
(2006) 11 DEL CK 0022
In the Delhi High Court
Case No : WP (C) No. 5670 of 2001

Regional Provident Fund Commissioner	APPELLANT
Vs	
Nath Traders and Others	RESPONDENT

Date of Decision : 29-11-2006

Acts Referred:

Constitution of India, 1950 — Article 43
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 7A

Citation : (2007) 137 DLT 631 : (2007) 2 LLJ 744

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : R.C. Chawla, for the Appellant; S.P. Arora and D.R. Tutani, for the Respondent

Final Decision : Allowed

Judgement

Shiv Narayan Dhingra, J.—By this writ petition, the petitioner has challenged the validity of order dated 3rd November, 2000 passed by Employees Provident Funds" Appellate Tribunal(in short " the Tribunal) whereby the Tribunal allowed the appeal of the respondents and set aside the order dated 7th October, 1999 passed u/s 7A of the Employees" Provident Funds and Miscellaneous Provisions Act, 1952(hereinafter referred to as "the Act").

2. Briefly the facts are that an inspection of the premises of the respondents was conducted by the members of the Squad, under Provident Funds Commissioner, and the squad recommended the applicability of the Act to M/s Nath Oil Company and Nath Trading, stating that the two establishments were one. The enquiry conducted by the Regional Provident Funds" Commissioner, after the report of the squad, revealed that Nath Trading and Nath Oil Company were operating from the same premises at 14, Kailash Colony, New Delhi ? 110048 and there was only one entry to that premises. There was no distinct or distinguishable demarcation distinguishing the two establishments. The employees sitting there were intermingled. Both the establishments had common telephone number

being 6432474 on the letterheads of both the firms. Mr. Surender Nath was the overall in charge of both the business. He was sole proprietor of Nath Oil Company and he was one of the two partners in M/s Nath Trading India. The other partner, being his wife, was a sleeping partner. The functions of both the establishments were one. One establishment was having dealership of LPG gas and other was having dealership of distribution of kerosene oil. Their accounts were being looked after by common accountant Mr. R.C. Singh. The combined and cumulative strength of employees of both the establishments was found to be 24. The Regional Provident Funds Commissioner observed that the period of infancy stood expired long before. The combined employees strength of the two establishments was more than the required strength under the Act. He found that there was functional integrity among the two firms, unity of ownership, inter-transfer of employees and geographical proximity, unity of management, supervision and control. He, Therefore, ordered M/s Nath Oil Company and Nath Trading to be treated as one establishment for the purpose of the Act.

3. In appeal, the Appellate Tribunal observed that since the two firms were dealing in two different commodities, one in kerosene oil and the other in LPG gas, and were having separate licenses from the respective authorities, they were separate units. M/s Nath Oil Company was the sole proprietorship concern and M/s Nath Trading India was a proprietorship. Both were having separate sales tax and income tax registrations. The two could not be considered as one establishment. The Tribunal considered that since one was partnership firm, it could not be clubbed with the sole proprietorship firm since there was another partner who was concerned with profit and loss of the establishment. The Tribunal also observed that the storage arrangement of LPG and kerosene oil was quite different. One establishment could survive without the other and this was the most crucial test in the opinion of the Tribunal, Therefore, he allowed the appeal and ordered that the two establishments cannot be clubbed together for the purposes of the provisions of the Act.

4. During arguments, learned Counsel for the petitioner argued that the two establishments, for all practical purposes, were owned by the same owner Mr. Surender Nath. The other partner in one of the firms M/s Nath Trading was a partner for the name's sake. Both the establishments were found to be working/operating from the same premises, having same entrance, using same telephone numbers and having same accountant, working under the same management. Nothing more was required for interconnecting functional integrity of the two establishments. Merely because the one firm was having of LPG distribution and other was having kerosene oil distribution and were having separate licenses, shall not affect the functional integrity.

