
(2011) 02 BOM CK 0087

In the Bombay High Court

Case No : Writ Petition No. 4218 of 1999

PIEM Hotels Limited and Another

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 11-02-2011

Acts Referred:

Companies Act, 1956 — Section 1(3), 2A
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16,
16(1), 7A

Citation : (2011) 2 ALLMR 516 : (2011) 129 FLR 762 : (2011) 3 LLJ 602 :
(2011) LLR 526 : (2011) 2 MhLj 763

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : S.K. Talsania., instructed by Mulla and Mulla, for the Appellant; S.N. Bhosle, AGP, for Respondent State and Suresh Kumar, for Resp. Nos. 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

Nishita Mhatre, J.—The Petitioner No. 1 is a Company incorporated on 13.3.1968 registered under Companies Act. It runs a hotel at Cuffe Parade known as President Hotel. The Taj President Hotel has been registered with the Regional Provident Fund Commissioner and has been allotted a Code number for the purposes of payment of provident fund contributions. Petitioner No. 1 set up a new 3 star hotel at Nasik in 1996 namely Petitioner No. 2. This hotel was run with a separate identity according to the Petitioners. Petitioner No. 2 issued its first invoice on 20.3.1996 i.e. the date on which it was established. It was placed on the approved list of the Department of Tourism on 21.1.1997. It obtained a licence to deal with foreign currency on 7.6.1996. Petitioner No. 2 was registered under The Bombay Shops and Establishments Act 1948 w.e.f. 28.6.1996. The Health Department also issued a separate licence to this Hotel on 18.3.1996. A separate registration for the purposes of Sales Tax was obtained on 17.4.1996. Besides this, a certificate of registration was issued by the Inspector of Weights

and Measures on 27.12.1998.

2. The Taj Residency i.e. Petitioner No. 2 sought infancy benefit since it was a newly set up established and could avail of such benefit u/s 16 of the Employees Provident Fund and Miscellaneous Provisions Act. According to the Petitioners, the Taj Residency was entitled to infancy benefit upto 19.3.1999 in view of the provisions of Section 16(1)(d) of the EPF Act. However, the Petitioners decided to have voluntary coverage of the Act and claimed the infancy benefit only upto 21.9.1997.

3. On 6.10.1997, a communication was issued from the RPFC, Nasik allotting a separate code number to the Taj Residency. However, the Petitioners were informed that the Taj Residency would be treated as a branch of main establishment.

4. The Enforcement Officer visited the hotel at Nasik on 27.1.1997 after taking inspection of the records of the Taj Residency indicated in the inspection memo that the Taj Residency should be covered under the Act w.e.f. March 1996 i.e. from the first date of its establishment and operation. A demand of Rs. 6,14,182/- was raised towards provident fund dues payable from March 1996 to October 1997. The demand was made since the infancy benefits for protection had been deleted w.e.f. 22.9.1997.

5. A detailed reply was submitted by the Petitioners to the demand notice on 15.12.1997 issued by the Respondents. The Petitioners contended that the amendment to the Provident Fund Act deleting the Section 16(1)(d) was prospective and therefore they could claim infancy protection for the Taj Residency as the section was in existence when the hotel was established.

6. Proceedings were initiated u/s 7A of the EPF Act on 3.2.1998 against the Petitioners. In their reply, the Petitioners contended that the Taj Residency was newly established and therefore entitled to infancy benefits under the Act. It was further pointed out that the Taj Residency could not be treated as a branch or unit or department of the Hotel President as each of the hotels had their own separate identity. The Petitioners further pointed out that each hotel was separately registered and had been issued separate licences under the Act. This contention of the Petitioners were opposed by the Inspector appointed under the EPF Act who also filed his say in the matter.

7. On 31.3.1999, the RPFC passed the impugned order upholding the demand made on the Petitioners. It was held that the Taj Residency was not entitled to any infancy protection as it was not a separate establishment but a part and parcel of the Hotel President in Mumbai. The Commissioner held that in view of Section 2A r/w Section 1(3)(b) of the Act, the Taj Residency was a branch of the Hotel President. While doing so, he has considered the fact that certain financial transactions had taken place between the parent company and the Taj Residency. Besides this, he concluded that there was a transferability of the employees from one hotel to the other. On this basis, the Commissioner negated the contentions

of the Petitioners that the Taj Residency was a newly set up establishment.

8. Section 16(1)(d) reads as follows:

16. Act not to apply to certain establishments.

(1) This Act shall not apply a) ...

(b) ...

(c) ...

(d) to any other establishment newly set up, until the expiry of a period of three years from the date on which such establishment is, or has been set up explanation.

9. Thus, under the aforesaid section any newly set up establishment would be entitled to the benefits of infancy. u/s 2A, the term "establishment" has been explained as follows:

2A. Establishment to include all departments and branches. -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.

10. In the case of Dharamsi Morarji Chemicals Co. Ltd. v. N.G. Desai, The Regional Provident Fund Commissioner and Ors. 1985 LLJ 433, a learned Single Judge of this Court (Pratap, J. as he then was) while considering whether there was functional integrality between two establishments has observed thus:

4. Other facts and circumstances also militate against the contention on behalf of the Respondents that the two factories are indeed one for the purposes of the Act. Thus, the two factories have separate registration numbers. The same are also separately registered under the Factories Act. The said factories also maintain and draw up separate profit and loss accounts. The said two factories also have separate works managers and plant superintendents. And each factory also has a separate and independent set of workmen or employees who are not as such transferable from one factory to the other. The workers at the Roha factory were recruited directly from outside sources. One also does not find any supervisory control by either of these factories over the other. The two factories do not have any inter-connection as such in the matter of supervisory, financial or managerial control. Inference and conclusion is irresistible that these two factories constitute distinctly different entities and separate establishments.

