SUPREME COURT OF INDIA

L.N.Gadodia & Sons & Anr.

Vs.

Regional Provident Fund Commr.

SLP(Civil)No.11230 of 2008

(J.M.Panchal and H.L.Gokhale,JJ.,)

26.09.2011

JUDGMENT

H.L.Gokhale,J.,

1. This Special Leave Petition raises the question as to whether the respondent herein had erred in clubbing the two appellant concerns for the purposes of applying the provisions of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Provident Funds Act).

Facts leading to this Special Leave Petition –

2. The facts leading to this petition are this wise. The petitioner no.1 herein and petitioner no.2 (M/s Delhi Farming and Construction Pvt. Ltd.) are sister concerns. The office of the respondent wrote to them vide their letter dated 11.6.1990 calling upon them to comply with the provisions of the Provident Funds Act, failing which legal action would be initiated against them. The petitioner filed an application, and disputed clubbing of the two concerns for the purposes of their coverage under the provisions of the said Act. The application was accordingly heard by the Regional Provident Fund Commissioner (Enforcement and Recovery) Delhi, under the provisions of section 7A of the Provident Funds Act. He heard the legal advisor of the petitioners as well as the enforcement officer representing the provident fund department. It was submitted on behalf of the petitioners that the second petitioner was incorporated in 1930 as the Delhi Cattle Farming Private Limited, and in the year 1983 it's name was changed to the present name i.e. Delhi Farming and Construction Private Limited (`Delhi Company' for short). The first petitioner was incorporated as another Private Limited Company in the year 1941, and there was no connection between the activities or business of the two companies. They were different and separate legal entities, and should not be clubbed into one establishment. It was pointed out that the main business of the second petitioner i.e. the Delhi Company was to acquire lands and farms for the purpose of cultivation and to engage in other agricultural activities. After its land was acquired by Delhi Administration in 1959 and after receiving compensation, the second petitioner shifted its business to purchase of gas cylinders and giving them on hire, supplying

security equipments to the Government of India, and supply of gray/processed fabrics to readymade garments exports though this was only a side business. It was pointed out that as far as the first petitioner is concerned, their business was only as a selling agent of Calico Mills and Tata Mills, Ahmedabad. It was also trading in whole-sale cloth business. It was not disputed that both the companies have their registered office at 1112, Kucha Natwan, Chandni Chowk, Delhi-6 but it was stated that the Delhi Company carries its business and commercial activities at 116, Hans Bhawan, Bahadur Shah Zafar Marg, New Delhi-110002. Shri R.G. Gadodia and Shri T.P. Gadodia were no longer the Directors in either of the two companies, and only Smt. Sudha Gadodia was Director in both the companies.

3. On the other hand, the enforcement officer pointed out that apart from the fact that the two companies had common registered office, Shri R.G. Gadodia and Shri T.P. Gadodia were the common Directors in both the units at the time of inspection and clubbing. Apart from Smt. Sudha Gadodia being admittedly a Director in both the units, Shri T.P. Gadodia was the Managing Director in both the units. It was further pointed out that as per the Audited Report of the Delhi Company dated 24.4.1988, it had given a loan of Rs.5 lakh to the first petitioner. Two officers viz. Shri G. Ventakeshwaran and Shri S.K. Shome were employed by both the units as Technical Manager and Commercial Manager respectively. The two companies had the same telephone nos. i.e. 2512890 and 2513009. Both the units were using the same gram number which was `GadodiaSon'.

4. In rebuttal, the petitioners pointed out that the Delhi Company had its own separate staff. The above referred two telephone nos. were in the name of the first petitioner and the second petitioner had another telephone no. i.e. 3318668. As far as the loan aspect is concerned, it was pointed out that the loan of Rs.5 lakh was just one loan to the first petitioner, and the Delhi Company had given loans to the tune of about Rs. 27 lakhs to different entities. The enforcement officer however pointed out that at the time of inspection it was noticed that the employees were being swapped between the two companies. Although the first petitioner had its branches at Bombay, Amritsar, Ahmedabad and Kanpur, the number of employees in the Delhi office of this company and the second petitioner were kept below 20 to avoid coverage under the Provident Funds Act. Having considered all these facts and the submissions by both the parties, the Provident Fund Commissioner came to the conclusion that there was an integrity in the management, finance and the workforce of the two companies, and the entire business was being run by one family. The management and the supervision was in the hands of the same Managing Director, and the finances of one company were being used by the other. In view of this, he held that both the units belonged to one establishment, and they have to be clubbed together for the purposes of application of the Provident Funds Act. He therefore, passed an order to proceed to determine the dues from the petitioners, and directed that further proceedings in the enquiry be taken up by the concerned Presiding Officer.

