

(2011) 07 MAD CK 0190

In the Madras High Court

Case No : Writ Petition No. 29715 of 2005

Sona Rajendra Spinners (P) Ltd.(now known as Sona
Valliyappa Textile Mills (P) Ltd.)

APPELLANT

Vs

The Regional Provident Fund Commissioner Employees'
Provident Fund Organisation and Employees' Provident Fund
Appellate Tribunal

RESPONDENT

Date of Decision : 27-07-2011

Acts Referred:

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

Citation : (2011) 07 MAD CK 0190

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

**Advocate : Vijay Narayan for R. Parthiban, for the Appellant; K. Gunasekar,
ACGSC for R1 R2 - Tribunal, for the Respondent**

Final Decision : Allowed

Judgement

K. Chandru, J.—The Petitioner is a Spinning Mill. They have come forward to challenge the order passed by the second Respondent Employees' Provident Fund Appellate Tribunal made in ATA No. 372(13)/2000 dated 10.5.2005. By the aforesaid order, the Tribunal dismissed their appeal and refused to interfere with the order made by the first Respondent u/s 7A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for short PF Act) dated 16.05.2000. By the said order, the first Respondent clubbed the Petitioner Mill with one M/s. Sree Rajendra Mills Ltd., for the purpose of applicability of the PF Act.

2. The writ petition was admitted on 15.09.2005. Pending the writ petition, this Court granted an interim stay. Subsequently, the said interim order was made absolute on 12.09.2006. On notice from this Court, the first Respondent had filed a counter affidavit dated 16.06.2011.

3. By a letter dated 16.01.1998, the first Respondent held that the Petitioner Mill

was engaged in Cotton Yarn and Synthetic Yarn Textiles, which is included in the Schedule I of the PF Act. Their factory had employed more than 110 persons on 18.04.1997. Since the factory had completed the infancy period of three years as on 17.04.1997, they are bound to be covered by the provisions of the Act. Therefore, they were directed to make compliance with the provisions of the PF Act. Thereafter, questionnaire Form was given by the Enforcement Officer, Provident Fund Office, Salem dated 12.02.1998 asking the Petitioner to give answers to 10 questions. The thrust of the questions proceeded on the basis as to whether the Petitioner Mill has any other branch for which they reliable to pay contributions.

4. After the receipt of the answers to the questionnaire, a notice dated 02.11.1999 was sent by the Assistant Provident Fund Commissioner, holding that the Petitioner is a Branch Unit of Sree Rajendra Mills Ltd., as there is unity of management, common manager in control, financial nexus, functional integrality and unity of purpose between the two units. Therefore, u/s na?f the PF Act, they are coverable from 18.04.1994 and the Petitioner Unit cannot be treated as a separate unit forth purpose of any infancy protection. Hence, the Petitioner was directed to submit all the returns for the period from 18.04.1994 to 18.04.1997 without the benefit of Section 16(1)(d) of the PF Act.

5. Subsequently, summons were issued on 14.12.1999 to appear in person to assess the Mill u/s 7A of theft Act. It is at this stage, the Petitioner filed anapplication before the first Respondent representing that the two units are separate entities and requested them to drop further action claiming the dues for the infancy period to which they were eligible. The first Respondent by an order dated 16.05.2000 passed an order under Section-A of the PF Act and held that the Petitioner is not entitled for infancy benefits and the unit is liable for coverage from 18.04.1994 and the Petitioner Spinning Millis wholly depending on M/s. Sree Rajendra Mills Ltd.

6. Aggrieved by the order passed u/s 7A of the PF Act, the Petitioner preferred an appeal u/s 7I of the PF Act to the second Respondent EPF Appellate Tribunal. The said appeal was taken on file asana No. 372(13)/2000. Along with the appeal memo, list of enclosures containing 8 documents were filed. On the said appeal, notice was issued to the first Respondent. But the first Respondent did not file any counter. After hearing both parties, the Tribunal held that the Petitioner Mill was set up with the active support of M/s. Sree Rajendra Mills Ltd, viz., technical or financial. Therefore, the Petitioner Mill could be clubbed along with M/s. Sree Rajendra Mills and the infancy protection can be denied totem. It was also held they were engaged in the same kind of business viz., manufacturing of cotton yarn and there was common ownership for both Units. The Directors of the established company had extended guarantee while loan was obtained by the Petitioner. Technical know-how was also provided by M/s. Sere Rajendra Mills. In the Memorandum of Articles of the Petitioner Mill, it was mentioned that they proposed to set up the Mill with the aid and assistance oversee Rajendra Mills

Limited. Challenging the said order of the Tribunal dated 10.05.2005, the present writ petition came to be filed.

