

Associated Polymers Ltd. Vs. Union of India (Uoi) and ors.

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Court : Mumbai

Decided On : Feb-19-1997

Reported in : (1999)IIILLJ1543Bom

Judge : S.H. Kapadia, J.

Acts : Employees' Provident Funds and Miscellaneous Provisions Act, 1952 - Sections 7A and 16(1)

Appeal No. : O.O.C.J. Writ Petition No. 2049/1993

Appellant : Associated Polymers Ltd.

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : R.C. Master, Adv.

Advocate for Pet/Ap. : P.K. Rele and ;S.K. Talsania, Advs., i/b., Crawford Bayley & Co.

Judgement :

S.H. Kapadia, J.

1. By this Writ Petition, Petitioners seek to challenge the Order passed by the R.P.F.C. on May 4, 1993 under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to for the sake of

brevity as 'the said Act', 1952). By the impugned order, R.P.F.C. has come to the conclusion that as a subsidiary company, Petitioners are a Department/ Branch of the holding Company Schrader Duncan Limited (S.D.L. for short)

2. The facts giving rise to this petition briefly, are as follows:--

3. Petitioners are a Company incorporated under the Companies Act. It has a registered Office at Nariman Point. It has a factory at M.I.D.C., Tarapor, Boiser in Greater Bombay. Petitioners are engaged in the manufacture of rubber sheets. They obtained loans from the State Industrial Investment Corporation of Maharashtra for purchasing plant and machinery in respect of their factory at Boiser. They commenced their production from November 8, 1977. They employed less than 50 workers under Section 16 of the Act, 1952. They got the benefit of infancy period for five years and they are covered under the Act with effect from November 30, 1982 as they started their production from November 8, 1977. By letter dated February 19, 1982, from the Office of the R.P.F.C., Petitioners were intimated that the Act was made applicable to them from November 30, 1982. By the said letter, they were communicated with a separate Code No. MH/21661 and they were covered under the scheduled item as establishment engaged in manufacturing of rubber and rubber products. Petitioners have made contributions under the Act from November 30, 1982 (sic.) and it is not in dispute that the Petitioners have complied with the provisions of the Act from that date. However, the Petitioners received a letter on December 16, 1985 from R.P.F.C. stating that on re-examination of the records of the Petitioners, it was revealed that the Petitioners were part and parcel of S.D.L. and, therefore, the Petitioners were required to implement the Act from November 1, 1975 i.e. the date on which the Petitioners - Company were incorporated. By reply dated January 16, 1986, Petitioners informed the R.P.F.C. that they were a Public Limited Company; that they were a separate legal entity under the Companies Act; that the Petitioners were not part and parcel of S.D.L.; that they were employing less than 50 workers during the relevant time; that they were entitled to infancy period which was at that time for five years and since the Petitioners have been implementing the Act, they were not liable to be covered from November 1975. In August, 1987, Petitioners received two notices dated August 7, 1987 and August

21, 1987 by which the R.P.F.C. alleged that the petitioners had failed to pay the Employees' Provident Fund and other contributions under the said Act from November 1975 to November 1982 and they were asked to show cause why contributions for the said period should not be recovered as arrears of land revenue. By the said Notices, Petitioners were given an opportunity to show cause under Section 7-A of the said Act 1952. By reply dated August 25, 1987 once again the Petitioners narrated the above facts and inter alia submitted that they were a subsidiary of S.D.L. which was a holding Company and that under the provisions of Section 4 of the Companies Act, they were a separate legal entity and in the circumstances they cannot be treated as a Department or a Branch of S.D.L. By further reply dated April 16, 1988, particulars were furnished by the Petitioner and it was pointed out that machinery utilized by the Petitioners was totally different and distinct from the machinery utilized by the S.D.L. and the items manufactured by the Petitioners were never manufactured by the S.D.L. It was also pointed out that even before incorporation of the Petitioners, S.D. L. used to purchase the said items from the market which subsequently were purchased by S.D.L. as raw material from the Petitioner's Company. On May 29, 1993, Petitioners received an order dated May 4, 1993 by which the R.P.F.C. treated the Petitioners as part and parcel of S.D.L. and the Petitioners were informed that they were covered under the provisions of the Act from November 1, 1975 instead of November 30, 1982. In other words, the benefit of infancy period under Section 16(1)(b) came to be withdrawn. Being aggrieved by the impugned order, the present writ petition has been tiled.