5. This order was challenged by the petitioners before the Employees Provident Fund Appellate Tribunal by filing an appeal No.ATA-167(4)/2000 under Section 7D of the Provident Funds Act. The Tribunal accepted the submission of the petitioners that the two units were separate private limited companies, and since a company is a juristic person, merely because there is a common Managing Director, the two units cannot be considered to

be one establishment. One company taking a loan of Rs.5 lakh from another, does not make them financially integrated. He also observed that there was no evidence to show that the two officers were mentioned as employed at the same time in the two companies. He relied upon section 2A of the Act, and submitted that considering different departments or branches of an establishment as one establishment was one thing, and considering different establishments as one establishment was another. Merely because the departments or branches of an establishment are to be treated as a part of the establishment, two establishments cannot be taken to be one. He, therefore, allowed the appeal and held that clubbing was not possible in the facts of the case, and set-aside the order of the first respondent.

6. Being aggrieved by that order, the respondent filed a petition bearing No. W.P.(C) 5669/2001 in the High Court of Delhi. A Single Judge of Delhi High Court who heard the matter examined the material on record, and considered the authorities cited by both the parties governing the legal position. Having considered all these aspects, he held that the Tribunal was swayed by the fact that the two companies are separate legal entities. He noted that the law laid down by this Court on this aspect was clear. What is to be seen is the proximity of the two units and common management. There was no error in the order passed by the Provident Fund Commissioner. The Appellate Tribunal had no reason to interfere therein. In his view, the order of the Tribunal was perverse and contrary to law. He, therefore, set-aside the same and allowed the petition.

7. The petitioners filed an appeal against the decision of the Single Judge being LPA No.399/2007. After examining the submissions of both the parties, the Division Bench came to the same conclusion as the single Judge and dismissed the appeal by passing a detailed judgment and order dated 20.12.2007.

8. The present Special Leave Petition has been filed to challenge this judgment and order dated 20.12.2007. We have heard Mr. S.K. Dholakia, Sr. Advocate for petitioners, and Ms. Shrabani Chakrabarty for the respondent. We have noted the submissions made by both the counsel, as well as the authorities relied upon by them. Consideration of the rival submissions –

9. As noted earlier, the main question in this appeal is whether the two units are to be regarded as one establishment for the purposes of the Provident Funds Act. Welfare economics, enlightened self interest and pressure of trade unions led the larger factories and establishments to introduce the schemes of provident fund for the benefit of their employees. But the employees of small factories and establishments remained away from these benefits. With the increase in the number of smaller factories and establishments, there was a need of a beneficial enactment for the employees engaged therein. The Provident Funds Act, is a welfare enactment brought into force for that purpose. The Parliament was concerned with the issue of making an appropriate provision for the employees in the factories and the establishments after their retirement, and for the benefit of their dependents in case of early death of the employees. That is how the Provident Funds Act came to be enacted in the year 1952, which requires a compulsory contribution to the fund and which is independently managed by the Provident Fund Commissioner. The employer and employees covered

thereunder, both contribute towards this fund. As per the present provision of section 6 of the Provident Funds Act, both of them have to contribute to the fund an amount equivalent to 10% of the basic wage and dearness allowance (and retaining allowance, if any) per month. The Central Government has the power to raise this contribution to 12% after making an appropriate enquiry. The contribution to fund earns an appropriate interest thereon. As stated above, after the retirement of the employee or in the event of need of finance for specified reasons, or in the event of his death prior thereto, the amount becomes available.

10. In para 5 of *Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner reported in*[1] this Court has explained as to what should be the approach towards this legislation in the following words :-

> "5. At the outset it has to be stated that the Act has been brought into force in order to provide for the institution of provident funds for the benefit of the employees in factories and establishments. Article 43 of the Constitution requires the State to endeavour to secure by suitable legislation or economic organisation or in any other way to all workers, agricultural, industrial or otherwise among others conditions of work ensuring a decent standard of life and full enjoyment of leisure. The provision of the provident fund scheme is intended to encourage the habit of thrift amongst the employees and to make available to them either at the time of their retirement or earlier, if necessary, substantial amounts for their use from out of the provident fund amount standing to their credit which is made up of the contributions made by the employers as well as the employees concerned. Therefore, the Act should be construed so as to advance the object with which it is passed. Any construction which would facilitate evasion of the provisions of the Act should as far as possible be avoided....."
>
> (emphasis supplied)

The present controversy with respect to the applicability of theProvident Funds Act has to be approached with this perspective.

