(2010) 12 GUJ CK 0258

In the Gujarat High Court

Case No : Special Civil Application No. 8577 of 2010

Nutan Bal Vidyalaya - Bababhai R. Patel thro'' Kiranbhai Patel — APPELLANT

Vs

Assistant P.F. Commissioner — RESPONDENT

Date of Decision : 14-12-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 16(1), 7A, 7I

Citation : (2010) 12 GUJ CK 0258

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : R.R. Vakil, for the Appellant; Niral R. Mehta, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The Petitioner has filed this petition under Articles 226 and 227 of the Constitution of India praying for quashing and setting aside the order dated 25.05.2004 passed in Case No. GJ-13926 by the Respondent - Assistant Provident Fund Commissioner. The Petitioner has also prayed for quashing and setting aside the order dated 16.04.2010 passed by the Employees Provident Fund Appellate Tribunal, New Delhi in Case No. ATA-456(5)/2004.

2. This Court has issued notice on 18.08.2010. Pursuant to the notice Mr. Niral R. Mehta, learned advocate appears on behalf of the Respondent.

3. It is the case of the Petitioner that the Petitioner, Nutan Bal Vidyalaya is run by an HUF through its Karta and it is recognized under the Bombay Primary Education Act. In the said premises, another school is functioning in the name of Shri B. R. Patel Nutan Fellowship High School. The said school is run by a Trust. It is the say of the Petitioner that both the schools are recognized under different Acts and are managed by different management. The High School is a Grant in Aid school and it gets 100% grant from the Government and the employees are getting salary through direct payment scheme. The Petitioner school is imparting

education from Standards 1 to 7 and the number of its employees are very less than the minimum number of employees required for covering an organization under the provisions of the Act of 1952.

4. It is the case of the Petitioner that on 29.08.1990 a draft letter was sent by Respondent covering the Petitioner under the scheme of the Act. The Petitioner challenged the same and an inquiry was held. Pursuant to the said inquiry, the Respondent covered the Petitioner school under the scheme of the Act on 16.01.1995.The Petitioner filed Special Civil Application No. 4323 of 1995 before this Court.This Court directed the Petitioner to approach the Appellate Tribunal, New Delhi. Accordingly, the Petitioner approached the Appellate Tribunal and Appellate Tribunal vide its order dated 18.03.1995 remanded the matter to the Respondent for deciding it a fresh. The Respondent again passed an order on 25.05.2004 holding therein that the Petitioner is covered under the scheme of the Act of 1952. Being aggrieved by the said order, the Petitioner again approached to the Appellate Tribunal and the Appellate Tribunal vide its order dated 16.04.2010 confirmed the said order of the Respondent.

5. It is this order which is under challenge in the present petition.

6. Mr.R. R. Vakil, learned advocate appearing for the Petitioner has submitted that Shri B. R. Patel Nutan Fellowship High School is run by the Trust while the HUF is running the Petitioner primary school and hence, both the schools are run by the different management and hence clubbing and treating them one entity for the purpose of bringing the Petitioner school under the coverage of P. F. Act is not just and proper. He has further submitted that the Respondent authority as well as the Appellate Tribunal both have committed an error in observing that only with a view to avoid liability under the Employees Provident Fund Act, the managements have shown that both the schools are separate, independent and distinct entity. He has further submitted that various documents produced by the Petitioner before the Respondent authority as well as Appellate Tribunal were not considered in their proper perspective. Both the authorities have failed to appreciate the documents regarding recognition of both the schools as well as balance sheet, pay register, muster roll, income tax returns as well as rent receipt show which that both the institutions are separate and independent. He has further submitted that the provisions of the Act are applicable to the establishment only if there are more than 20 workers in the establishment as per Section 1(3)(b) of the Act of 1952 and the rules framed therein. The said High School is a Grant-in-Aid and is getting 100% grant from the Government of Gujarat and the employees of the High School are getting salary in direct payment scheme. Moreover, the retirement benefits are paid to the employees of the High School which is totally under the control of the State Government. u/s 16(1)(b) of the Act, the employees of Shri B. R. Patel Nutan Fellowship High Schools are not covered under the provisions of the Act of 1952 as it is covered under the provisions of the Gujarat Secondary Education Act, 1972 and the Rules and regulations framed thereunder and, therefore, the question of clubbing the