4. As a prelude, I would like to point out that time has come for this Court to give a broader interpretation to the provisions of Section 16(1)(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. With the globalization and liberalization taking place in the economy, the Government plans to give incentive to entrepreneurs to establish new Companies so that jobs, production and growth could be generated in the economy. This prelude is required to be made because, to my mind, provisions of Section 16(1) of the Act, 1952 is required to be read as a Code by itself. It is true that the said Act is a benevolent Act. It is true that the said Act is a welfare legislation but we have to strike balance in the matter of interpretation while construing various provisions of the Act and it

is in this regard that I have mentioned that Section 16(1)(b) is required to be read as a Code by itself because while interpreting the said Section the Court has to keep in mind that this is one Section in the Act which favours the establishment of a Company and Unit which would generate employment and growth. In the present matter, as stated hereinabove, the only point which arises in this case is: whether the benefit of infancy period given to the Company should be withdrawn or not. I may also mention that, in the present matter, on the facts of the case in the context of the activities and in the context of various tests including the unity of ownership, the provisions of Section 16(1)(b) are required to be looked at.

5. Before coming to the impugned order passed by the R.P.F.C., it may be mentioned that S.D.L. is the holding Company incorporated in 1963. The Company has filed before me the Balance Sheet and the Profit and Loss Account as contained in the Annual Reports for the relevant period. The Annual Report for 1975 contains Directors' Report of S.D.L. S.D.L. is in Automobile, Tyre and Tube Industry. It has a domestic and overseas market. According to the said Report, during the year 1975, raw material prices went up substantially. In the said Report, it is further indicated that the Petitioners-Company became subsidiary of S.D. L. as on November 22, 1975 and its manufacturing operations were to be located in modern plant under construction at Tarapor in Thane District and it was to carry on the business as processors of all kinds of Rubber, PVC, Polyethylene and other substitutes. In the said Report, it is recited vide Directors' Report, page-9, that a new plant was to come up at Tarapor and it was to carry on business as processors not only of Rubber but also of PVC and other substitutes. The said Report further recites that the Rubber Compound required by S.D.L. which was procured from other sources will also be manufactured and supplied by the Petitioners. This Directors' Report is relied upon both by the Petitioners as well as by the R.P.F.C. in support of their respective contentions. According to the R.P.F.C., the Directors' Report mentioned in the Annual Report of 1975 clearly indicates that the Petitioners-Company were to supply raw material to S.D.L. and, therefore, there was functional integrality. I do not find any merit in the said contention. On the other hand, I agree with Mr. Rele the learned counsel for the Petitioners-Company that this Directors' Report clearly indicates that the Petitioners are a separate legal entity under the Companies Act: that a new

modern plant was required to be set up at Tarapor in Thane District which would generate an employment growth; that apart from the business of processing Rubber, it was also required to process PVC, Polyethylene and other substitutes and further the plant is required to be set up because with the costs of raw material increasing by the day, even the holding Company realized that if a plant could be set up at Thane District which would particularly meet with its requirements, then certainly a subsidiary Company should be allowed to set up a plant at Tarapor. Therefore, I find merit in the contention of the Petitioners that while interpreting the provisions of Section 16(1)(b) of the Act, if the Court finds that a new legal entity starts a business then certainly certain incentives are required to be given and we cannot look at the problem in every matter with a fixed mindset only with an idea of seeking to cover the Unit on the ground that the Act is a benevolent legislation. The Act is a benevolent legislation. It gives benefit both to the workers and the employers as far as Section 16(1)(b) is concerned. This is not a case where device is sought to be put in order to avoid or evade the provisions of the Act. I have gone through the Annual Reports of the relevant years. Each Report clearly indicates that a new Company was set up. That, that new Company had under taken multifarious activities including rubber processing. That, in any event looking to the figures which are indicated in the Balance Sheet, it is clear that the Petitioners Company cannot be labelled as feeder industry to the S.D.L. and further it is a Company having different Units, it is a Company having different staff, it is a Company employing fresh hands with different machinery altogether and this is fully borne out by each and every Annual Report which has been scrutinized by me from 1975 to 1982. Even the Balance Sheet indicates that the subsidiary Company is a Creditor of the S.D.L. and that is because the goods have been sold from time to time as one of the activities of the Petitioners. In fact, the Balance Sheet clearly indicates that the wages are being paid to employees. Depreciation is claimed in respect of the machinery owned by the Petitioners. That, depreciation has nothing to do with the depreciation claimed by the petitioners. Depreciation claimed by S.D.L. is quite different from the depreciation claimed by the Petitioners Company which clearly shows that there was no unity of ownership. There was no unity of employment. There was no unity of management. Merely because names of some of the Directors are common, will