5. The petitioner relied upon State of Punjab Vs. Satpal and Another, wherein the Supreme Court observed as under:

6. The Contention of the respondents is that the business which they were running in 1964-65 was an entirely different business and was not the same

business which Tirath Ram had started. They referred in particular to the kind of articles that Tirath Ram was manufacturing and submit that the manufacturers had been changed when action was taken under the Employees' Provident Funds Act. In other words, they draw attention to the difference between the manufacture of Tawas and Knives on the one hand and nails for bullock shoes on the other. We do not think that this makes any difference. In fact, the business had already changed in the hands of the partnership long before the establishment changed its premises. The business of the partnership was running and iron-smithy for the manufacture of iron articles and the factory continued even though the manufacturing process changed from one article to another. We must Therefore, hold that the same factory continued in spite of the change from Tawas to iron nail in the manufacturing process.

7. The next submission on behalf of the respondents is that the partnership changed and Therefore, a new business came into existence. Here again, we are not concerned with the law of partnership but with the Employees' Provident Funds Act. the law takes into account only the existence of establishments and the employment of a certain number of persons in factories over a given period. It is for this purpose that change of location or change of composition of partners or even a change in the manufacturing process is not considered vital in the application of law. This was laid down by this Court in very explicit terms in Civil Appeals Nos. 572 and 573 of 1964, D/- 6-10-1965 (SC) (Lakshmi Rattan Engineer Works v. Regional Provident Fund Commissioner Punjab).

6. The appellant also relied upon the judgment of this Court delivered in CW No. 1881 of 1982 on 20.4.2004, Hotel Jaipur Ashok and Anr. v. Miss K.P. Sarojini, Legal Adviser to the Government of India. In this case Hotel Jaipur Ashok of Jaipur had claimed benefit of infancy period on the ground that it was a separate establishment. This Court observed that one has to see the sum and substance of relationship in broad context of the objects of the Act. Looked at in this light it hardly matters if the hotel was described as a unit and not a branch or department of ITDC. The employees of one unit of ITDC can be transferred to other unit and such transfers have taken place among the employees of the hotels were under the control of ITDC. Although a separate balance sheet of Hotel Ashok was being maintained but its balance sheet also formed a part of the balance sheet of the ITDC and profit and loss account. So, ITDC and Hotel Jaipur Ashok were one establishment and not entitled for infancy period.

7. The next judgment relied upon is the Regional Provident Fund Commissioner, Jaipur Vs. Naraini Udyog and Others, wherein Supreme Court held: On the basis thereof, the appellant has called upon them to contribute the amount u/s 7A of the Employees' Provident Funds and Miscellaneous Provision Act, 1952 (for short "the Act") holding that the above two concerns are establishments within the meaning of Section 1(3)(a) of the Act. The Division Bench in the impugned order had held that that they were registered under the Companies Act as two different individual identities, though they are represented by the members of the same

family. Therefore, they are two independent companies. Both cannot be clubbed together for the purpose of levying contribution u/s 7A of the Act. We have gone through the reasoning given by the High Court. We find that the High Court is wholly unjustified in reaching the above conclusion. It is true, as found by the High Court, 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. Accordingly, the High Court had not considered in proper provide healthy security to the workmen. In the ultimate analysis the employer gets maximum out-turn of his production by ensuring health insurance to its employees which is the fundamental right to the latter.

8. The respondent on the other hand relied upon 1998 (I) LLJ 1060 Regional Provident Fund Commissioner and Anr. v. D.M. Chemical Company Ltd., wherein the Supreme Court held that the common ownership by itself was not sufficient to arrive at a conclusion of the inter connection between the two units. There should be clear evidence to show that there was common supervisory, financial and managerial control to show the inter connection necessary to bring the units under EPF Act. The respondent also relied upon Ebrahim Currim and Sons Vs. Regional P.F. Commissioner and Another, wherein Bombay High Court observed that mere fact of common ownership by itself was not sufficient to satisfy the test of financial integrity. Similarly, mere fact of supply of raw materials or purchase of raw materials for the factory by the petitioner or sale of the finished good by the petitioner was not sufficient to satisfy the test of financial integrality. Reliance was also placed on Periwai Trading Corpn. Vs. Regional P.F. Commissioner, wherein Rajasthan High Court held that two establishments owned by two firms could not be said to have common employer although the partners in them may be interested in each other and may be closely related, so the establishments of one firm cannot be considered to be department or branch of the other.