employees of Shri B. R. Patel Nutan Fellowship High School with the Petitioner primary school does not arise. He has further submitted that even the Appellate Tribunal has not considered the fact that service conditions of the employees of primary school are quite different than that of the employees of the secondary school. There are different Acts and Rules applicable to both the schools. He has further submitted that there is no basis for arriving at the conclusion that the schools are owned by one family and managed by one committee.The managerial power does not rest with one family nor the finance of both the schools are controlled by the Trust and there is no financial relations between the two. He has further submitted that as far as the accounts of secondary school and higher secondary school are concerned, the said accounts are maintained separately. The office of the District Education Officer has also audited the accounts of the school. As far as the Petitioner school is concerned, the said school maintains separate accounts and every year the said accounts are also audited. The Petitioner school has also appointed a separate clerk and that clerk is being paid salary by the Petitioner and the said salary is also shown in the audited accounts. Considering the facts and circumstances of the case, he has submitted that employees of Shri B. R. Patel Nutan Fellowship High School should not be clubbed along with the employees of the Petitioner - school and hence, both the orders challenged in this petition deserve to be quashed and set aside.

7. Mr. Niral R. Mehta, learned advocate appearing for the Respondent - authority, on the other hand, has supported the orders passed by the Respondent authority as well as the Appellate Tribunal. He has further submitted that there is concurrent finding of facts given by both the authorities below and hence, this Court, while exercising its writ jurisdiction under Article 227 of the Constitution of India should not interfere in the said findings. He has further submitted that the Respondent - authority, after proper inquiry in the matter and considering the evidence on record, has come to the conclusion that the separate entity of both the schools are on paper but in reality both the institutions are run, supervised and managed by Shri Kiran B. Patel in the shadow of Karta of B. R. Patel (H.U.F.) proprietor of Nutan Bal Vidhyalaya and B. R. Patel Nutan Fellowship High School. He has further submitted that even if both the schools are registered under the different statutes and even if payment of share towards Provident Fund etc. to the teachers of the High School being made by the State Government and even if the teachers of the Higher Secondary School and teachers of the Primary School are not interchangeable, even then, since both the schools are run in the same premises and furnitures and fixtures and other amenities are being used by all of them in common, they are liable to be clubbed together for counting the number of employees for the purpose of the Act. He has further submitted that true tests to hold two establishments belonging to one owner are, as to whether they are branches or units of each other, and the true relationship between them must be such that they constitute one integrated entity. The broad tests are unity of ownership, management and control, functional integrality, general unity and

unity of employment. Whether all these tests are attracted or only some of them come into play would depend on the facts of each case. The question of unity of the two establishments must, therefore, be decided on the touchstone of its total functional unity. He has further submitted that in the case of Noor Niwas Nursery Public School Vs. Regional Provident Fund Commr. and Others, the Apex Court held that when two units are located adjacent to one another and there are only two teachers with an Aya, a Clerk and a Peon, it is difficult to believe that the society which runs 30 schools would run a separate school consisting of such a small number of staff. It is further held that indisputably, the two units are run by the same Society and they are located on one and the same address thereby establishing geographical proximity and nothing worthwhile has been elicited in the inquiry, the facts on record clearly point out to one factor that the two units constitute one single establishment. The link between the two cannot be ruled out.

8. Mr. Mehta further relied on the decision in the case of Regional Provident Fund Commissioner, Jaipur Vs. Naraini Udyog and Others, wherein it is held that the High Court was wholly unjustified in concluding that both the firms, being registered under the Companies Act as two different individual identities, were two independent companies and could not be clubbed together for the purpose of levying contribution u/s 7A of the Act. The Court further observed that it is true that they are registered as two independent units and represented separately by the members of a Hindu Undivided Joint Family. Nonetheless the Commissioner recorded, as a fact, the functional unity and integrality between the two concerns. Consequently, the definition of establishment which was widely defined would encompass within its ambit the two units as an establishment for the purpose of the Act.