11. Now, on the question as to whether such two units should be considered as one establishment or otherwise, there is no hard and fast rule. However, guidelines have been laid down in two judgments of this Court rendered way back in the years 1959-60 and they are followed from time to time. Thus, in The *Associated Cement Companies Ltd., Chaibasa Cement Works, Jhinkpani Vs. Their Workmen reported in*[2] a bench of three judges was considering the question as to whether the factory and the limestone quarry belonging to the appellant company should be considered as one establishment for the purpose of Industrial Disputes Act, 1947. This Court observed therein as follows:-

> "11. ..... What then is `one establishment' in the ordinary industrial or business sense? ..... It is, perhaps, impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units etc. If in their true relation they constitute

one integrated whole, the establishment is one; if on the contrary they do not constitute one integrated whole, each unit is then a separate unit. How the relation between the units will be judged must depend on the facts proved, having regard to the scheme and object of the statute which gives the right of unemployment compensation and also prescribes a disqualification therefor. 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, the important test may be the unity of employment. Indeed, in a large number of cases several tests may fall for consideration at the same. The difficulty of applying these tests arises because of the complexities of modern industrial organization; 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."

Later in paragraph 5 of *Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers' Union Delhi reported in*[3] another bench of three judges explained the above proposition in Associated Cement Company (supra) in the following words:-

" .....While pointing out that it was impossible to lay down any one test as an absolute and invariable test for all cases it observed that the real purpose of these tests would be to find out the true relation between the parts, branches, units etc. This court however mentioned certain tests which might be useful in deciding whether two units form part of the same establishment. Unity of ownership, unity of management and control, unity of finance and unity of labour, unity of employment and unity of functional "integrality" were the tests which the Court applied in that case.....

12. Accordingly, depending upon the facts of the particular case, in some cases the concerned units were held to the part of one establishment whereas, in some other cases they were held not to be so. *Regional Provident Fund Commissioner Vs. Dharamsi Morarji Chemical Co. Ltd. reported in*[4] *and Regional Provident Fund Commissioner Vs. Raj's Continental Export (P) Ltd. reported in*[5] are cases where the two units were held to be independent. In Dharamsi Morarji (supra), the appellant company was running a factory manufacturing fertilizers at Ambarnath in Distt Thane, Maharashtra since 1921. The appellant established another factory at Roha in the adjoining district in the year 1977 to manufacture organic chemicals with separate set of workers, separate profit and loss account, separate works manager, plant superintendents and separate registration under the Factories Act. The two were held to be separate for the purposes of coverage under the Provident Funds Act. In Raj's Continental Export (supra), Dharamsi Morarji was followed since the two entities had separate registration under the Factories Act, Central Sales Tax Act, 1956, Income Tax Act, 1961, Employee State Insurance Act, separate balance sheets and audited statements and separate employees working under them.

13. As against that in *Rajasthan Prem Krishan Goods Transport Co. Vs. Regional Provident Fund Commissioner, New Delhi reported in*[6] and *Regional Provident Fund Commissioner,*

Jaipur Vs. Naraini Udyog and others reported in[7] the concerned units were held to be the units of the same establishment. In Rajasthan Prem Kishan Goods Transport Co. (supra) the trucks piled by the two entities were owned by their partners, ten out of thirteen partners were common, the place of business was common, the management was common, the letter-heads bore the same telephone numbers. In Naraini Udyog (supra) the two entities were located within a distance of three kilometers as separate small-scale industries but were represented by the members of the same Hindu undivided family. They had a common head office at New Delhi, common branch at Bombay and common telephone at Kota. The accounts of the two entities were maintained by the same set of clerks. Separate registration under the Factories Act, The Sales Tax Act and The ESIC Act were held to be of no relevance and the two units were held to be one establishment for the purpose of Provident Funds Act.

14. In the present case the Directors of the two petitioner companies belong to the same family. The Managing Director is common. The two senior officers i.e Commercial Manager and Technical Manager are common. At the time of inspection, the Enforcement Officer noticed that the employees of the two companies were being swapped. Both of them have same registered address and common telephone numbers and a common gram number. The audited accounts revealed that the second petitioner company had given a loan of Rs. 5 lakhs to the first petitioner in the year 1988. The two companies are family concerns of the Gadodia family. Hence, in the facts of the present case we have to hold that there is an integrity of management, finance and the workforce in the two private limited companies. The two companies have seen to it that on record each of the two entities engage less than twenty employees, although the number of employees engaged by them is more than twenty when taken together. The entire attempt of the petitioners is to show that the two entities are separate units so that the Provident Funds Act does not get attracted. The material on record however, leads to only one pointer that the two entities are parts of the same establishment and in which case they get covered under the Provident Funds Act.

