Bombay High Court
M/S. Niton Industries vs The Union Of India And Others on 17 January, 2000
Equivalent citations: 2000 (3) BomCR 212, (2000) 1 BOMLR 697, 2000 (85) FLR 536, (2000) ILLJ 1518 Bom, 2000 (3) MhLj 104
Author: . P Upasani
Bench: . B Saraf, . P Upasani
ORDER Dr. Pratibha Upasani, J.

1. Both these appeals are directed against the common judgment and order dated 10th April, 1994 passed by the learned Single Judge of this Court in the above mentioned writ petitions.

2. The above mentioned writ petitions were filed by M/s. Niton Industries, a partnership firm registered under the provisions of the Indian Partnership Act, being aggrieved by the order passed by the Regional Provident Fund Commissioner, Maharashtra and Goa dated 23rd September, 1992, in the matter of proceedings under section 7-A of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 ("the Act"), against Inventa Valve Industries (Bombay) Private Limited, MH/21449.

3. To understand the controversy in the matter, few facts are required to be stated, which are as follows:

Inventa Valve Industries (Bombay) Private Limited (respondent No. 3) was a covered establishment under the Act, under Code No.MH/21449. The Department had sought compliance from the establishment, namely, Inventa Valve Industries (Bombay) Private Limited in respect of one M/s. Nitor Industrial Corporation (petitioner in Writ Petition No. 918 of 1993) and M/s. Nitor Industries (petitioner in Writ Petition No. 2781 of 1992), treating them as part and parcel of the establishment and sub-code Nos. MH/21449-B and MH/21449-A were allotted to them respectively for implementation with effect from 30th June, 1981.

4. The establishment disputed the coverage of M/s. Niton Industrial Corporation and M/s. Niton Industries, as an integral part of it, and thus, the proceedings under section 7-A of the Act were initiated vide Notice dated 28th October, 1988 for resolving the issue of coverage. All the above mentioned establishments were impleaded as a party, who also filed their detailed submissions in these proceedings.

5. The establishment namely, Inventa Valves Industries (Bombay) Private Limited, who are respondent No. 3 in both the writ petitions, by their letter dated 15th December, 1988 contended that it was an independent Private Limited Company, having no contacts with M/s. Niton Industries and M/s. Niton Industrial Corporation, and that, they were not branches or department of it.

6. M/s. Niton Industrial Corporation (petitioner in Writ Petition No. 918 of 1993) vide its submission dated 12th April, 1989 also repudiated coverage on the grounds that-

(1) It was an independent separate entity, established in the year 1981 (2) It was engaged in the manufacture and sale of industrial valves.

(3) It was a partnership firm, independent of the covered establishment Inventa Valves Industries (Bombay) Private Limited, which was a company registered under the Indian Companies Act and was established in the year 1973.

(4) It was registered separately under the various State/Central Statutes.

(5) It was separately assessed under the Income-Tax Act.

(6) There was no unity of management or control of finance of common supervision between the establishments.

(7) There were no common employees for the establishments and the existence of one does not depend on the existence of the other.

7. Giving these reasons, M/s. Niton Industrial Corporation claimed that it was entitled to independent coverage under the Act.

8. M/s. Niton Industries, who are petitioners in Writ Petition No. 2781 of 1992, also filed written submissions and contended that they were entitled to independent coverage under the Act, giving following grounds-

(1) It was a registered partnership firm, independent of the establishment, and had started functioning from 1978.

(2) It was registered separately under the different State/Central Acts and that, it was also assessed separately under the Income-Tax Act.

(3) There was no common management or control of the finance of common supervision between the establishments and there was separate set of workmen.

(4) Its employment strength exceeded 20 in the month of January, 1988.

9. M/s. Niton Industrial Corporation and M/s. Niton Industries both filed copies of their balance-sheets up to year 1986-87 before the Regional Provident Fund Commissioner. They also further intimated that they had filed Writ Petition No. 3769 of 1988, and Writ Petition No. 3716 of 1988 in the Bombay High Court, which were subsequently withdrawn by them vide order dated 9th March, 1989 passed by this Court on the request of the establishment. It was submitted by the representative appearing for the establishment that the dispute might be resolved on the basis of submissions and documents in the proceedings filed before the Regional Provident Fund Commissioner. He also filed copy of the order dated 10th July, 1990 passed by the Industrial Court, Bombay in Complaint No. 604 of 1990 filed by the employees' union.

