

(2006) 11 DEL CK 0014

In the Delhi High Court

Case No : Writ Petition (C) No. 5671 of 2001

Regional Provident Fund Commissioner

APPELLANT

Vs

Victory Service Station, Kapoor Service Station and
Employees Provident Fund Appellate Tribunal

RESPONDENT

Date of Decision : 23-11-2006

Acts Referred:

Constitution of India, 1950 — Article 43

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

Citation : (2009) 93 DRJ 207

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 the order dated 29.5.2000 passed by the E.P.F. Appellate Tribunal whereby the Appellate Tribunal set aside the order of the Regional Provident Fund Commissioner bringing M/s Victory Service Station and M/s Kapoor Service Station, two petrol pumps in the fold of Employees' Provident Fund and Miscellaneous Provision Act and the respondents were directed to file the returns.

2. Briefly, the facts are that M/s Kapoor Service Station was brought under the purview of the Act vide order dated 26.10.1999 along with M/s Victory Service Station on the ground that there was unity of management, control, supervision and ownership in respect of two service stations. M/s Victory Service Station consisted of three owners viz. Mr. B.M.Kapoor, Mr. Jitender Kapoor son of Mr. B.M.Kapoor and Mr. Surinder Pal Singh while M/s Kapoor Service Station consisted of two partners viz. Mr. B.M.Kapoor and his son Mr. Jitender Kapoor. There was inter transfer of employees between the two petrol pumps. Manager, M.C.Bhudani of M/s Kapoor Service Station had made a statement that he was

working with the management since 1969; the management was having another service station as M/s Victory Service Station, the workers were being transferred between the two service stations. He gave the names of three workers viz. Narender, Pramod & Vijay who, were transferred to M/s Victory Service Station from M/s Kapoor Service Station. He also stated that whenever there was shortage of staff at one station, the staff was called from another station. There were 14 employees shown in the employees' register of M/s Kapoor Service Station while M/s Kapoor Service Station was also running three tankers bearing registrations Nos. DL 1G 1649, DIL 5334 and DL 1G 5350. These three tankers were having three drivers and three helpers, their names had not been shown in the employees' register. The Regional Provident Fund Commissioner after making enquiry and considering the material placed before him from both sides observed that there was common management, supervision and control. The unity of ownership was also clear because two partners were same in both the service stations i.e. M/s Victory Service Station and M/s Kapoor Service Station. So, he passed an order that employee strength of the establishments of M/s Kapoor Service Station and M/s Victory Service Station be clubbed together for the purpose of applicability of the Act. Against this order of Regional Provident Fund Commissioner an appeal was preferred before the Appellate Tribunal only by M/s Victory Service Station. The Appellate Tribunal observed that partnership firm was a distinct personality from the partners Constituting the firm. Because one of the firms was constituted by the father and son and Anr. was having one more partner viz. Mr. Surinder Pal Singh, the two were distinct from each other. The Regional Provident Fund Commissioner did not record a finding that Mr. Surinder Pal Singh, was having only a negligible share or was a partner for namesake only. M/s Victory Service Station was an establishment which was established in the year 1957 whereas M/s Kapoor Service Station was established in 1968. Both the firms had separate dealership agreement in petroleum goods with M/s Hindustan Petroleum. Since two service stations were situated at two different places, it was not feasible that worker of one service station may run the other service station. The statement of manager Mr. Bhudani was recorded in 1998 in respect of transfer of employees while clubbing was sought to be done from 1989. The statement of Mr. Bhudani was in the nature of complaint, it was doubtful if it was in the hand writing of Mr. Bhudani because writing of the contents and the signature was different. He, Therefore, concluded that because of presence of Mr. S.P.Singh as a partner in the appellant firm i.e. M/s Victory Service Station, the appellant firm cannot be clubbed with M/s Kapoor Service Station because that would cause much injury to the interest of Mr. S.P.Singh.

3. In the writ petition, the petitioner has challenged the order of the Tribunal on the ground that the service stations were common establishment having common partners dealing in petroleum goods under M/s Hindustan Petroleum. There was transferability of employees as per the information given by the manager of the establishment itself. The Appellate Tribunal went wholly wrong by

observing that since the two service station were located at some distance so, the employees at one station cannot run to the other station. The Appellate Tribunal also ignored the fact that the M/s Kapoor Service Station had not preferred any appeal against the order and it was arrayed as respondent No. 2 in the appeal. No notice was issued to M/s Kapoor Service Station by the Tribunal and the version of the M/s Kapoor Service Station Therefore, could not come on record. The Tribunal ignored the fact that there were large number of employees at M/s Kapoor Service Station and there was a communication on record from the M/s Kapoor Service Station that its employees strength by itself was over 20. The names of the three tanker drivers and helpers were not borne in the employees" register of M/s Kapoor Service Station thus, the total strength of the employees would have been much more than 20 of M/s Kapoor Service Station itself. By setting aside the order of the Regional Provident Fund Commissioner at the behest of M/s Victory Service Station, M/s Kapoor Service Station has also been kept free from the application of EPF and Miscellaneous Provision Act.

4. 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).

5. The petitioner 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 the not entitled for infancy period.

6. 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 7-A 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 7-A 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.