15. As the preamble of the Provident Funds Act states, `it is an act to provide for the institution of provident funds, pension fund and deposit-linked insurance fund for employees in factories and other establishments'. The term factory is defined under section 2 (g) of the Act, however, there is no definition of an establishment or a commercial establishment in the statute. Inasmuch as the petitioners are entities situated in Delhi, we may profitably rely upon the definition of `establishment' and `commercial establishment' under the Delhi Shops and Establishments Act, 1954. The definition of establishment is available in section 2 (9) and that of commercial establishment in section 2 (5) thereof. These two definitions read as follows:-

> "Section 2(9) Establishment-
> "establishment" means a shop, a commercial establishment, residential hotel, restaurant, eating house, theatre or other places of public amusement or entertainment to which this Act applies and includes such other establishments as Government may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act;

> Section 2(5) Commercial establishment 2(5) "commercial establishment" means any premises wherein any trade, business or profession or any work in connection with, or incidental or ancillary thereto, is carried on and includes a society registered under theSocieties Registration Act 1860 (XXI of 1860) and charitable or other trust, whether registered or not, which carries on any business, trade or profession or work in connection with or incidental or ancillary thereto, journalistic and printing establishments, contractors and auditors establishments quarries, and mines not governed by the Mines Act, 1952 (XXXV of 1952), educational or other institution run for private gain and premises in which business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on, but does not include a shop or a factory registered under the Factories Act, 1948 (LXIII of 1948), or theatres, cinemas, restaurants, eating houses, residential hotels, clubs or other places of public amusement or entertainment;"

It cannot be denied that the two petitioners carry on a trade or business for private gain from the premises wherein the two companies are situated. They would therefore, fall within the definition of `commercial establishment' and consequently, under the definition of `establishment'. The only question is whether they are to be treated as two separate establishments or one establishment for the purposes of this act.

16. The petitioners have contended that the two entities are two separate establishments. They have tried to draw support from section 2(A) of the Act which declares that where an establishment consists of different departments or has branches whether situated in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment. It was submitted that only different departments or branches of an establishment can be clubbed together, but not different establishments altogether. In this connection, what is to be noted is that, this is an enabling provision in a welfare enactment. The two petitioners may not be different departments of one establishment in the strict sense. However, when we notice that they are run by the same family under a common management with common workforce and with financial integrity, they are expected to be treated as branches of one establishment for the purposes of Provident Funds Act. The issue is with respect to the application of a welfare enactment and the approach has to be as indicated by this Court in Sayaji Mills Ltd. (supra). The test has to be the one as laid down in Associated Cement Company (supra) which has been explained in Management of Pratap Press (supra).

17. The Provident Fund Department had issued notice to the petitioners on 11.6.1990 on the basis of their inspection. It had relied upon the 1988 Audit Report of the petitioners. The petitioners had full opportunity to explain their position in the inquiry before the Provident Fund Commissioner conducted under Section 7A of the Provident Funds Act. The petitioners, however, confined themselves only to a facile explanation. If according to them, the management, workforce and financial affairs of the two companies were genuinely independent, they ought to have led the necessary evidence, since they would be in the best know of it. When any fact is especially within the knowledge of any person, the burden of proving that fact lies on him. This rule (which is also embodied in section 106 of the Evidence Act) expects such a party to produce the best evidence before the authority

concerned, failing which the authority cannot be faulted for drawing the necessary inference. In the facts and circumstances of the present case, the Provident Fund Commissioner was therefore justified in drawing the inference of integrity of finance, management and workforce in the two petitioners on the basis of the material on record.

18. The Regional Provident Funds Commissioner was therefore, entirely justified in taking the view that on the facts and law, the two petitioners had to be clubbed together for the purposes of their coverage under the Provident Funds Act. The Appellate Tribunal clearly erred in re-appreciating the facts on record and applying wrong propositions of law thereto. The learned Single Judge was therefore required to set-aside the order of the Appellate Tribunal in view of his conclusion that the order was contrary to the facts and the law, and was perverse. The Division Bench has rightly confirmed the order passed by the learned Single Judge.

19. In the circumstances, this petition is dismissed. The concerned officer of respondent will now proceed for the determination and recovery of the provident fund dues from the petitioners in accordance with law. There will be no order as to the costs.

Judgment Referred.

[1]*AIR 1985 SC 0323*
[2]*AIR 1960 SC 0056*
[3]*AIR 1960 SC 1213*
[4]*(1998) 2 SCC 0446*
[5]*(2007) 4 SCC 0239*
[6]*(1996) 9 SCC 0454*
[7]*(1996) 5 SCC 0522*