10. The learned Regional Provident Fund Commissioner, Maharashtra and Goa, after perusing all the documents, which were placed before him, and after hearing all the sides, came to the conclusion that M/s. Niton Industrial Corporation and M/s. Niton Industries, were nothing but formed part of the covered establishment namely, Inventa Valve Industries (Bombay) Private Limited, and that, they altogether constituted one integral whole for the purpose of extending the benefits of the Act. According to him, there was a clear nexus between all these establishments, in as much as there was common management, common partners/directors, and that, there was financial integrality. According to him, there was total interdependency in management, control and finance, and although these establishments were seemingly different, they constituted one integral whole and that, it was only a devise adopted by the management to establish separate set ups to take advantage of various legislations and to evade from the liabilities arising out of the various Statutes. He further observed that it was a clear case of subterfuge, so as to get away from the clutches of the Social Security Legislation like the Employee's Provident Funds and Miscellaneous Provisions Act, 1952. Observing this, the Regional Provident Fund Commissioner held that Department, therefore, rightly required the establishment namely Inventa Valves Industries (Bombay) Private Limited to comply with the provisions of the Act and the Scheme in respect of the employees engaged in the other two establishments namely, M/s. Niton Industrial Corporation and M/s. Niton Industries. Thereafter, he adjourned the matter tilt 15th October, 1992 for determination of the dues for the period of 1st July, 1981 and onwards, in respect of the other two establishments.

11. Being aggrieved by the impugned order of the Regional Provident Fund Commissioner, M/s. Niton Industries filed Writ Petition No. 2781 of 1992 and M/s. Niton Industrial Corporation filed Writ Petition No. 918 of 1993, which were heard by the learned Single Judge of this Court, who by his common judgment and order, dismissed both the writ petitions and upheld the finding of the Regional Provident Fund Commissioner. Being aggrieved by this order of the learned Single Judge, both the establishments have filed two separate appeals which can be disposed of by this common judgment and order.

12. Mr. Naidu, learned Counsel for the appellants in both the matters submitted that the learned Single Judge erred in not looking into the provisions of section 2-A of the Act, whereby only departments or branches could be clubbed with the main establishment. Section 2-A of the Act, for the sake of convenience, can be reproduced below:

"2-A. Establishment to Include All Departments And Branches.---For removal of doubts, it is hereby declared that where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment".

Mr. Naidu submitted that the Act did not permit the respondents to club two independent establishments, as was sought to be done by the impugned order. Mr. Naidu, learned Counsel for the appellants inter alia submitted that vital factor for deciding functional integrality between the two establishments was to see that the establishments in question could survive without other, and that the learned Single Judge erred in not appreciating that the appellant establishment was not at all dependent on respondent No. 3 company and that, it was independently managing its own activities

and business, without the assistance of respondent No. 3. Mr. Naidu also submitted that common ownership by itself would not be a criteria for deciding functional intergrality. He submitted that keeping in view the provisions of section 2-A of the Act, it could not be said that any one of these three establishments was the department or branch of the other. This was the sum and substance of the arguments of Mr. Naidu. He, therefore, prayed that the judgment and order of the learned Single Judge be set-aside and the appeals be allowed.

13. Mr. Naidu, learned Counsel for the appellants, in his elaborate arguments, cited many judgments of this Court as well as of the Hon'ble Supreme Court to canvass his point that the order of the Regional Provident Fund Commissioner, so also the learned Single Judge of this Court, holding that M/s. Niton Industries and M/s. Niton Industrial Corporation were nothing but formed part of the covered establishment Inventa Valve Industries (Bombay) Private Limited, was erroneous.

14. Firstly, he relied upon the judgement of this Court reported in 1992(II) C.L.R. 977 Sunder Transport & another v. The Regional Provident Fund Com-

missioned, wherein the learned Single Judge of this Court, has at length, discussed the scope of section 2-A of the Act, and has also highlighted the clear distinction between, "different departments or branches of one establishment" and "different establishments".

