

(2008) 12 MAD CK 0042

In the Madras High Court

Case No : Writ Appeal No. 3680 of 2003 and M.P. No. 6016 of 2003

South India Corporation Limited

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 04-12-2008

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16, 19A, 2A

Citation : (2009) 148 CompCas 200 : (2009) 122 FLR 94

Hon'ble Judges : V. Periya Karupiah, J;D. Murugesan, J

Bench : Division Bench

Advocate : Meenakshi Sundaram, for the Appellant; V. Vibhishanan, Spl. Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

V. Periya Karupiah, J.—This appeal has been directed against the dismissal of the writ petition by the learned Single Judge of this Court

made in W.P. No. 13757 of 1996 dated 20.08.2003.

2. The aggrieved writ petitioner had filed the appeal against the said order. The above writ petition has been filed before the learned Single Judge

for issuing a writ of certiorari to call for the records relating to the order of the respondent dated 28.06.1996 and quash the same.

3. Brief facts of both parties in the writ petitions are as follows:

3(i) The petitioner establishment was incorporated on 31.1.1990 as ""Chettinad Granites Limited"" under the provisions of the Companies Act. The

company known as South India Corporation Ltd., incorporated on 5.9.1935 under Pudukottai Companies Regulation Act 1929, as a Private

Limited company and subsequently became a deemed Public Company and

engaged solely in trading activities. The Board of Directors of Chettinad Granites Limited, with a view to utilising the funds generated by the South India Corporation Ltd., which was interested in diversifying in the granite field, proposed an amalgamation of the said Chettinad Granites Limited with the said South India Corporation Limited by resolution dated 25.03.1993 considered and approved a Scheme of amalgamation with South India Corporation Limited. Likewise the Board of Directors of South India Corporation Limited also by resolution dated 25.03.1993 considered and approved a Scheme of amalgamation of Chettinad Granites Limited with South India Corporation Limited.

3.(ii) In pursuance of these resolutions Chettinad Granites Limited filed on 15.4.1993 a Company Application No. 676 of 1993 before this

Hon"ble Court, praying for approval of the scheme of Amalgamation South India Corporation Limited also filed Company Application No. 677 of

1993 in this behalf. The companies were directed to file a copy of the order with the Registrar of Companies within 30 days thereof and also

process the necessary formalities. The formalities were completed accordingly on 15.10.1993 and effective that date Chettinad Granites Limited

became amalgamated with as the Granite Division of South India Corporation. Despite the petitioner enjoying the benefit of infancy period u/s 16

of the Employees Provident Fund and Miscellaneous Provisions Act 1952 [hereinafter referred to as the "ACT"], it applied to the Respondent for

coverage of the employees of the Granite Division from 15.10.1993, the date when the amalgamation was completed in terms of the order of the

High Court. Though the Scheme of Amalgamation, approved by the High Court, was effective 1.4.1992, the actual amalgamation and dissolution

of the company known as Chettinad Granites Ltd., was only on 15.10.1993. The petitioner also submitted that the infancy protection u/s 16 of the

Act enjoyed by the said Chettinad Granites Limited, cannot be wiped out and the Act made application with retrospective effect from 1.4.1992

and that coverage under the Act and the contributions payable shall be effective 15.10.1993 only.

3.(iii) The respondent by his order dated 7.3.1995, received on 22.3.1995 held that since the Scheme of Amalgamation has specified that the

merger shall be effective 1.4.1992, when the assets and liabilities of Chettinad

Granites Limited shall vest with South India Corporation Limited, the petitioner Division will be brought under the purview of the Act as a Branch of South India Corporation Limited, though a separate Code number has been allotted for administrative convenience and the coverage will be from 1.4.1992. Against this Order the petitioner Division preferred a petition u/s 19A of the Act to the Government of India. Mere amalgamation of two companies may not attract Section 2A of the Act unless it is established that the factory run by Chettinad Granites Limited has become a department or branch of South India Corporation Limited.

In view of the matter the order dated 7.3.1995 of the Respondent was set aside and since the Respondent had not examined the issue by applying the various tests as has been laid down by various judicial pronouncements namely, unity of ownership, employment etc., remitted for applying after examination the said tests in the matter and decide afresh. The respondent called for further details and documents. By his order No. H6/TN/MS/30903/Enf/Regl/96 dated 28.06.1996 the Respondent passed the impugned order wherein held that the petitioner Division is a part and parcel of South India Corporation Limited and is not entitled to infancy protection as contemplated u/s 16 of the Act and in view of the orders of the High Court amalgamating the companies effective 1.4.1992, the provisions of the Act will apply to the Petitioner Division from 1.4.1992.