9. In Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, Supreme Court explained the intention of the Act in the following words:

At the outset it has to be stated that the Act has been brought into force in order to provide for the institution of provident funds for the benefit of the employees in factories and establishments. Article 43 of the Constitution requires the State to endeavor to secure by suitable legislation or economic organisation or in any other way to all workers, agricultural, industrial or otherwise among others conditions of work ensuring a decent standard of life and full enjoyment of leisure. The provision of the provident fund scheme is intended to encourage the habit of thrift amongst the employees and to make available to them either at the time of their retirement or earlier, if necessary, substantial amounts for their use from out of the provident fund amount standing to their credit which is made

up of the contributions made by the employers as well as the employees concerned. Therefore, the Act should be construed so as to advance the object with which it is passed. Any construction which would facilitate evasion of the provisions of the Act should as far as possible be avoided.

10. There can be no doubt that the Provident Fund and Miscellaneous Provisions Act is a welfare legislation intended for the benefit of the employees and to secure their well being and provide them with some financial security in future when the employees are not in physical capacity to earn. The provisions of the Act have to be interpreted keeping in view this objective of the Act. The purpose of putting limitation of twenty employees as cut off point was to see that unnecessary burden should not be put on the employer if the employer is a small employer not capable of bearing the burden. The same was the purpose for providing infancy period. Thus, the Act has taken care to see that unnecessary burden should not be put on the employer while providing for benefit to the workman. The legislature did a balancing between the interests of the employer and the workmen. If the employer was a new employer though having more than 20 employees not capable of bearing the burden due to new business, he should be given infancy period and if the employer was a small employer, who had not employed even 20 persons, he should not be burdened. But the Act also provides that where new branches and units are opened then those branches and units must be considered as parts of the same establishment to ensure that by fragmenting its business or opening new branches, the employer though capable of bearing the burden, does not escape the liability under the Act. Once the viability and stability of business is there, the employer should not be allowed to deprive the workers the benefit of the EPF Act by opening different units and branches and when the business grows, the welfare of the employees should also be taken care of. The growth of business is seen as a sign of affordability of the employer to comply with the beneficial legislation. Where the employer grows and grows in such a manner that he opens one after another branch in different names, including one or the other members of his family as a partner, e.g., one firm in partnership with his wife, second with his one son, third in partnership of another son and in this way he multiplies the wealth of his family by leaps and bounds but in order to deprive the workmen of fruits of growth, keeps the number of employees less than 20 in each firm, the law cannot be a moot spectator. By such fragmentation of work while growth of the employer continues, the growth of the workmen remains static and does not change at all. If each and every firm, opened by the employer in partnership with another person is considered as a separate unit and separate entity and these different units cannot be clubbed together for the purpose of EPF Act, the very purpose of the legislature in enacting this Act shall stand defeated. While the employer shall continuously grow, simultaneously he will be able to deprive the workmen of beneficial legislations like EPF Act and others, on the ground that his each unit was a separate unit independent of other and in each unit there were different partners.

11. In *Western India Match Co. Ltd. Vs. Their Workmen*, Supreme Court observed that the principles to be followed in deciding these problems have so often been considered by the Court and the test evolved can be applied to assist the solutions of the problems. The many tests that have been evolved are namely functional integrality, inter dependence or community of financial control and management, community of man-power and its control, recruitment and discipline, the manner in which the employer has organized different activities, whether he has treated them as independent or one another or as inter connected and interdependent, enjoy pride of place. But this list is by no means exhaustive.

12. In *Management of Wenger and Company v. Their Workmen* 1964 SC 864 where the issue was whether the wine shop is an integral to running the restaurant. Supreme Court observed as under:

The question as to whether industrial establishments owned by the same management constitute separate units or one establishment has been considered by this Court on several occasions. Several factors are relevant in deciding this question. But it is important to bear in mind the significance or importance of these relevant factors would not be the same in each case; whether or not the two units constitute one establishment or really two separate and independent units, must be decided on the facts of each case. Mr, Pathak contends that the Tribunal was in error in holding that the restaurants cannot exist without the wine shops and that there is functional integrality between them. It may be conceded that the observation of the Tribunal that there is functional integrality between a restaurant and a wine shop and that the restaurants cannot exist without wine shops, is not strictly accurate or correct. But the test of functional integrality or the test whether one unit can exist without having regard to the relevant facts of that case, and so, we are not prepared to accede to the argument that the absence of functional integrality and the fact that the two units can exist one without the other necessarily show that where they exist they are necessarily separate unit and do not amount to one establishment. It is hardly necessary to deal with this point elaborately because this Court had occasion to examine this problem in several decisions in the past, vide *The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen*, ; *Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers" Union and Its Workmen*, ; *The Management of Pakshiraja Studios Vs. The Workers in Pakshiraja Studios represented by the Secretary, Commercial and Allied Employees"s Union*, ; *The Honorary Secretary, South India Millowners" Association and Others Vs. The Secretary, Coimbatore District Textile Workers" Union*, ; *National Transport and General Company (Private) Ltd. Vs. Ishar Singh and Others*, and *D.C.M. Chemical Works v. Its Workmen* 1962 I LLJ 888.

13. It is now settled law that the test of functional integrity is not the absolute test of holding the two establishments as one. Nor the test whether one can exist without the other, is the absolute test of holding the two establishments as one

for purposes of the Act. The Court has to consider all facts and circumstances of the case to arrive at a conclusion whether the two units can be clubbed together for the purposes of the Act or not. In the instant case, Mr. Surender Nath was running business of distribution of LPG and kerosene oil. LPG gas and kerosene oil, both are fuels. He opened two firms for the two agencies and obtained separate licenses in the name of two firms. He could have obtained the licenses in the same name and obtained the licenses of distribution of LPG as well as kerosene oil under the same name. This would only show that he, in order to deprive the employees of the benefits of beneficial legislations and labours laws, fragmented his business in two firms. The management and the control and supervision remained with him. There was a common accountant. Both the firms were found operating in a common premises at the time of inspection.

The employees were intermingled. Both were using the same phone number and had given same number on their letterhead. All these circumstances show that the two firms were, in fact, one establishment, working under one management and control of Mr. Surender Nath. The other partner was his wife. The unity of functions can be easily seen from the above facts. Merely having separate sales tax and income tax registrations, shall not change the unity of the establishment. Even if registration is separate, the income of a proprietorship firm is considered as income of the proprietor and in a partnership firm it is considered as income of partners. A partnership firm or proprietor firm has no separate and independent identity. They are identified with the partners or proprietors. It is only the partner/proprietor of a firm who can sue in his name. The law does not recognize proprietorship firm or a partnership firm as independent legal entity.

14. I consider that the order of the Tribunal is contrary to facts brought on record as well as contrary to law. The entire evidence clearly showed that the two firms were working as one establishment under one management and the division of employees between two firms was merely to escape the liability under different labour laws. The Tribunal overlooked all these facts and did not look into the fact that the opening of different firms by a person in order to fragmentize his business so as to deprive the workmen all the beneficial legislations should not stand in way of clubbing of the two establishments, which are otherwise one, for the purpose of the Act.

15. In Rajasthan Prem Krishan Goods Transport v. R.P.F. Commissioner 1997 LIC 146, Supreme Court observed as under:

The finding recorded by the Regional Provident Fund Commissioner is that there is unity of purpose on each count inasmuch as the place of business is common, the management is common, the letter heads bear the same telephone numbers and 10 partners of the appellant are common out of the 13 partners of the third respondent. The Trucks plied by the two entities are owned by the partners and are being hired through both the units. The respective employees engaged by the two entities when added together, bring the integrated entities within the grip of the Act; so is the finding. Now, this finding is essentially one of fact or on

legitimate inferences drawn from facts. Nothing could be suggested on behalf of the appellant as to why could the Regional Provident Fund Commissioner not pierce the veil and read between the lines within the outwardness of the two apparents. No legal bar could be pointed out by the learned Counsel as to why the views of the Regional Provident Fund Commissioner, as affirmed by the Central Government be overturned.

16. I consider that the order of the Tribunal is liable to be set aside and is hereby set aside. The Order of the Regional Provident Funds Commissioner is restored. The employees of the two firms were rightly clubbed together to apply the provisions of the Act. The writ petition is allowed. No orders as to costs.