7. 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 *Periwal 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.

8. 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.

9. There can be no doubt that the Provident Fund & 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 employee is 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 interest of the employer and the worker. If the employer is 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 is a small employer, who has 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 Ors., on the ground that his each unit was a separate unit independent of other and in each unit there were different partners.

10. 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 laws is by no means is exhaustive.

11. 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 integrity 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 integrity 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 integrity 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*, ; *The Fine Knitting Co., Ltd. Vs. The Industrial Court, Bombay and Others*, and *D.C.M. Chemical Works v. Its Workmen* 1962 I LLJ 888.

12. It is clear that the two units though can exist without each other and still can form part of one establishment. The test of functional integrity is not the absolute test of holding two establishments as one. 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 purpose of EPF Act or not.

13. In running of petrol pump supervision of work by the partners themselves is necessary. It is the partners, who enter into the dealership agreement with the supplier, it is the partners, who get installed the machines and keep the delivery machines at petrol pump in order. In the present case M/s Victory Service Station had not employed any manager. The list of the employees of the petrol pumps, which is on record shows that all employees were in the pay range of Rs. 1500-1800/- meaning thereby that there was no employee, who was working in the capacity of manager and the management was in the hands of the partners only. The unity of function is discernible from the operations of such petrol pumps. The management and supervision was in the hands of father and son. Merely because in one petrol pump there was a third partner it shall not break the unity of function of two petrol pumps, more so when there was evidence of transfer of employees from one petrol pump to other.

14. The observation of the Tribunal that the firms are separate independent entities from its partners is contrary to basic law of partnership as well as proprietorship concerns. While a private limited or a limited company is a legal personality and an independent entity in itself because of its incorporation as a company, a partnership firm and a proprietorship firm cannot be identified differently from their partners and owners. A partnership or a proprietorship firm is no legal entity, thus, the observation of the Tribunal that the partnership firm

was distinct entity from its partners was contrary to law.

15. In this case, the Regional Provident Fund Commissioner has considered the entire evidence before it including the statement of manager, observation of the Tribunal that the statement of manager was of 1998 and the Regional Provident Fund Commissioner wanted to bring the establishment under the fold of Act from 1989 is meaningless. The enquiry and proceedings in this case continued for years together. If the evidence is not recorded on the date when the case or the enquiry is disposed of that does not mean that the statement is not relevant. If the transfers from one petrol pump to another petrol pump were being made in the year 1998, there was no reason to believe that they were not being made in 1989 or after. The Tribunal has also wrongly doubted the statement of manager of the petrol pump Mr. M.C.Bhudani; he was working as manager with M/s Kapoor Service Station and M/s Kapoor Service Station had not even appealed against the order nor challenged the statement of Mr. Bhudani. While considering the appeal of M/s Victory Service Station, Tribunal could not have doubted the statement of manager of M/s Kapoor Service Station, who was neither served a notice by the Tribunal nor heard, nor was a party before the Tribunal.

16. I consider that the order of the Tribunal is contrary to law and contrary to facts brought on record. While, the facts brought on record by the Regional Provident Fund Commissioner clearly showed that not only the employees of the petrol pumps were being transferred from one petrol pump to another even the proper attendance registers were not being maintained and the names of some of the employees were not entered in it. The Tribunal overlooked all these facts and on the basis of the consideration that one Mr. Surinder Pal Singh, Partner of M/s Victory Service Station shall suffer much injury if the order of the RPFC is allowed to stand, allowed to appeal.

17. 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 outward lines 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.

18. One of the arguments advanced by the respondent is that the respondent was free to arrange its business in such a manner so as to avoid the law. The respondent relied upon Ghatge and Ghatge and Patil Concern"s Employees" Union Vs. Ghatge and Patil (Transports) Private Ltd. and Another,

The matter of dispute no doubt referred in the second part to ex-drivers but it referred generally to the new system in the first. The Tribunal was wrong in thinking that the first part also referred to the ex-drivers (now operators). On the whole, however, it is clear that the Company has not done anything illegal. A person must be considered free to so arrange his business that he avoids a regulatory law and its penal consequences which he has, without the arrangement, no proper means of obeying. This, if course, he can do only so long as he does not break that or any other law. The Company declared before us that it is quite prepared, if it was not already doing so to apply and observe the provisions of the Motor Transport Workers" Act in respect of its employees proper where such provisions can be made applicable. In view of this declaration we see no reason to interfere, because Parliament has not chosen to say that transport trucks will be run only through paid employees and not independent operators. The appeal fails but in the circumstances of the case we make no order as to costs.

19. However, I consider that while the respondent is free to arrange its business in the manner he likes, the Courts have to see that the interpretation of the law must not be contrary to the intention of legislature and provisions of Act must be interpreted in a manner so as to sub-serve the legislative purpose for which it has been enacted. I consider that the order the Appellate Tribunal is liable to be set aside and is hereby set aside. The employees of M/s Victory Service Station and M/s Kapoor Service Station were rightly clubbed together to apply the provisions of EPF Act. The writ petition is allowed. The order of the EPF Tribunal is set aside and the order of the Regional Provident Fund Commissioner is restored.