The impugned award of the respondent is contrary to law and facts of the case and is irregular and vitiated by errors apparent on the face of the records and deserves to be quashed by the Hon"ble Court.

3.(iv) In the Counter filed by the Respondent while denying the various allegations, it is stated that the Granites division of South India Corporation Limited was interested in promoting the Transferor Company, the Board of Directors of the erstwhile company were also found to be the members of the Transferee Company. Right from the inception, the transferor Company was depending on the Transferee Company for finance. The transferee company was promoting the company and proposal for merger of both the companies had been in contemplation even in the earlier stages and both the Companies have resolved in the Board Meeting to seek merger as on 1.4.1992. It was only later they applied before the High Court for merger. It is further stated that this is a case where the Transferor and

Transferee Companies should have taken note of the Provisions of

Section 2A of the Act which clearly states that the Act was applicable to all branches, Department and Units of the establishment. In the counter

certain other details have also been stated in support of the contention that for all practical purposes, the merger had taken effect with effect from

1.4.1992 itself. Hence the writ petition was liable to be dismissed.

4. On the basis of the contentions raised in the petition and in the Counter, arguments were heard and the learned Single Judge of this Court had

dismissed the plea of the writ petitioner, against which the present appeal has been preferred.

5. We have heard Mr. Meenakshi Sundararm, learned Counsel for the Appellant and Mr. V. Vibhishanan, learned Counsel for the Respondent.

6. Learned Counsel for the Appellant would submit in his arguments that the Learned Single Judge had not considered the legal aspects that the

amalgamation of both M/s. Chettinad Granites Limited and M/s. South India Corporation Ltd., had even though taken place with effect from

1.4.1992, actual formalities were over by 15.10.1993 and the amalgamation had taken place only on that date. Even though the resolutions were

passed to the effect that it should have been taken effect from 1.4.1992, actually it had taken place on 15.10.1993 and the collection of the

Provident Fund from the employees of M/s. Chettinad Granites Limited could not be possible from a retrospective date (i.e.) 1.4.1992 as the said

transferor concern viz., M/s. Chettinad Granites Limited, enjoyed the benefit of infancy period, exempted from contribution of provident funds to

its employees. He would further submit that the status of the employees of the transferor company could not be changed because of the

amalgamation as the employees had been employed and had not completed three years period then and therefore the period of amalgamation

should have been considered as on and from 15.10.1993 and not from 1.4.1992.

7. He would further argue that the liability to pay Provident Fund to the employees of M/s. Chettinad Granites Limited did not exist on 1.4.1992 to

15.10.1993 on which date the terms and conditions of service applicable to the employees of Chettinad Granites Limited had commenced and

continued and M/s. Chettinad Granites Limited enjoyed the infancy period u/s 16 of the Act. It is also argued that the Provident Fund liabilities

could not be said to have been transferred to the transferee company under the amalgamation scheme and Section 2A of the Act cannot be

applied to the amalgamated transferor company since it cannot be considered as a department or branch of its transferee company. He would also

bring to the attention of the Court to a Judgment of Calcutta High Court reported in *Devesh Sandeep Associates and Others Vs. Regional*

Provident Fund Commissioner, Bangalore, in support of his case. Similarly he has also cited an authority of Karnataka High Court reported in

1994 III LLJ 1193(Supp) [*B. Ganapathy Bhandarkar v. Regional Provident Fund Commissioner, Bangalore*]. He would also submit that the

finding of the learned Single Judge of this Court in C.P. No. 73 of 1993 dated 27.08.1993 that the amalgamation was ordered with effect from

1.4.1992 and the scheme would be effective from 1.4.1992 and therefore the transferor company has to pay the contribution under the Act with

effect from 1.4.1992 is not in accordance with law. Therefore, he would request for setting aside the order passed by the learned single Judge and

to allow the writ appeal and quash the order passed by the respondent.

