The Management of Hotel Pratap Plaza Vs The Presiding Officer Employees' Provident Fund Appellate Tribunal and The Regional Provident Fund Commissioner

Court: Madras High Court

Date of Decision: July 27, 2011

Acts Referred: Employees Provident Funds and Miscellaneous Provisions Act, 1952 â€" Section 1(3), 16(1), 16D, 17, 2A

Citation: (2011) 131 FLR 474

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: S. Ravindran, for T.S. Gopalan and Co, for the Appellant; K. Gunasekar, for R1, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K. Chandru, J.
The Petitioner is the Management of Hotel Pratap Plazarepresented by its Partner. The writ petition is filedagainst the

order passed by the first Respondent Employees''Provident Fund Appellate Tribunal made in ATA No. 94(13)2002 dated 13.04.2010. By the

aforesaid order, theTribunal upheld the order passed by the second Respondentunder Section 7-A of the Employees Provident Funds and

Miscellaneous Provisions Act, 1952 (for short PF Act) dated06.05.1996 and dismissed the appeal filed by the Petitioner.

2. The writ petition was admitted on 30.04.2010. Pending the writ petition, this Court order notice on the application for stay.

3. It is the case of the Petitioner that oneM/s.M.P. Rao and Company was registered as partnership firmin the year 1970 and it had four partners

and they allbelong to the same family. The firm was engaged in finance business. However, in the year 1983, the finance company was wound up.

Subsequently, the firm engaged in the business of hiring machinery such as Generators, lights andother equipments for Film and other Industries and

thatbusiness was closed during the year 1991. The machineries were also sold and the employees engaged by them were discharged after settling

their accounts. Thereafter, the firm decided to explore the possibility of utilizing itslanded property at No. 96-C, Kodambakkam High Road,

Chennai - 34. Accordingly, in that property, the Hotel was constructed and the hotel business commenced from04.03.1993. During the period

between 1991 and 1993, the firm did not carry on any business. After the hotel was started with effect from 04.03.1993, they were entitled to

have infancy protection in terms of Section 16(1)(b) of the PF Act. Therefore, the employees engaged by them were liable to be covered by the

provisions of the PF Act after the infancy period of three years with effect from04.03.1996. However, even before the expiry of infancy period, all

the employees in the Hotel were covered by the provisions of the PF Act from 01.07.1995 onwards.

4. The Petitioner submitted a proforma to the second Respondent. The second Respondent by a letter dated30.10.1995 sought for certain

clarifications from the Petitioner. Thereafter, the second Respondent, by a letter dated 09.01.1996 informed the Petitioner that since the Hotel was

a Unit of M/s.M.P. Rao and Company, who were having 31 persons during May 1993, it was liable to becovered from 01.05.1993 itself and was

not entitled for any infancy protection. The Petitioner was also allotted a code number and was called upon to remit contributions. They were also

directed to send the arrears of contribution for the period from 01.05.1993 to 31.12.1995. An enquiry u/s 7-A was also conducted and by

proceedings dated06.05.1996, the second Respondent held that the Petitioner was bound to implement provisions of the Act from01.05.1993 and

are also liable to pay the damages.

5. Aggrieved by the said order, the Petitioner preferred an appeal u/s 7-I of the PF Act before the first Respondent Tribunal. Along with the

appeal, they have also enclosed 17 documents in support of their memorandum of appeal. The Tribunal after notice to the second Respondent held

that the Petitioner is not entitled for infancy protection. The Hotel business was started in the year 1993 when Section 16-D was in force. The

Tribunal further held that to avail the benefit of infancy protection, the Petitioner must show that it was a new establishment. Even as per the appeal

memo, it was the same firm which was doing different business. Hence, the owner was one and the same. The Tribunal referred to the judgment of

the Supreme Court in Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, , wherein, the Supreme Court held that mere investment of

additional capital or affecting the repairs to the existing machinery business can not make it a new business. The diversification of the line of

production will not make it as a new factory. The Tribunal held that since the owner and finance are the same and there was only change of

business, the Petitioner''shotel business cannot be construed as a new establishment. Hence, the order of the second Respondent was upheld by

the Tribunal.

6. On notice from this Court, the second Respondent has filed a counter affidavit dated 13.07.2011. It was contended that M/s.M.P. Rao and

Company and the Petitioner are not two different establishments. One is the continuation of the other with a different name and style. Hence, it was

contended that the Petitioner cannot claim any infancy protection.

7. The learned Counsel for the Petitioner also filed an additional typed set containing the list of Annexures enclosed along with the appeal filed

before the Tribunal. A perusal of the order of the Tribunal does not show that it had even looked into those Annexures before rendering the

finding. No legal finding can be given unless the facts are looked into by the Tribunal.