15. In the above mentioned case of Sunder Transport, the order of the Regional Provident Fund Commissioner, Bombay, was challenged by four partnership firms by way of filing four writ petitions. The grievance of these four partnership firms was that the Regional Provident Fund Commissioner, Bombay had clubbed together, and treated them as one establishment for the purpose of determining the liability under the Act and had asked to pay the provident fund dues with effect from 31st January, 1975. A common code number was allotted by the Regional Provident Fund Commissioner, Maharashtra and Goa, being Code No. MH/22043 to one of the firms namely, M/s. Sunder Transport, the petitioner in Writ Petition No. 1199 of 1988 for itself, and the other three firms who were petitioners in the other three writ petitions. The liability under section 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. Thereafter, common order dated 27th January, 1988 in pursuance of the demand notice was issued which was the subject matter of challenge in those writ petitions. The contention of the petitioner in Writ Petition No. 1199 of 1988 i.e. M/s. Sunder Transport, was that their firm was a partnership firm which was registered under the Indian Partnership Act in the year 1964, and composed of three partners. It was carrying on the business of transport of chassis and trucks and products of Bharat Petroleum to Dhule and various other places. The petitioner in Writ Petition No. 1200 of 1988 was M/s. Bafna Motors was also a partnership firm with four partners. It held dealership of international tractors and parts thereof. It was also registered as a firm under the Partnership Act. The third petitioner in Writ Petition No. 1175 of 1988, namely, M/s. Bafna Investment was also a partnership firm duly registered under the Indian Partnership Act, which comprised of five partners. Business of this firm consisted of letting out of premises on rent and commission agency. The fourth petitioner namely M/s. Bafna Finance was a separate firm registered with the Registrar of Firms and comprised of four partners. Thus all these four partnership firms were registered as independent firms with the Registrar of Firms and were

also registered separately under other enactments, viz. Bombay Sales Tax Act and Bombay Shops and Establishments Act. These firms were carrying on their business since the year 1964 and were being separately assessed to income-tax as independent firms. The partners of these firms were not identical though some partners were common. When the Regional Provident Fund Commissioner, Bombay served show cause notice dated 10th October, 1983 to the petitioner firms asking them to show cause as to why the provisions of the Act should not be made applicable to them by treating all the four firms as one establishment, replies were sent by all the petitioner firms, contending that they were different and independent firms and were separate legal entities. They contended that none of them employed more than five employees and that, they were all carrying on their separate business having no interconnection, interdependency 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 these firms filed relevant documents including account books and income-tax assessment order in support of their contention. The contentions of the petitioner firms, however, were not accepted by the Regional Provident Fund Commissioner, who by his communication, informed the petitioners that with effect from 31st January, 1975, all the four firms were treated as one establishment as per the provisions of section 2-A of the Act, and accordingly, they had been rightly asked to pay the provident fund dues with effect from 31st January, 1975. Being aggrieved by the said order of the Regional Provident Fund Commissioner, writ petitions as mentioned above, came to be filed in this High Court, assailing the said order. The learned Single Judge of this Court, after hearing all the parties at length, and after perusing the documents, came to the conclusion that the order of the Regional Provident Fund Commissioner, allotting a code number to one of the firms, by clubbing all the four firms together, and determining the amount payable by them under section 7-A of the Act, and directing them by the impugned notice to pay the same, was not correctly passed. Holding this, the learned Single Judge allowed all the four writ petitions. In the above mentioned judgment of M/s. Sunder Transport (supra), there was no dispute about the factual situation. It was categorically admitted by the respondent Regional Provident Fund Commissioner that the identity/entity of the four establishments in so far as Income-tax Act, Sales Tax Act, Bombay Shops and Establishment Act, etc. were concerned, was separate. It was, however, contended by him that the fact that the four establishments were separate legal entities was not relevant for the purpose of applicability of the Act. Thus, the real dispute in this case was, whether the four separate and independent partnership firms could be treated as one establishment for the purpose of application of the Act by taking resort to section 2-A of the said Act. The contention of the petitioners in the above mentioned case of M/s. Sunder Transport (supra) was that the four firms could not be clubbed together, as each one of them was having its own constitution, the partners in these firms were not identical, though one or two of the partners in these firms were common. They had obtained separate licences under the Shops and Establishment Act, Sales Tax Act, etc. and as such, they were separate and distinct firms, that each one of them was being assessed separately under the Income-Tax Act, treating them as separate and independent taxable entities. It was a factual position that they were located in one premises, were having one telegraphic address and post box number. They also had common accountant for maintaining the accounts, but that, these factors by themselves, were not sufficient to come to the conclusion that they could be clubbed together, since none of them could be said to be branch or department of one another, as envisaged by section 2-A of the Act.

