

(1992) 09 BOM CK 0073

In the Bombay High Court

Case No : Writ Petition No's. 1175, 1199, 1200 and 2207 of 1988

Sunder Transport and Another

APPELLANT

Vs

The Regional P.F. Commissioner

RESPONDENT

Date of Decision : 04-09-1992

Acts Referred:

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

Citation : (1993) 1 LLJ 811

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : R.J. Kochar, for the Appellant; J. Sankararamakrishnan, for the Respondent

Final Decision : Allowed

Judgement

B.P. Saraf, J.—These are four writ petitions filed by four partnership firms who have been clubbed together and treated as one establishment by the Regional Provident Fund Commissioner, Bombay for the purpose of determining the liability under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("the Act") and asked to pay the provident funds dues with effect from 31.1.1975. A common Code number was allotted by the Regional Provident Funds Commissioner, Maharashtra and Goa, being Code No. MH/22043 to one of the firms, namely, M/s. Sunder Transport, the petitioner in W.P. No. 1199/88 for itself and the other three firms who are petitioners in the other three writ petitions. The liability u/s 7 of the Act was determined at Rs. 1,99,087.50 and notice was served on each one of the four firms separately to pay the said amount. The aforesaid demand notices of the Regional Provident Funds Commissioner which are dated 20.2.1988 and the common order dated 27.1.1988 in pursuance of which these demand notices were issued, are the subject-matter of challenge.

2. The petitioner in Writ Petition No. 1199/1988 is M/s. Sunder Transport. This is a partnership firm. It was registered under the Indian Partnership Act in the year

1964. At the relevant time, it had been carrying on the business of transport of chassis and trucks and products of Bharat Petroleum to Dhule and various other places. It is composed of three partners. The petitioner in W.P. No. 1200 of 1988 is M/s. Bafna Motors which is also a partnership firm with 4 partners. It holds the dealership of International Tractors and parts thereof. It is also registered as a firm under the Partnership Act. Another firm M/s. Bafna Investment, petitioner in Writ Petition No. 1175 of 1988, is also a partnership duly registered under the Indian-Partnership Act. It comprises of five partners. Business of the firm consists of letting out of premises on rent and commission agency. Similarly, Bafna Finance is - a separate firm registered with the Registrar of Firms. It comprises of four partners. All these four partnership firms are registered as independent firms with the Registrar of Firms and are also registered separately under other enactments viz. Bombay Sales Tax, Act, Bombay Shops and Establishments Act. All these firms have been carrying on their businesses since the year 1964 and are being separately assessed to Income Tax as independent firms. The partners of these firms are not identical though there are some common partners.

3. The respondent, Regional Provident Funds Commissioner, Bombay, served the show cause notice dated 10.11. 1983 to the petitioner firms asking them to show-cause as to why the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, should not have been made applicable to them by treating all the four firms as one establishment. The petitioner-firms showed cause by their letter dated 27.11.1983. Their contention was that all of them were different and independent firms and were separate legal entities. None of them employed more than five employees. They were all carrying on their separate businesses having no inter-connection, inter-dependence and integrality of any nature and, therefore, clubbing them together and treating them as one establishment for the purpose of determining the applicability of the Act, was wrong, illegal and incorrect. All the firms filed relevant documents including the account-books and the Income Tax assessment order in support of their contention. In continuation to this letter, another letter dated 15.11.1984 was filed explaining why the four firms could not be clubbed together and treated as one establishment. By yet another letter being letter dated 25.2.1985, the petitioners drew the pointed attention of the respondent to the fact that there was neither any common supervisory, managerial or financial control by any of the petitioner-firms over the others nor was there any functional integrity amongst them. These contentions of the petitioner-firms did not find favour with the in-charge of 7-A Cell of the respondent who by his communication (Exh. D to the petition) informed the petitioners that with effect from 31.1.1975 all the four firms were treated as one establishment as per the provisions of Section 2A of the Act and, accordingly, they had been rightly asked to pay the provident funds dues with effect from 31.1.1975. Aggrieved by this communication, the petitioners wrote a letter to the Regional Provident Funds Commissioner reiterating their contentions. It was specifically stated that Section 2A of the Act

