the other side. The perusal of the impugned order and contents thereof dated November 29, 1989 gives rise to the two aspects involved therein, firstly it is apparent that while passing the impugned order, the concerned authority has altogether missed the very letter and spirit of the provisions of Section 7-A of the said Act. Secondly, while conducting the so-called enquiry under the provisions of Section 7-A, basic aspects of the functional integrality of the different units involved in this case have not been properly dealt with. These lacunae are apparent from the order which is based mainly on the record of the Inspectors without reference to the documents sought to be produced by the petitioner, while it was held that there was financial dependency with each other and functional integrality was apparent only because geographical proximity was apparent in this case.

7. In this connection, we may note that Provident Fund Act is a piece of social legislation which provides for institution of compulsory provident fund, family

pension fund and deposit linked insurance fund for the benefit of the employees in factories and other establishments. As Act, subject to the provisions contained in Section 60 applies to other establishments in industry specified in Schedule-1 and in which 20 or more persons are employed. Section 2-A of the Provident Fund Act declares that, when 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 part of the same establishment. The concept of one establishment has been explained by the Supreme Court in the case of *The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen*, . In that case, the question arose before this Court, whether the lime- stone quarry and the cement factory were separate establishments or one establishment for the purpose of Section 25-E of the Industrial Disputes Act, 1947. The Apex Court observed that the Act having not prescribed any tests for determining what is one establishment, it was necessary to fall back on such considerations as in the ordinary industrial or business sense to determine the unity "of an industrial establishment having regard to the Scheme and Object of the Act. The Supreme Court observed thus:

"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. Thus, in one case the unity of ownership, management and control may be an important test, in another case functional integrality or general unity may be the important test; and still in another case the important test may be the unity of employment."

The test laid down in *Associated Cement Companies case* (supra) was also followed by the Supreme Court in the case of *Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers" Union and Its Workmen*, . In that case, the Apex Court laid emphasis on the test of functional integrality. It was observed thus at pp. 499 & 500 of LLJ:

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

Keeping in view the law laid down by the Apex Court in the aforesaid cases the question that requires to be considered in this proceeding is, whether the petitioner Company can survive even if the trading establishment of other three entities are closed forever. To answer and set aside the test of functional integrality, as is apparent from the impugned order, the respondent has applied only the test of geographical proximity and alleged financial dependency to hold

that all the said four units can be clubbed together for the purpose of the said Act. Therefore, in our considered view, the facts recorded and test applied by the respondent in the impugned order is not the relevant test to consider the applicability of Section 2-A of the said Act. The pre-determining test as enunciated by the Supreme Court is, whether subsequent units would survive on the closure of the petitioner unit and whether in matters of finance and employment the employer has actually kept the two units in common, distinct or integrated. Mere fact of common ownership of the two units and mere location of the two units in common building complex by itself is not sufficient to satisfy the test of functional integrality and further mere common object of common ownership of the two units and mere location of the two units in common premises or building by itself would not be sufficient to satisfy the test of functional integrality. The first and foremost test to establish the functional integrality would be, whether the second unit would survive in the absence of first unit or when the first unit is closed whether the second unit continue to do its business activity. This aspect has not been noticed by the respondents at all in its impugned order.

8. The dispute can also to be considered from altogether a different angle. The provision of Section 7-A of the said Act contemplates quasi-judicial enquiry in the sense that, by virtue of Sub-sections (2) and (3) thereof, it is contemplated that the officer conducting enquiry under Sub-section (1) shall, for the purpose of such enquiry, have some powers as vested in the Court in the CPC for trying a suit in respect of certain matters including attendance of witnesses, discovery of production of documents and receiving evidence on affidavit and issuing commission. It is further stipulated that, no order shall be made under Sub-section (1) unless the employer concerned has been given an opportunity of representing his case. If we peruse the entire record including the contents of the impugned order, it is more than apparent that the respondent Commissioner has totally relied upon the reports of the Inspector without applying his own mind to the pros and cons of the case. This aspect assumed further importance in view of the unchallenged allegations made by the petitioner that he was not provided proper opportunity to defend his case, nor was provided even copies of the reports of the Inspector which are relied upon by the concerned authorities, to plead his case effectively. If this is the position, then there is hardly any compliance with provisions of Section 7-A of the said Act with regard to the manner of conduct of the enquiry.

9. In this view of the matter, the respondent has to re-examine the entire issue in the light of the observations made in this order. In this view of the matter, the matter is required to be remanded for hearing afresh and respondent shall be directed to hold a detailed enquiry afresh on those directions and pass orders after examining all the facts and circumstances of the case in the light of this order and after applying all the relevant tests.

10. In the result, the impugned order dated November 29, 1989 passed by the

Regional Provident Fund Commissioner respondent, is quashed and, set aside and the matter is remanded, to the respondent for fresh disposal in accordance with the law and the observations made in this order. Before passing the final order, the respondent is directed to offer sufficient opportunity of hearing to the petitioner.

11. Accordingly, the petition stands disposed of. Parties to act on the authenticated copy of this order.