16. Mr. Naidu, learned Counsel for the appellants also relied upon Supreme Court judgment, reported in 1998(1) L.L.J. 34 Regional Provident Fund Commissioner & another v. Dharamsi Morarji Chemical Co. Ltd. In this case, the dispute was whether the respondent factory at Roha was a separate establishment or whether it was a part of Ambarnath factory of the respondent. The facts were that the respondent-Chemical Company had established a new concern at Roha in Kolaba District of Maharashtra on July 9, 1977. The said new concern was to manufacture organic chemicals, and had nothing to do with the existing factory of respondent-company at Ambarnath in Thane District, which was being run since 1921, The contention of the respondent-Chemical Company was to the effect that Roha factory was an infant industry which was entitled to earn exemption from the operation of the Act, in view of section 16(1)(b) of the Act. The authorities under the Act were of the view that the Roha factory was not an infant industry at all, but was a part and parcel of the parent factory of the respondent-company at Ambarnath which was being run since 1921. When the respondent -company approached this Court by way of filing writ petition under Article 226 of the Constitution of India, the learned Single Judge of this Court, after perusing all the material on record and after hearing the parties, came to the conclusion that Roha factory, only because it was owned by the same respondent -company, it could not be said that Roha factory was a part and parcel of Ambarnath factory. The learned Single Judge observed as follows:

"..... Ambarnath factory was established as long back as in the year 1921 ..... while the Roha factory was established as late as in July, 1977. The Ambarnath factory manufactures heavy inorganic chemicals and mainly fertilizers while the Roha factory manufactures only organic chemicals. The products manufactured at these two factories are thus separate, distinct and different. The workers of these two factories are also separate. Though at the time when the Roha factory was established or set up, about 5 or 6 employees of the Ambarnath factory were sent to Roha factory to take advantage of their expertise and experience and help set up the Roha factory, this circumstance by itself has hardly any significance in deciding as to whether in law the two factories constitute one or separate establishments. In the very nature of things when a new factory is sought to be set up, the benefit of such expertise and experience is and surely can be availed of. This by no stretch can be considered to conclude that the two factories, therefore, constitute one establishment".

17. The learned Single Judge in the above mentioned Dharamsi Morarji's case, also observed that other facts and circumstances like having separate registration numbers of these two establishments under the Factories Act, maintaining and drawing up separate profit and loss accounts, having separate works managers and plant superintendents, etc. also militated against the contention on behalf of the respondent-Chemical Company that Roha factory was a part and parcel of Ambarnath factory. It was observed in this case by the High Court that even though both the factories were owned by a common owner, namely, respondent-company, and even though the Board of Directors was common, that by itself could not be sufficient unless there was clear evidence to show that there was interconnection between these two units and there was common supervisory, financial or managerial control, and as there was no such evidence, the contentions of the respondent-company were not accepted by the High Court.

18. Mr. Naidu, learned Counsel for the appellants also relied upon another Division Bench judgment of this Court, reported in 1999(11) L.L.J. 998 Yeshwant G. Chikhalkar & others v. Killick Nixon Ltd. & others, wherein it was observed that when company was having several activities severable from each other, and if one unit or division of an employer was totally independent and would not be affected by the closure or stoppage of another unit of the same employer, then it could not be said that there was any functional integrality between the two units. This was a case under Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, and the company's action of lay-off was under challenge. The Industrial Court dismissed the complaint made by the employees of the respondent-company of unfair labour practice in declaring the lay-off in its shipping division. The main contention of the employees was that, as the employees were transferable from one division to another, and since, there was unity of ownership and management, the entire company should be taken as one unit, ignoring the separate divisions/undertakings/establishments. This contention of the employees of the respondent-company was not accepted by the learned Member of the Industrial Court. Appeal by the employees from the order of the learned Single Judge, also was dismissed. Being aggrieved, the employees filed Letters Patent Appeal before-the Division Bench. It was observed by the Division Bench in this case, as follows:

"It is now very well established that if one unit which is totally independent and which will not be closed or affected by the closure or stoppage of another unit owned by the same employer in that case these two units would be independent and not interdependent and, therefore, there cannot be any functional integrality between these units. If, however , one unit is adversely affected or is closed down because of the closure of the other unit and it cannot survive unless the other unit also functions, in such a situation two units would be interdependent mutually. One would not survive unless the other continues to function".