not mean that there is a unity of management between the two Companies. In fact, definition of the provisions of Section 4 of the Companies Act and definition of the word 'holding' and 'subsidiary' company' under the Companies Profits Sur Tax Act clearly indicates that these two Companies are distinct and separate Companies and by no stretch of imagination it can be said that the Petitioners Company are a Department or a Branch of S.D.L. Apart from the Balance Sheet, I have meticulously scrutinized the Returns filed by the Company under the Income Tax Act and the Sur Tax Act. For example, for the Assessment Year 1983-84 the Assessment Orders issued under Section 143(3) of the Income Tax Act clearly indicate that the Petitioners Company have processed not only rubber products for S.D.L., they have also processed rubber and plastic items like PVC and its substitutes for other Companies. Similarly, in respect of the Assessment Year 1976-77, I find that the expenditure claimed by the Petitioners Company in respect of the maintenance of two guest houses, by the Assessment Order under Section 143(3) of the Income Tax Act, the Department came to the conclusion that the guest houses at different places are owned by different Companies and this reasoning of the Department atleast indicates that the properties of each of the Companies are different and distinct. The machinery is different. The depreciation and the allowances claimed in respect of each of the Companies are different and it is for this reason that even under the Sur Tax provisions the Returns of the Assessment Orders clearly indicates that the S.D.L. which was engaged in the manufacture of tyre tubes, valves and other products had received some material, from the Petitioners but in the larger turn over it hardly comes to 7 to 8 per cent of the total turn over of S.D.L. which clearly indicates that by no stretch of imagination the Petitioners could be treated as a feeder Industry of S.D.L. One of the main tests laid down by the various Judgments of our Court including the Judgments of the Division Bench of this Court in Carola Rubber v. R.P.F.C. is that in order to decide the functional integrality of the two Establishments, the question to be answered is: whether the closure of one Industry would affect the other and whether it would lead to the closure of the other. It is in this sense that functional integrality has to be seen. Having scrutinized the Balance Sheet and the Income Tax Records, I am satisfied that, in the present case, the Petitioners-Company are a separate legal entity. They are separate legal entity duly incorporated under the

Companies Act. They are separately treated under the Income Tax Act. They are, separately treated under the provisions of Sur Tax Act and even with regard to activities it is clear that the machinery, workers, ownership and the management are distinct and separate and in the circumstances one fails to understand on what basis the R.P.F.C. has come to the conclusion that the Petitioners-Company are a Department or a Branch of S.D.L.

6. There is one more way of looking at this problem. Under Section 1 of the said Act, 1952, the Act is enacted to provide for the institution of Provident Funds for employees in Factories and other Establishments. Section 1(3) inter alia lays down that subject to the provisions contained in Section 16, the Act applies to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, or class of such establishments which the Central Government may by notification specify in this behalf. Section 2(e) defines the word 'employer' to mean any person in relation to any establishment which is a factory, the owner or occupier of the factory, and in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment. Section 16(1)(d) deals with an infancy period. Under Section 16(1)(d), the Act shall not apply to any other establishment newly set up until the expiry of a period of three years from the date on which the said establishment is, or has been set up. The period at the relevant time was five years which is not in dispute. In the above circumstances, if we read the provision of Section 16(1)(d), it is clear that, in the present case, a newly set up establishment came into existence and that establishment cannot be said to be under any sort of managerial, ownership, or any other control of S.D.L. It is for this reason that I started this Judgment by analyzing the Balance Sheet and Income Tax Returns and it is for this reason that, as stated hereinabove, it is clearly laid down under Section 16(1)(d) that the legislature wanted to encourage the establishments to be newly set up so that more employment is generated, growth is generated and the economy as a whole stands to benefit. In the above circumstances, subsidiary Company, as in the present case, cannot by any stretch of imagination be treated as a Department or the Branch of S.D.L.