5. Such being the emerging facts and circumstances, it is not possible to accept the contention of Mr. Master, learned Counsel for the Respondents that there is here what is termed as functional integrality between the two factories. Indeed, the facts and circumstances which are mainly undisputed, distinctly point in the other direction. Except the fact that the two factories are owned by one and the

same company, all the other relevant factors lead to the conclusion, fair, just and reasonable, that the two factories are different and separate establishments. The Roha factory is neither a branch of the Ambarnath factory nor its subsidiary nor can it with any justification be termed a feeding factory. There is no bar to a company establishing more than one factory. Indeed, in this case, taking advantage of the incentives given to factories established in backward areas the Company several years after the establishment of their original Ambarnath factory, decided to establish another factory independent and distinct in management, in products, in workmen, etc. at Roha, far away from the factory at Ambarnath. The mere fact that the Company ultimately consolidated the accounts of two factories for the purpose of the Companies Act and the Income Tax Act cannot result in a conclusion that, therefore, the two factories constitute one establishment. It is not unknown that where one and the same company establishes separate, distinct and different factories at different places in the country with each having its own separate accounts, consolidation is annually effected for the purpose of the Companies Act and the Income Tax Act. In all the circumstances, the Company's claim to the benefit of the infancy period u/s 16(1)(b) of the Act qua the Roha factory is well justified.

11 .This judgment of Pratap, J. was challenged before the Supreme Court. The Supreme Court has upheld the judgment in the case of Regional Provident Fund Commissioner and Another Vs. Dharamsi Morarji Chemical Co. Ltd., . The Supreme Court has observed thus:

4. It is true that if an establishment is found, as a fact, to consist of different departments or branches and if the departments and branches are located at different places, the establishment would still be covered by the net of Section 2-A and the branches and departments cannot be said to be only on that ground not a part and parcel of the parent establishment. However, on the facts of the present case, the only connecting link which could be pressed in service by the learned Counsel for the Appellant was the fact that the Respondent-Company was the owner not only of the Ambarnath factory but also of Roha factory. On the basis of common ownership it was submitted that necessarily the Board of Directors could control and supervise the working of Roha factory also and therefore, according to the learned Counsel, it could be said that there was interconnection between Ambarnath factory and Roha factory and it could be said that there was supervisory, financial or managerial control of the same Board of Directors. So far as this contention is concerned the finding reached by the High Court, as extracted earlier, clearly shows that there was no evidence to indicate any such interconnection between the two factories in the matter of supervisory, financial or managerial control. Nothing could be pointed out to us to contraindicate this finding. Therefore, the net result is that the only connecting link which could be effectively pressed in service by the learned Counsel for the Appellant for culling out interconnection between Ambarnath factory and Roha factory was that both of them were owned by a common owner, namely, the Respondent-Company and the Board of Directors were common. That by itself

cannot be sufficient unless there is clear evidence to show that there was interconnection between these two units and there was common supervisory, financial or managerial control. As there is no such evidence in the present case, on the peculiar facts of this case, it is not possible to agree with the learned Counsel for the Appellant that Roha factory was a part and parcel of Ambarnath factory or it was an adjunct of the main parent establishment functioning at Ambarnath since 1921.

12. Besides these Judgments, there are a catena of judgments which enunciate the principles to be considered while determining whether an establishment which is newly set up is a part of the old establishment or is a separate establishment. These principles have been elucidated in *Sunder Transport and Anr. v. The Regional P.F. Commissioner* 1992 2 CLR 977, *Associated Polymers Ltd. v. Union of India and Ors.* 1997 2 CLR 2941, *Allana Sons Private Limited v. R.M. Gandhi and The Regional Provident Fund Commissioner of Maharashtra and Goa* 1991 1 CLR 743.

13. The common thread running through all these judgments is that the corporate identity of two establishments may be the same as they may be set up by one company. The two establishments can still be considered to be separate, without having any functional integrality. It is apparent from the impugned order that the Commissioner has not dealt with these Judgments and has not considered the dispute between the parties in the light of the principles laid down in the aforesaid judgments. Similarly, in the case of *Noor Niwas Nursery Public School Vs. Regional Provident Fund Commr. and Others*, , the Supreme Court has observed that to decide whether different units are a part of the same establishment, the Court has to assess the extent of functional integrality between them and also whether one unit can exist conveniently and reasonably without the other. These factors have not been considered by the Provident Fund Commissioner in the present case.

14. Besides this, if the Respondent finds that two establishments are separate, infancy benefit would have to be extended to Petitioner No. 2 as the provision has been deleted on 22.9.1997. The deletion operates prospectively as held in *S.L. Srinivasa Jute Twine Mills P. Ltd. Vs. Union of India (UOI) and Another*, . In my opinion, therefore it would be appropriate to remand the matter back to the Regional Provident Fund Commissioner.

15. Accordingly, the petition is allowed. The proceedings u/s 7A of the Employees Provident Fund and Miscellaneous Provisions Act are remanded to the Provident Fund Commissioner for deciding the issue afresh in the light of the aforesaid judgments and any other judgments which the parties may rely on.

16. The amount which has already been deposited by the Petitioners pursuant to the interim order passed by this Court when the petition was admitted shall be retained with the Commissioner during the pendency of the 7A proceedings, subject to the outcome of the decision of the 7A proceedings.

17. The Writ Petition is allowed. Rule made absolute. No costs.