9. Mr. Mehta further relied on the decision of this Court in the case of In the case of Akhandanad Kelavani Utejak Mandal v. Regional Provident Fund Commissioner, reported in 1997 (2) G.L.H. 96 wherein it is held that the trinity of unity shall have to be examined and absence of one of the three factors would not necessarily make the establishment to be independent establishment. The fact that the establishments were owned by the same persons or by the same trust, that the management was the same, that the schools were being run in the same premises, with the same facilities such as furniture, blackboards, compound, lavatory, bathroom, office, etc, would be sufficient to establish that the establishment is covered by the provisions of the Act.

10. Mr. Mehta further relied on the decision of the Apex Court in the case of The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen, wherein it is held that the Court must have regard to the provisions of the statute under which the question falls to be considered; if the statute itself says what is one establishment, then there is no difficulty. If the statute does not, however, say what constitutes one establishment, then the usual tests have to be namely whether they constitute one integrated whole or

not. No particular test can be adopted as an absolute test in all cases of this type and the word ''establishment'' is not to be given the sweeping definition of one organisation of which it is capable, but rather is to be construed in the ordinary business or commercial sense.

11. Based on the aforesaid judgments and facts of the case as well as findings recorded by the Respondent No. 1 and Appellate Tribunal, Mr. Mehta has submitted that the petition deserves to be dismissed.

12. Having heard learned advocates for the parties and having considered the rival submissions, in light of the statutory provisions and the decided case law on the subject, the Court is of the view that the impugned order passed by the Assistant Provident Fund Commissioner u/s 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 as well as the Appellate Tribunal u/s 7I of the Act confirming the order passed by the Assistant Provident Fund Commissioner, do not call for any interference by this Court while exercising its writ jurisdiction under Articles 226 and 227 of the Constitution of India. While passing the impugned order u/s 7A of the Act, the learned Assistant Provident Fund Commissioner has specifically observed in his order that the Petitioner - school was established by late Shri Bababhai Ramdas Patel and his wife namely Leelavati Bababhai Patel is a "Sanchalika" (Controller) of the school. The school is situated in the compound of Shri B. R. Patel Nutan Fellowship High School. The Petitioner - school is run by the proprietory concern of B. R. Patel HUF. Some of the members of the HUF, are also the trustees of the Trust running B.R. Patel Nutan Fellowship High School. Smt. Leelavati Bababhai Patel, who is controller of the Petitioner - school is also the managing trustee of Shri B. R.Patel Nutan Fellowship High School Trust. Though there are separate registrations, the facilities are common. Even if they are independent units, the functional unity and integrality between two concerns bring them within the ambit of one establishment under the provisions of the Act. If the combined, strength of these two units, is taken into consideration, in that case it would certainly exceed the minimum limit prescribed under the Act. It is also to be kept in mind while considering such cases that the employees'' Provident Funds & Misc. Provisions Act is benevolent piece of legislation and it is for upliftment and betterment of the working condition of the employees. As such, the finding recorded by the Assistant Provident Fund Commissioner, after examining the factual position, the State Government Rules and judgments of the various Courts, that, only with a view to avoid liability towards the social security benefits under the Act, the management of the school had created two entities namely the Petitioner school and Shri B. R. Patel Nutan Fellowship High School, but in fact, they are not separate or independent entities and they are required to be clubbed together under the Act, does not call for any interference by the Court. Even otherwise, this finding is confirmed by the Appellate Tribunal. The Appellate Tribunal has recorded its finding that both the schools are managed by one family and one caters to the need of another. The Tribunal has, therefore, not found any infirmity in the order passed by the Assistant Provident Fund Commissioner. When two

Authorities under the Act have given concurrent findings of facts after applying the provisions of the Act as well as the law, this Court finds itself unable to disturb the said concurrent findings. The Court does not find any merit or substance in the present petition and hence, it is dismissed. Notice is discharged without any order as to costs.