8. Mr. V. Vibhishanan, the learned Counsel for the respondent would submit in his arguments that the liability to contribute Provident Fund would

arise from the moment an employee is engaged in an employment and the infancy protection given u/s 16 of the Act was only a temporary

exemption and when two companies have been amalgamated on their resolutions and the date has been fixed to be effective unless both companies

are in the infancy period u/s 16 of the Act the benefit of infancy period of one company cannot be continued when the other company is having no

such benefit from the said effective date. He would further contend that the effective date was fixed by the amalgamated companies themselves to

be from 1.4.1992 and that alone still govern the amalgamation and the subsequent procedures and formalities will not in any way alter the date of

amalgamation in order to indicate giving effect the said amalgamation.

9. He would further submit that the appellant cannot contend that the said transferor company had not been coming into the amalgamation with

effect from 1.4.1992. He would also draw our attention to Section 2A of the Act and say that the said provisions mentioned therein would apply

to the transferor company since it has become a branch or division of the

amalgamated company viz., M/s. South India Corporation. In order to show that the appellant itself had mentioned the name by showing as a division of South India Corporation Limited in various indications made by the said transferor company in its communications. Therefore he would stoutly oppose the fixing of the amalgamated date at 15.10.93. He would also submit in his argument that the learned single Judge had correctly appraised the facts and circumstances of the case and had approved the order passed by the respondent and there is no case shown by the appellant to interfere with the order passed by this Court in the writ petition. Therefore the writ appeal has to be dismissed.

10. We have given our anxious consideration to the arguments submitted on either side.

11. The appellant was amalgamated by virtue of resolutions of the Appellant Company and transferor company viz., M/s. Chettinad Granites

Limited as ordered by this Court in the Company Petition No. 676 and 677 of 1993 dated 3.9.1993 and the formalities of amalgamation were

completed only on 15.10.1993, and the said amalgamation would take place on 1.4.1992 as mentioned by the parties or from the date of

completion of formalities viz., 15.10.1993 onwards only.

12. The facts of amalgamation in between two companies, resolutions passed thereon and orders passed by this Court in Company Application

and the entitlement of infancy period for the transferor company for three years from the date of commencement of its commercial production from

November 1991 are not disputed. The respondent after analysing all these factors had come to the conclusion that the amalgamated transferor

company viz., M/s. Chettinad Granites Limited has become a division or branch of the South India Corporation Limited and therefore Section

2(A) of the Act is applicable. For the purpose of appreciation of the case, the extraction of 2(A) is necessary, which reads as follows:

2-A. Establishment to include all departments and branches: For the removal or doubts, it is hereby declared that where an establishment consists

of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated

as parts of the same establishment.

13. Apart from the said nature of the amalgamated company it was also found by

the respondent that such an amalgamation merging the transferor company from 1.4.1992 and therefore the benefit of infancy period exempting from paying the contribution of Provident Fund to its employees was lost by the transferor company and therefore the employees of the transferor company are not liable to pay contribution from 1.4.1992 onwards. There is no dispute that the completion of the procedures in amalgamation of both the companies was over only by 15.10.1993 in pursuance of the orders of the Court made in the Company Petitions dated 03.09.1993. Factually, both the companies have merged only on and from 15.10.1993. However, it has been categorically mentioned in the resolution and in the various proceedings and before the company proceedings seeking permission for amalgamation, that the amalgamation would be effective from 1.4.1992. If really, the company applications filed by the companies seeking permission for amalgamation as per the resolution of both companies are to be made effective, the recognition of the Company Court is necessary by passing an order to that effect. Only after the order of the Company Court is passed, the amalgamation proposed by the companies can take effect, even though, two companies seeking amalgamation of the companies had proposed, an amalgamation to be effective on and from an earlier date. The rights and liabilities of those amalgamated companies cannot have retrospective effect and it could only be possible from the date of order of the Court. Moreover the subsequent procedures for execution of amalgamation as termed by the Court has to be carried on and on the date of completion of the procedures of amalgamation only, it can be taken that both the companies have actually amalgamated into one company. Therefore the reference of parties regarding the effect of amalgamation to a retrospective date cannot be made available, as employees of any of the said company are within a period of three years enjoying the benefit of exemption from contributing Provident Fund as infancy period as they would be appointed only recently, cannot be made liable to pay the contribution of Provident Fund during the period prior to the amalgamation.

14. The next question that arises for our consideration is as to the applicability of Section 2A of the Act. In order to attract the provisions of

Section 2-A, the transferor company should be treated as a department or

branch of the transferee company. To hammer the above point, Mr. V.