8. The learned Standing Counsel for the PF Department referred to the judgment of the Supreme Court in State of Punjab Vs. Satpal and

Another, . Reliance was placed upon the following passages found in paragraphs 6 to 8, which is as follows:

6. The contention of the Respondents is that the business which they were running in1964-65 was an entirely different business and was not the

same business which TirathRam 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 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 an 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

nails 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 acertain number of persons in factories overa 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 this law. This was laid

down by this Court in very explicitterms in Civil Appeal Nos. 572 and 573 of1964, decided on October 6, 1965 (Lakshmi Rattan Engineering

Works v. Regional Provident Fund Commissioner, Punjab).

8. The most important question which arises for consideration in this case is whether the period of infancy is to be calculated from 9-11-1957

when the establishment was first begun or from 13-11-1962 when the employment of 20 or more workmen first commenced. This point is also

covered in the case we have cited above. A further ruling on the subject exists in R. Ramakrishna Rao v. State of Kerala1. In that case also

employment of 20 or more persons began later than the commencement of the establishment. Explaining the Sub-section, this Court states that the

word ""is"" in the Sub-section clearly indicates a newly started business, and the word ""has been"" a business which has been in existence before. It

is, there fore held that the period of infancy must be calculated from the first establishment of the factory and not from the moment of time when the

figure of 20 or more is first reached.

9. The learned Standing Counsel further 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 defence of the accused in that case was that the Cooperative Society of

which he was the Secretary had acquired the press in question in March 1961 and had established anew press subsequently and hence the Act

was not 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, anew 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, out of 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 was held that a new establishment

had come into existence. In the case before us, it is seen that about 70 per cent of the former work men had been employed by the Appellant and

there was no change of machinery. Further this is a case where the interruption of work had taken place owing to the order in the winding up

proceedings. It is relevant to state here that this Court in the course of its judgment in the above case did not over rule the decision of the Calcutta

High Court in Bharat Board Mills Ltd.2 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 in Vittaldas Jagannatahdas v. Regional

Provident Fund Commissioner 13 but that does not 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.

10. On the contrary, Mr. S. Ravindran appearing for M/s.T.S. Gopalan and Co., learned Counsel for the Petitioner 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 2-A of the Act which declares 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 establishment. In such cases, the court has to consider how far there is functionalintegrity

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. Infact, this Court set out certain tests in Pratap Press v.

Secy., Delhi Press Workers'' Union1. However, we may point out that each case would depend upon its own peculiar facts and has to be decided

accordingly.

11. 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 asingle 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 Actunder Section 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 u/s 17of 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 Acton

the ground that it falls short of the number of employees.

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

12. The learned Counsel further referred to the judgment of 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-A 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 Counsel for the Appellant was the fact that the Respondent-Company was the owner not only of the

Ambarnath factory but also of Rohafactory. On the basis of common ownership it was submitted that necessarily the Board of Directors could

control and supervise the working of Roha factory also and therefore according to the learned Counsel, it couldbe said that there was

interconnection between Ambarnath factory and Roha 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 greached by the High Court, as extracted earlier, clearly shows that

there was noevidence to indicate any such inter connection 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 Counsel for the Appellant for culling out interconnection between Ambarnath factoryand Roha 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 it self can

not be sufficient unless there is clear evidence to show that there was inter connection 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 Roha factory was a part and parcel of Ambarnath factory or it was an adjunct of the main parent

establishment functioning at Ambarnath since 1921.

13. The learned Counsel for the Petitioner 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 contention raised by the Respondent was rejected.

14. In the light of the rival contentions, it has to be seen whether the Tribunal had adverted to all there levant facts before dismissing the appeal. As

noted already, the Tribunal passed a cryptic order and affirmed the order passed by the second Respondent. When an appeal is filed with

necessary enclosures, the Tribunal has to advert to those Annexures and pass an order after applying its mind on the relevant particulars. The

Tribunal except relying upon the judgment of the Supreme Court in Sayaji Mills''s case (cited supra) did not take note of the subsequent legal

developments.

15. In this regard, it is necessary to refer to the judgment of the Supreme Court in Regional Provident Fund Commissioner Vs. Raj''s Continental

Exports (P) Ltd., . In paragraphs 2 and 3, it was held as follows:""2. Background facts in a nutshell are asfollows:

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, a 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 a 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/s Continental Exporters. The High Court as a 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/s Continental Exporters were not one and thesame.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.

16. 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 are 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 II Ion 28-9-2001 in both the appeals.

17. In the present case, the Petitioner is not doing the same business and the employees are not the same employees. Merely because the

ownership of the establishment are the same does not automatically enable the authorities to come to the conclusion that it is a continuous business

and not a new establishment.

18. In the light of the above, the writ petition stands partly allowed and the impugned order of the Tribunal is set aside. The matter is remitted to

the first Respondent Employees'' Provident Fund Appellate Tribunal for fresh disposal in accordance with law. The Tribunal shall dispose of the

appeal after taking note of all the relevant facts indicated in the judgment and after due notice to the parties, 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. Consequently, connected miscellaneous petition is closed.