7. In the impugned Order the R.P.F.C. has not properly appreciated the basic evidence which is contained in the Balance Sheet and the Income Tax Orders and the Returns filed by the Petitioners. The R.P.F.C. in para 4 of the impugned Order has stated that on the basis of a Report to the Area Inspector dated August 31, 1985 he is of the view that the Petitioner was under the common management because the Management of the Petitioners and the Management of S.D.L. was with the same Directors. The R.P.F.C. has further found on the basis of the Report submitted by the Inspector that because the Petitioners - Company are also processing rubber products for S.D.L., there was a functional integrality between the two establishments. Firstly, I would like to mention that in a matter of this magnitude, R.P.F.C. should not depend only on the Site Inspection Reports submitted by the Inspectors. The matter requires investigation by looking at the Accounts, the Annual Reports, the Balance Sheet and the Profit and Loss and also the Income Tax Records. This is a case where the Assessee is a genuine and bonafide Assessee. It is not a case of partnership firm which may stand on the same footing as a holding Company and a subsidiary Company. Secondly, as observed by me, with the globalization of the economy, we will have cases of joint ventures, collaborations which will have to be looked at by the R.P.F.C, in the context of the genuine records which are produced by the Assessee. In such cases, while construing the provisions of Section 16(1)(d), the R.P.F.C. will have to apply proper yardstick which I have endeavoured to lay down in the above observations contained in this Judgment. Further, as stated hereinabove, the figures in the Balance Sheet and the Profit and Loss Account and the Income Tax Returns submitted by the Petitioners Company clearly indicate that the Petitioners - Company do the work of processing Rubber, PVC and other items. That the Petitioners - Company are not exclusively in the rubber processing activity. That the Petitioners-Company supply their manufactured items to large number of Companies and that in the Judgment of R.P.F.C., there is no finding of fact as to on what basis, Petitioners are categorized as a feeder Industry of S.D.L. A small quantity being supplied in the larger sale turn over, cannot lead R.P.F.C. to the conclusion that the Petitioners are a feeder Industry for S.D.L. Further, the R.P.F.C. in such matter is required to see the relevant figures of both the Companies before coming to the conclusion as to whether there is a functional

integrality. No finding has been recorded as to whether the number of employees employed by the Petitioners are separate and distinct from the employees of S.D.L. No discussion is there with regard to depreciation claimed by the S.D.L. and the Petitioners. There is no discussion regarding any of the important heads of the Balance Sheets of the two Companies including the share capital and one fails to understand as to on what basis the R.P.F.C. has come to the conclusion that the Petitioners - Company are a Department or Branch of S.D.L. There is no unity of ownership. There is no unity of management. There is no unity of employment and there is no functional integrality in between the two Companies. Moreover, the R.P.F.C. has not even considered the provisions of Companies Act particularly Section 4 of the Companies Act. The R.P.F.C. has not considered the provisions of the Income Tax Act and the provisions dealing with Sur Tax which clearly indicate that these are two distinct and separate Companies and in the above circumstances, I find merit in this Writ Petition.

8. Accordingly, Rule is made absolute in terms of prayer Clause (a) and (b) with no order as to costs. At the time of admission, the Petitioners had furnished a Bank Guarantee to R.P.F.C. As the Petitioners have succeeded, the Bank Guarantee furnished to R.P.F.C. shall stand cancelled and the R.P.F.C. is directed to return the said Bank Guarantee to the Petitioners Company within four (4) weeks from the receipt of this order.