referred only to branches and departments of one establishment - it did not apply to different establishments. He was also informed that one of the establishments, namely, Sunder Transport had already been closed from 25.10.1986. The respondent, however, did not accept the contentions of the petitioners and by order dated 27.1.1988 held that the petitioners were liable to pay provident fund contributions, etc. as on clubbing the four firms together the total employees' strength of Sunder Transport including the other three establishments was more than 20 for the month of January 1975. In pursuance of the aforesaid order, a notice dated 10.2.1988 was also served on all the four petitioners asking them to pay the provident fund contributions as stated in the said notice from 1.1.1975 to October 1987. The order was passed against Sunder Transport (petitioner in Writ Petition No. 1199/1988) including the other three firms (petitioners in the other three petitions) and copy of the order was served on all the petitioners. The petitioners have challenged the aforesaid order of the Regional Provident Funds Commissioner and the notice issued in pursuance thereto.

3. The contention of the petitioners is that the action of the respondent is wholly illegal and without any authority of law. Evidently, the four firms which have been clubbed together are different establishments. Each one of them is having its own constitution. The partners in these firms are not identical though one or two of the partners in all these firms are common. That does not and cannot justify a conclusion holding the four firms as one establishment. The further contention of the petitioner is that these firms were established as separate firms as back as in the year 1964 and were registered as such with the Registrar of Firms. They have also obtained separate licences under the Shops and Establishments Act, Sales-tax Act, etc. which as separate and distinct firms they are obliged to do. The income of each of the firms is being assessed by the authorities under the Income Tax Act separately treating them as separate and independent taxable entities. All these, according to the petitioners, clearly demonstrate their separate independent nature and standing. Factors, such as, situation of the offices in one premises, user of a common telegraphic address and post-box numbers and having a common person to write and maintain accounts are not at all relevant to decide whether these four firms are independent establishment or they are one establishment. The petitioners submit that Section 2-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, on which reliance has been placed by the respondent for treating the four establishments of the petitioners as one does not authorise the respondent to take any such action. The section simply provides that different departments or branches of an establishment, whether situate in the same place or in different places shall be treated as parts of the same establishment. It does not provide for clubbing of different independent establishments into one for the purposes of applicability of the provisions of the Act. The respondent has filed a counter in W.P. No. 1199/1988. In the said counter, in reply to the contentions of the petitioners in regard to their separate and legal identity, he states, "I say

that the entity of the Establishment in so far as Income Tax, Sales-tax Act, Bombay Shops and Establishments Act etc. are concerned is admittedly separate. However, for the purpose of applicability of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the contention that the establishment is a separate legal entity is not at all relevant". In reply to the objection of the petitioners to the clubbing of their four independent establishments, the respondent has reiterated the factors such as situation of all these establishments in one premises, use of one telegraphic address and post box number, maintenance of accounts by a common accountant etc. The respondent, in his affidavit, has also referred to certain decisions of different Courts, including two decisions of the Gujarat High Court, wherein according to him clubbing together of two independent firms for the purpose of applicability of the Provident Funds Act had been upheld. No report or copy of such judgments could be produced at the time of hearing. Under the circumstances, it was not possible to ascertain the facts and the circumstances of those cases and the reasoning of the Court in support of such a conclusion.

5. I have heard at length the Counsel for the parties. There is no dispute about the factual situation. It is categorically admitted by the respondent in his affidavit that the entity of the four establishments in so far as Income Tax Act, Sales-Tax Act, Bombay Shops and Establishments Act, etc. are concerned is separate. What is contended by him is that the fact that the four establishments are separate legal entities is not all relevant for the purpose of applicability of the Provident Funds Act. It is this contention that is the bone of controversy. The real dispute that falls for determination in this case, therefore, is whether the four separate and independent partnership firms can be treated as one establishment for the purpose of application of the Employees' Provident Funds Act, 1952 by taking resort to Section 2-A of the said Act.

6. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, was enacted to provide for the institution of provident funds, etc. for employees in Factories and other establishments. By virtue of Sub-section (3) of Section 1 of the Act it applies to (1) every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and (2) any other establishment employing 20 or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf. There is no dispute that Road-motor transport establishment was notified by the Central Government Sub-section (5) further provides that an establishment to which this Act applies shall continue to be governed by the Act notwithstanding that the number of persons employed therein at any time falls below twenty. The expression, "establishment" has not been defined in the Act. There was a controversy in regard to the true meaning and import of this expression. To remove such doubts, Section 2-A was incorporated in the Act by Act 46 of 1960 with effect from 31.12.1960. Section 2-A declares, for removal of doubts, 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. From a plain reading of the section itself it becomes clear that it was enacted for removal of doubts which had arisen in the past in regard to treatment of different departments or branches of an establishment situated in same place or different places. It presupposes one establishment having different departments or branches. It does not provide that different establishments may be clubbed together and treated as one establishment for the purposes of this Act. In my opinion, there is a clear distinction between "different departments or branches of one establishment" and "different establishments". It is the omission to take note of this glaring distinction that has given rise to the controversy in the present case. Most of the decisions that have been referred are decisions rendered in cases where the dispute was whether the different factories or departments of one company constituted one establishment or not. It was in this context, that the various tests were laid down. These decisions, in my opinion, do not have any bearing on the controversy in the cases before me. Take for example the decisions of the Supreme Court in *The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen*, . It was a case under the Industrial Disputes Act, 1947. A dispute has arisen in this case also as to the meaning of one establishment. In that enactment no specific test had been prescribed for determining what is one establishment as has been done in the Provident Fund Act by inserting Section 2-A. The Supreme Court, under such circumstances, took resort to considerations as in the ordinary industrial or business sense determined the unity of an industrial establishment. This was, however, a case of an industrial establishment which consisted of parts, units, departments, branches, etc. as is evident from the following observations of the Supreme Court:

"If it is strictly unitary in the sense, of having one location and one unit only, there is little difficulty in saying that it is one establishment. Where, however, the industrial undertaking has parts, branches, departments, units, etc. with different locations, near or distant, the question arises what tests should be applied for determining what constitutes "one establishment".

It was in such situation, that the various tests to determine what is one establishment were discussed. There too, it was observed (at page 63):

"Thus, in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test; and in still another case functional integrality or general unity may be the unity of employment. Indeed, in a large number of cases several tests may fall for consideration at the same time. The difficulty of applying these tests arises because of the complexities of modern industrial organisation; many enterprises may have functional integrality between factories which are separately owned; some may be integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned. In the midst of all these complexities it may be difficult to discover the

real thread of unity. In an American decision, *Donald L. Nordling v. Ford Motor Company*, (1950) 28 ALR 272, there is an example of an industrial product consisting of 3800 or 4000 parts, about 900 of which came out of one plant; some came from other plants owned by the same Company and still others came from plants independently owned, and a shutdown caused by a strike or other labour dispute at any one of the plants might conceivably cause a closure of the main plant or factory"".

As the various complexities indicated above did not arise in the case before the Supreme Court, it did not deal with the same.

The facts of the case before the Supreme Court in the aforesaid case were quite different from the present ones. In this case, a company owned a cement factory and also a limestone quarry which supplied limestone exclusively to the factory. The quarry was a feeder to the factory and without limestone from the quarry, the factory could not work. There was a manager of the quarry but he was under the manager of the factory. There was thus unity of ownership, unity of management, supervision and control, unity of finance and employment, unity of labour and conditions of service of workmen, functional integrality; general unity of purpose and geographical proximity. It was under such circumstances that the Supreme Court came to a conclusion that the limestone quarry and the factory constituted one establishment. This decision is not an authority for the proposition that two independent establishments under different ownership may be treated as one establishment by applying these tests.

6. More opposite to the controversy in this case is the Full Bench decision of the Kerala High Court in *T.A. Zainulabdeen v. R.P.F. Commissioner Kerala* reported in 1975 L.I.C. 412, where dealing with Section 2-A of the Provident Funds Act, as inserted by Act 46 of 1960, it was observed:

"Section 2-A has no application, for distinct and separate establishments cannot be treated as departments or branches of another establishment".