7. In Paragraph 6.9(G) of the grounds of Appeal filed before the Tribunal, it was stated by the Petitioner, which is as follows:

(G) It is submitted that the Respondent has totally overlooked the fact that there was separate income tax assessments, balance sheets, Central Excise registration, Central Sales Tax registration, Tamil Nadu General Sales Tax registration, labour agreements, bonus agreements and that there was no inter-company transferability. All these would show that the two companies were totally separate entities and hence, couldn't be clubbed together for the purpose of the act. Hence, it is submitted that the order is illegal and liable to be set aside.

8. It was claimed by the Petitioner that the said documents were produced before the first Respondent. Therefore, the learned Counsel for the Petitioner was directed to produce the documents relied upon by them which were produced before the first Respondent. Accordingly, the learned Counsel for the Petitioner filed an additional typed set containing those documents which were referred to in the Memorandum of Grounds of appeal. The first document, letter dated 03.09.1993 showed that the Petitioner company has been registered as a separate Dealer under the Tamil Nadu General Sales Tax Act (TNGST) and they were also given an Area Code. Under the Central Sales Tax Act (CST), they registered the Mill on 27.08.1996. On 03.12.2001, the Mill has been registered under the Central Excise Act. Under the Tamil Nadu Value Added Tax, 2006 (VAT), the company was registered on 02.01.2007. The balance sheet for the company for the accounting years 1994 to 1997 produced showed that there was a separate balance sheet. Settlement with the Trade Union was entered into on 24.03.1997 with reference to the wages and other service conditions separately for their Mill.

9. In the light of these facts, Mr. Vijay Narayan, learned Senior Counsel appearing for Mr. Parthiban, counsel for the Petitioner Mill submitted that the Tribunal did not take note of these relevant factors and also did not apply its mind in considering whether the Petitioner Mill can be clubbed along with M/s. Sree Rajendra Mills Ltd. The learned Senior Counsel also contended that the Petitioner Mill is a registered company and started its commercial production with effect from 18.04.1996. Its registered office is at Bangalore, but the factory is at Salem. The Mill is separately registered under the provisions of the Companies Act and it has also separate registration under various enactments such as Central Excise Act, Central Sales Tax Act and Tamil Nadu General Sales Tax Act. It has its own separate audited balance sheets. It has three directors and is an independent entity. Merely because two of the Directors are common in both the companies and that the production relates to manufacturing of yarn cannot be assumed that there is a functional integrality. The company enters into a separate settlement with the workmen and there was no inter-company

transferability.

10. However, Mr. K. Gunasekar, learned Standing Counselor the Respondent Department referred to paragraph 12 of the counter affidavit for arriving at the conclusion that the two Mills can be clubbed u/s 2A of the PF Act for the purpose of the coverage.

11. In Paragraph 12 of the counter affidavit, it was averred as follows:

12. It is submitted that the Respondent after verifying the records of the establishment has passed the order the statement of Memorandum of Articles of the Petitioner establishment clearly reveal that the company was proposed to be set up with the aid of assistance of Sree Rajendra Mills Pvt Ltd and the latter shall have the power to control the composition of the Board of Directors of the proposed new unit. This proves that there is unity of ownership, unity of management, supervision and control. The Management has accepted that both the establishments are engaged in the manufacture of "Yarn". Further, it has been stated in the Auditor's Report that Two Directors of Sere Rajendra Mills Ltd. Have given "Personal Guarantee" in respect of the "Secured Loans" for Working Capital{Schedule "C" of Balance Sheet as on 31.3.1996). Further, Schedule "D" of the same Balance Sheet states that a sum of Rs.13,00,000/-(Rupees Thirteen lakhs only)have been paid by the Directors towards Working Capital (Unsecured Loans). An in-depth probe will also prove that at the time of installation of the Petitioner establishment, technical staff and supervisors from M/s. Rajendra Mills Ltd. were deputed to put the said establishment in operation. These factors prove there disunity of finance and functional integrality between the two establishments. Therefore, the order of the Respondent is very much maintainable under law.

12. The learned Standing Counsel for the Department in support of his contention referred to the judgment of the Supreme Court in Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, . He relied upon the following passage found in paragraph 12, which is as follows:

12. On behalf of the Appellant, reliance was placed on the decision of this Court in Provident Fund Inspector v. Secretary, N.S.S. Cooperative Society, Changanacherry 12. That was a case in which the Secretary of a cooperative society which owned a press had been acquitted by the Magistrate of the charge of not complying with the provisions of the Act. The High Court had confirmed the order of acquittal. On appeal, this Court found that there was no ground to interfere with the acquittal. The defense of the accused in that case was that the Cooperative Society of which he waste Secretary had acquired the press in question in March 1961 and had established anew press subsequently and hence the Act wasn't applicable to the press as the period of three years prescribed by Section 16(1)(b)of the Act had not expired. The evidence in that case showed that after the purchase, a new owner had come in the place of the former owner, the work of the press was stopped on the date of its sale and was started again

after a break of three months, the machinery in the press was also altered and the persons employed previously were not continued in service. While a fresh recruitment of workmen had taken place, outfox those workmen only six happened to be the former employees and compensation had been paid to the workmen at the time of the sale by the former owner. On these facts it washed that a new establishment had come into existence. In the case before us, it is seen that about 70 per cent of the former workmen had been employed by the Appellant and there was no change of machinery. Further this Isa case where the interruption of work had taken place owing to the order in the winding up proceedings. It is relevant testate here that this Court in the course obits judgment in the above case did not overrule the decision of the Calcutta High Court in Bharat Board Mills Led"s but only distinguished it. The facts of that case more or less corresponded to the facts of the case before us. It is true that this Court in the above decision approved the decision of the Madras High Court inVittaladas Jagannatahdas v. Regional Provident Fund Commissioner¹³ but that doesn"t make any difference so far as the case before us is concerned since in the Madras case there was a finding that in reality the old establishment had come to an end and there was a new establishment. In the case before us, the finding of fact of the trial court is to the contrary. The learned trial Judge has held that the intention in this case was to maintain the continuity of the old factory. Hence the decision on which reliance is placed being distinguishable on facts is not of much use to the Appellant.

13. The learned Standing Counsel further referred to the subsequent judgment of the Supreme Court in Regional Provident Fund Commissioner, Jaipur Vs. Naraini Udyog and Others, . He relied on the following passage found in paragraph 2, which is as follows:

2. On the basis thereof, the Appellant hascalled upon them to contribute the amountunder Section 7A of the Employees" Provident Funds and Miscellaneous Provisions 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 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 perspective the provisions of the Act which is a beneficial legislation to provide healthy security

tithe workmen. In the ultimate analysis the employer gets maximum out-turn of his production by ensuring health insurance to employees which is the fundamental right to the latter.

14. Lastly, he relied on the judgment of the Supreme Court in *Transport Corporation of India Vs. Employees' State Insurance Corpn. and Another*, wherein, it was held that even though the establishment has branches in different states all over the country, the establishment and all its branches will be one establishment and therefore, he contended that the Petitioner is part of M/s. Sree Rajendra Mills Limited.

15. As to the fact they were having separate balance sheets, it was stated that it is for their administrative convenience and that will not absolve their liability of being treated as a single Unit.

16. However, Mr. Vijay Narayan, learned Senior Counsel submitted that Section 2A of the PF Act came to be considered by number of judgments. He placed reliance on the judgment of the Supreme Court in *Noor Niwas Nursery Public School Vs. Regional Provident Fund Commr. and Others*, . He relied upon the following passage found in paragraph 4, which is as follows:

4. Whether two units are one or distinct will have to be considered in the light of the provisions of Section 2A of the Act which declares that where an establishment consists of different departments or has branches whether situate in the same place in different places, all such departments or branches shall be treated as parts of the same establishment. In such cases, the court has to consider how far there is functional integrity between the two units, whether one unit cannot exist conveniently and reasonably without the other, and on the further question, in matters of finance and employment, the employer has actually kept the two units distinct or integrated. In fact, this Court set out certain tests in *Prate Press v. Secy., Delhi Press Workers' Union*¹. However, we may point out that each case would depend upon its own peculiar facts and has to be decided accordingly.

17. But in the very same judgment, in paragraph 6, the Supreme Court had observed as follows:

6. ...The learned Counsel submitted that if the two units were put together as a single establishment, the Act would be applicable and otherwise not, inasmuch as it falls short of the number of minimum of employees for the applicability of the Act u/s 1(3)(b) of the Act. We are not impressed with this argument. The two establishments have more than 20 employees and the exemption granted under the Act is subject to the condition that such exclusion will not apply to the Appellant's unit because the same would not be covered under another scheme for subscribing to the provident fund. When the entire establishment is covered by the Act, only part of the establishment is excluded and condition of exclusion being applicable only to a part, we fail to understand as to how the Appellant can rely upon the said letter to claim non-applicability of the Act on the ground that it

falls short of the number of employees.

Therefore, that judgment has no direct application to the facts on hand.

18. It is necessary to refer to certain other decisions of the Supreme Court which will have a bearing on this case. The Supreme Court in *Regional Provident Fund Commissioner and Another Vs. Dharamsi Morarji Chemical Co. Ltd.*, , in paragraph 4, it was held as follows:

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 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 Counselor the Appellant was the fact that the Respondent-Company was the owner not only of the Amaranth 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 Rocha factory also and therefore, according to the learned Counsel, it could be said that there was interconnection between Amaranth factory and Rocha 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 Counselor the Appellant for culling out interconnection between Amaranth factory and Rocha 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 Rocha factory was a part and parcel of Ambarnath factory or it was an adjunct of the main parent establishment functioning at Ambarnath since 1921.