Vibhishanan, learned Counsel has drawn our attention to certain correspondence from the transferor company, wherein it is mentioned that the

Chettinad Granites Limited is a division of South India Corporation Limited. The proper test to find out the applicability of Section 2-A of the Act

is as to whether the two establishments are to be treated as a single or distinct and separate units from each other and the test of functional

integrality, namely, whether the second unit would survive in the absence of the first unit or when the first unit is closed, whether the second unit

would continue to do its business activity should be considered. Merely because the Board of Directors of both the establishments are one and the

same and even the two units are in common premises, the same could not be the ultimate test to find out whether the departments or branches shall

be treated as part and parcel of the same establishment.

15. In this regard, it is relevant to quote the Judgment of Karnataka High Court reported in 1994 (III) LLJ 1193 (Supp.) : 1989 (2) Kar.L.J. 480

[B. Ganapathy Bahandarkar v. Regional Provident Fund Commissioner, Bangalore.] wherein it is explained to the effect that the integrality of

ownership, Management and control could be the decisive tests in order to see whether the two establishments are to be treated as single or

distinct and separate from each other. The relevant passage would read as follows:

In order to find out whether different units constitute one establishment, no one test can be applied in a given case integrality of ownership,

management and control could be the decisive tests; while in another functions integrality or general unity; yet in another it may be the unity of

employment. To illustrate the effect of this observation a person who is carrying on an activity in selling books engages himself also in the

manufacture of furniture, could it be said that the two units together constitute one establishment for the purpose of the Act? The nature of activities

carried on in the two establishments in the illustration are entirely different. One is not a feeder to the other, although there may be unity in capital

and management, can it be said that the two units in such case together constitute one establishment? It must be held that they are different and

distinct unless an inter connection between the two units is established of mutual

dependence of one over the other, so that one cannot function altogether or substantially without the other, or at any rate cannot wholly or substantially in the absence of the other; if one unit goes dry, another unit cannot exist and therefore, the two units must be held to be one. Hence, there is common control in finance and administration but does not establish that one unit is dependent on the other nor the activities are common much less that the sales units carry on dominantly the activity of the sales of the weighing machines manufactured by the petitioner. There is enough material on record to show that the dominant activity is trading and selling and not manufacture of weighing scales. The only aspect considered is that there is only one common proprietor and, therefore the units must be treated as one establishment irrespective of the nature of the activities carried on in the two establishments in so far as the functional aspects are concerned. Thus there is an error apparent on the face of the record in not applying proper tests to the fact of the case.

16. A single Judge of Karnataka High Court had also followed the said decision in the Judgment reported in Devesh Sandeep Associates and

Others Vs. Regional Provident Fund Commissioner, Bangalore, wherein it is observed as under:

Allowed the writ petition and remanding the matter for fresh consideration by the first respondent, the court observed that mere fact of common

ownership of the two units and mere location of the two units in common premises by itself was not sufficient to satisfy the test of functional

integrality. The test of functional integrality would be whether the second unit would survive in the absence of (the) first unit or when the first unit

was closed whether the second unit (would) continue to do its business activity.

17. The aforesaid Judgments would go to show that merely because the two establishments are integral part of a single proprietor and are carrying

on different activity that cannot be considered as one unit in order to attract the provisions of Section 2-A of the Act. In this case also the

transferor company is engaged in the export of granite whereas the transferee company is involved in some other avocation which is not connected

with the granite exports. But the Board of Directors are the same persons. Therefore, the principles laid down in the aforesaid Judgments of

Karnataka High Court can be adopted to the present case.

18. In view of the above factual aspect, we find force in the submissions made by the learned Counsel for the appellant and we are of the considered view that the benefit of infancy period cannot be deprived of from the amalgamated company, as it was engaging the same at the time of proposal to amalgamation. However, the appellant itself had asked for the implementation of contribution of Provident Fund from the actual date of amalgamation i.e., 15.10.1993 despite the infancy period of three years was not over by that time. However, the respondent has passed an order that the contribution of Provident Fund by the amalgamated transferor company should have been paid from 1.4.1992 in a retrospective manner which is not sustainable both in law and on facts. The learned single Judge has not considered this point, but had approved the order passed by the respondent and therefore the said order is liable to be set aside.

19. Accordingly, the order of the respondent questioned in the Writ Petition is liable to be quashed and the writ appeal is allowed. Consequently, the order of learned single Judge upholding the order of respondent is set aside and the order passed by the respondent dated 28.06.1996 is quashed. No order as to costs. Consequently connected M.P. is closed.