Reference may also be made to the decision of the Supreme Court in the *Workmen of The Straw Board Manufacturing Co. Ltd. Vs. Straw Board Manufacturing Co. Ltd.*, , where referring to the functional integrality test, it was held:

"That the unity of ownership, supervision and control that existed in respect of the two mills involved in that case and the fact that the conditions of the service of the workmen of the two mills were substantially identical were not by themselves sufficient in the eye of law to hold that there was functional integrality between the two mills".

Section 2-A of the Act also came for interpretation before this Court in *Metazinc Private Limited v. R.M. Gandhi* reported in 1991 I C.L.R. 505. In this case there were two units, one at Bhivandi Manufacturing Zinc Oxide and another at Patalganga Manufacturing Sulphuric Acid, both owned by the same company.

There was consolidation of their accounts also. The question arose whether these two units owned by the same company can be treated as one establishment. The answer was in the negative. It was held that as there was nothing which could be said to be indicative of the two units being a department or a branch of each other, they could not be termed as one establishment. To the same effect is the decision reported in *Allana Sons Private Ltd. v. R.M. Gandhi* 1991 I C.L.R. 743. I do not propose to multiply the authorities as in my opinion, the controversy in this case is simple. The four partnership firms in this case are admittedly separate establishments in so far as Partnership Act, Income Tax Act, Sales-Tax Act, Shops and Establishments Act are concerned. The rights and liabilities of the partners in each firm depend on the terms and conditions of the partnership agreement subject however to the provisions of Indian Partnership Act. In no way, these firms are interconnected, except for the fact that some of the partners in these firms are common. But here again, all the partners are not identical. Not only the composition of the partners but the number of partners, their shares, etc. all are different. The business of these firms is also not the same. The firms are in existence since 1964 from much before 1975 when the provisions of the Provident Funds Act were made applicable to the activities undertaken by one of the firms, namely, Sunder Transport. It is also, therefore, not possible to contend that these firms were created as separate and independent firms to avoid the liability under the Provident Funds Act. The factors, such as, situation of the office of these firms in one premises, user of a common telephone number and post box number and employing the services of the same person to write the accounts, on which reliance has been placed by the Regional Provident Fund Commissioner for the purpose of clubbing together these four firms and treating them as one establishment within the meaning of Section 2-A of the Act are, in my opinion, not relevant once they are considered in the background of the totality of the facts and circumstances of the case.

7. A partnership, as defined by Section 4 of the Indian Partnership Act, 1932, is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one other are called individually as "partners" and collectively a "firm". The firm name is only a collective name for the individual partners. It is the relationship between the partners which constitutes the partnership. The relation is founded on the agreement between them. Each partnership is a distinct relationship. Each partnership agreement constitutes a distinct and separate partnership and therefore distinct and separate firm. In a given case, the partners may be different, but the nature of the business may be the same. In another case, the business may be different but the partners may be the same. An agreement between the partners to carry on a business and share its profits may be followed by agreement between the same partners to carry on another business and to share the profit therein. The intention may be to constitute two separate partnerships and, therefore, two distinct firms or it may be to extend merely a partnership originally constituted to carry on one business