19. The Supreme Court further in *Regional Provident Fund Commissioner Vs. Raj's Continental Exports (P) Ltd.*, , in paragraphs 2 and 3 held as follows:

2. Background facts in a nutshell are as follows: The Respondent claimed infancy protection under the provisions of the Act. It started production in 1984. The Respondent was of the view that it was an extension of the branch of M/s Continental Exporters, proprietorship concern of one Sampathraj Jain, who was also the Managing Director of the Respondent Company. The Appellant's view was that the Respondent was nothing but department of the aforesaid "M/s

Continental Exporters". Assailing the adjudication, the Respondent filed a writ petition stating that there was no financial integrity. It was separately registered under the Factories Act, the Central Sales Tax Act, 1956, the Income Tax Act, 1961 and the Employees' State Insurance Act. The concerns are separate and distinct. They have separate balance sheets and audited statements. The High Court accepted the contention and held that there was total independent exercise of power in the two concerns. Though the manufacturing of goods was in respect of the same article, that by itself was not sufficient to hold that it was a branch or department of M/continental Exporters. The High Court as matter of fact found that there was total independence in exercise of the management and control of the affairs, the employees were separately appointed and controlled. Taking into account these factors it was held that the Respondent Company and M/continental Exporters were not one and the same.

3. Challenge was made to the order of learned Single Judge in the writ appeal. The High Court after analysing the factual position came to hold that there was nothing in common between the two establishments. Merely because the proprietor of one concern was the Managing Director of the other that by itself is not sufficient to establish that one was branch of the other. Accordingly, the writ appeal was dismissed.

20. The Supreme Court while dealing with the clubbing of various manufacturers under the Central Excise Act in *Rollatainers Limited Vs. Commissioner of Central Excise, Delhi-III*, dealt with the clubbing of various manufacturers for levying excise. In paragraphs 7 and 8, it was observed as follows;

7. There are no two opinions that both the factories are near to each other and they're owned by the same owner and the common balance sheet is maintained. But, by this can it be said that both the factories are one and the same? The definition of "factory" as defined in Section 2(e) of the Central Excise Act, 1944, reads as under:

2. (e) "factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on;

8. Simply because both the factories are in the same premises, that does not lead to the inference that both the factories are one and the same. In the present case, from the facts it is apparent that there is no commonality of purpose, both the factories have a separate entrance, there is a passage in between and they are not complementary to each other nor are they subsidiary to each other. The end product is also different, one manufactures duplex board and the other manufactures paper. They are separately registered with the Central Excise Department. The staff is separate, their management is separate. It is also not the case of the Revenue that the end product of one factory is raw material for the other factory. From the above facts it is apparent that there is no

commonality between the two factories, both are separate establishments run by separate managers though at the apex level they are maintained by the Appellant Company. There are separate staff, separate finished goods. Simply because both the factories may have common boundaries, that will not make them one factory. Accordingly, we are of the opinion that the view taken by the Tribunal does not appear to be well-founded and likewise, the view taken by the Commissioner, Central Excise. Accordingly, we allow both these appeals, set aside the order of the Tribunal passed on 7-6-2002 as well as the order passed by the Commissioner, Central Excise, New Delhi III on 28-9-2001 in both the appeals.

21. The learned Senior Counsel also referred to a judgment of this Court in *Regional Provident Fund Commissioner, Tirunelveli v. Prabha Beverages (Private) Ltd., and Anr.* reported in 2008 (4) L.L.N. 899, where similar contentions raised by the Respondent was rejected.

22. In the light of the above, it has to be seen whether the impugned order of the Tribunal can be interfered with?

23. A perusal of the impugned order clearly shows that the Tribunal did not even look into the materials produced before the first Respondent whose order came under appeal before the second Respondent Tribunal. Since the finding of the Tribunal was solely based upon the Articles of Association in forming the company, wherein M/s. Sree Rajendra Mills have power to control the composition of Board of Directors and that the Petitioner institution also can be clubbed with that company cannot be sustained. Since the Tribunal failed to take note of the relevant facts in passing order u/s 2A of the PF Act and also didn't take note of the materials produced by the Petitioner company before the first Respondent, the order of the second Respondent in ATA No. 372(13)/2000 dated 10.5.2005 is liable to be set aside.

24. Accordingly, the writ petition stands partly allowed and the order of the second Respondent in ATA No. 372(13)/2000 dated 10.5.2005 stands set aside. The matter is remitted back to the second Respondent Tribunal to decide afresh in accordance with law after due notice to the parties. This exercise shall be undertaken by the second Respondent Tribunal within a period of six months from the date of receipt of a copy of this order. However, there will be no order as to costs.