The Division Bench in the above mentioned case, found that this concept of integrality between the two units was totally absent. It therefore held that the shipping division of the company was altogether different and had no connection or relation with the activities of other units. The fact that merely because some employees were transferable or were transferred there being a unity of ownership and management, it does not find favour with the Division Bench, and the order of the Industrial Court and the Single Judge was upheld.

19. Citing the above mentioned judgments, Mr. Naidu argued that in the present case at hand, M/s. Niton Industries, Inventa Valves Industries (Bombay) Private Limited, M/s. Niton Industrial Corporation were three different legal entities, and that, there was no functional integrality between them, if one applied the criteria laid down by the Hon'ble Supreme Court and the above mentioned judgments of this Court. He submitted that keeping in mind the factual position about the separate existence of the firms, it could not be said that one of the establishment is the department or branch of the other, as envisaged or defined by section 2-A of the Act.

20. We find force in the contentions of Mr. Naidu, learned Counsel for the appellants.

21. Mr. Master, learned Counsel for the respondents on the other hand, strenuously tried to argue that all these establishments were one and the same and therefore, they were rightly clubbed together by the Regional Provident Fund Commissioner for the purpose of applicability of the provisions of the Act. To substantiate his argument, he relied heavily on the judgment of the Supreme Court reported in 1957(I) L.L.J. 448 J.G. Vakharia v. Regional Provident Fund Commissioner, Bombay. This was a case under the Employee's Provident Funds and Miscellaneous Provisions Act, 1952. In this case, a sick 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 the 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 the Act, it was held that the five units were not independent units and that 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 carried 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 Act, and 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 Court came to the conclusion that it was a clear case of a subterfuge which could not be permitted to succeed so as to defeat the rights of the employees who should be benefited by the Act.

22. This decision, in our opinion, however, has no application to the facts of the present case at hand, where there is nothing to show that the three establishments namely; M/s. Niton Industries, M/s. Niton Industrial Corporation, and Inventa Valves Industries (Bombay) Private Limited were artificially set up as subterfuge to avoid the liability of contribution under the Act or when admittedly, there is no inter-dependency in management, control and finance. In such a situation, it cannot be said that there is functional integrality between these establishments.

23. Mr. Master, learned Counsel for the respondents also relied upon Rajasthan Prem Krishan Goods Transport Co. v. Regional Provident Fund Commissioner & others, , wherein it is held by the Hon'ble Supreme Court that the authorities functioning under the Act can pierce the veil and read between the lines within the outwardliness of the two apparent. In this case, Regional Provident Fund Commissioner treated Rajasthan Prem Krishan Goods Transport Company and Rajasthan Prem Krishan Transport Company as one and the same entity, holding the ostensible separate existence of these two particular concerns as artificial and non-existent even though the two concerns were being treated as separate for the purposes of Income-tax Act. It was in this case that the doctrine of piercing the veil was set out for the application of the provisions of the Act. In our opinion, even this case does not come to the rescue of the respondents. The facts of the above mentioned case were totally different, the integrality between the firms was obvious, leading to the legitimate inference of subterfuge. No such case is made out in the present case at hand. The factual position totally belies such a suggestion. In our view, therefore, the learned Single Judge committed error in holding that just because there was common ownership and just because all the companies were in the same line of manufacturing of valves, there was functional integrality between them. The

observation about financial proximity between three establishments also is not correct, in as much as the loans taken can always be paid off and the shares can be transferred or sold. For these reasons, in our opinion, the appeals have to be allowed. Hence, the following order :

Both the appeals are allowed in the above stated terms.

The order of the learned Single Judge dated 10th April, 1994 is hereby set-aside.

Appeals allowed.