to the carrying on of another business. It will all depend on the intention of the partners which has to be decided with reference to the terms of the agreement between them and all the surrounding circumstances. [See Deputy Commissioner of Sales Tax (Law) v. K. Kelukutty (1985) 60 STC 7. Difficulties sometimes do arise in deciding whether two partnerships having identical partners are two different firms or in fact they are one firm governed by two agreements. But the position will be different where the partners are not identical. Because the firm is merely a collective name for the individual partners and if the partners in two firms are not identical, it cannot be said that there is one firm. Existence of some common partners will not make any difference. Because in that event, the partners who are not common will have no right, liability or interest in firm in which they are not partners. The two partnerships are constituted by different set of persons. Each agreement between such persons, thus constitutes a distinct and separate partnership, and, therefore, distinct and separate firms. Applying these principles, in the present case, there is not much difficulty in deciding whether the four firms are one firm or distinct and separate firm. The facts are not in dispute. There are four separate partnership firms carrying on business since 1964. Each firm has been constituted under a different agreement of partnership and has a different set of partners. Each firm is separately registered with the Registrar of Firms and under all other relevant enactments. The income of all these firms is also being assessed under the Income-tax Act treating them as separate firms. On the face of these facts, it is difficult or rather impossible to hold that any of these firms is a branch or department of the other. The respondent in this case has clubbed the three firms, namely, (1) M/s. Bafna Motors, (2) Bafna Investment and (3) M/s. Bafna Finance with M/s. Sunder Transport, meaning thereby that they are branches or departments of Sunder Transport. This action, on the face of it, is not tenable because at no stretch of imagination, the three firms can be said to be branches or departments of the firm M/s. Sunder Transport. The partners of each of these three firms are different from those of Sunder Transport. In fact, none of these firms is a branch or department of the other. They are in no way dependent on each other for their existence or functioning. They are carrying on separate and independent businesses. All these circumstances clearly go to show that these four firms are distinct and separate firms.

8. However, before finally concluding the matter, I think it necessary to refer to a decision of this Court in J.G. Vakharia Vs. Regional Provident Fund Commissioner, , on which heavy reliance was placed by the learned Counsel for the respondents. This was a case under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. In this case, a silk mill was run by a partnership consisting of father and son. On the death of his father, the son entered into partnership with his two major sons. Shortly before the advent of Employees' Provident Funds Act, the Factory was made to close its business. Subsequently, the various machineries were leased to the members of the family owing separate units. Under the terms of the lease, they were bound to work in

priority for the parent lessor company. On a question as to whether the various units run by the members of the family should be considered as distinct and independent units or as a subterfuge to avoid the liability of contribution under Employees" Provident Funds Act, it was held that the five units were not independent units; they were clearly inter-dependent and in between them, they carried on same process which the original mill was carrying on and the process were earned on for the benefit of the original mill and for no one else. It was found in this case that the entire transaction was subterfuge to avoid the liability of contribution under the Provident Funds Act. In fact, the parent partnership firm continued to carry on the business through the separate units artificially set up. It was under such circumstances that the aforesaid decision was rendered. It is evident from the following conclusion:

"In our opinion, this is a clear case of a subterfuge and this subterfuge cannot be permitted to succeed so as to defeat the rights of the employees who are benefited by the Employees" Provident Funds Act".

This decision apparently has no application to the facts of the present case where there is nothing to show that the four firms were artificially set up as a subterfuge to avoid the liability of contribution under the Act. On the contrary, the admitted position is that these firms came into existence in 1964 whereas the provisions of the Act were applied to them only from 1975. It was not a case of application of Section 2-A of the Act which was inserted only in the year 1960.

9. In the premises aforesaid, it is difficult to hold that Section 2-A is attracted in the present case. The orders of the Regional Provident Funds Commissioner allotting a Code number to one of the firms by clubbing all the four firms together and the impugned order dated 27.1.1988 determining the amount payable by them u/s 7-A of the Act (Annexure A) and the impugned notice dated 27.1.1988 directing them to pay the same are all illegal and as such being set aside.

10. It appears from Annexure-D that even on the basis of the material available with the respondent, M/s. Sunder Transport, M/s. Bafna Investment Corporation and M/s. Bafna Motors were not employing 20 or more persons. The maximum number of employees according to the records (Exh.D) in the year 1975 in these three firms was 6, 10 and 5, respectively. These firms are, therefore, clearly outside the purview of the Act. So far as Bafna Motors is concerned, the report (Exh.D) shows that maximum number of employees in 1975 was 25. Counsel for the petitioner submits that neither the number is correct nor does this firm fall within the purview of the Act u/s 1(5) read with the relevant notification issued thereunder. The order, according to him, was passed without giving the petitioner an opportunity of hearing on this count. The respondent, therefore, shall be at liberty so far as Bafna Motors is concerned to proceed with the determination of their liability, if according to him independently it falls under the purview of the Act and after giving due notice and proper opportunity of hearing, pass such orders as he may deem fit in accordance with law.

11. In the result, all the four writ petitions are allowed. No order as to costs.
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