

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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CM(M) No.193/2000

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Date of decision: 21st January, 2010

M/S KUNJ & CO.

..... Petitioner

Through: Mr. Ashval Vadera & Mr. Arvind Bhatt,
Advocates

Versus

**THE REGIONAL PROVIDENT FUND
COMMISSIONER (ENF)**

..... Respondent

Through: Mr. Rajesh Manchanda with Mr. Sunil
Kumar Sharma, Advocates

AND

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CM(M) No.211/2000

M/S ROOP SAREES EXTENSION

..... Petitioner

Through: Mr. Ashval Vadera & Mr. Arvind Bhatt,
Advocates

Versus

**THE REGIONAL PROVIDENT FUND
COMMISSIONER (ENF)**

..... Respondent

Through: Mr. Rajesh Manchanda with Mr. Sunil
Kumar Sharma, Advocates

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported
in the Digest? | YES |

RAJIV SAHAI ENDLAW, J.

1. The two petitioners, who vide order dated 20th September, 1999 of the Regional Provident Fund Commissioner have been clubbed together for the purpose of application of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and whose appeals to the Employees Provident Fund Appellate Tribunal have been dismissed vide order dated 31st March, 2000, have aggrieved therefrom, preferred these petitions under Article 227 of the Constitution of India. This Court while issuing notice of the petitions, vide *ex parte* orders of the year 2000 stayed the demands consequently made against the petitioners. The said orders remain in force.

2. This Court in exercise of jurisdiction under Article 227 of the Constitution of India cannot re-open/re-appreciate the factual position. However, the same does not admit of any controversy in the present case. This Court is thus only concerned with the conclusion, though concurrently arrived at by the two foras below from the said admitted facts.

3. The two petitioners are independent entities and it has not been held by either of the foras below that there is any relationship between the two. While the petitioner M/s Roop Sarees Extension (Roop) is a partnership firm of the members of the family of Rastogis; the petitioner M/s Kunj & Company (Kunj) is a sole proprietary of M/s Karuna Raj Vadera. While Roop is engaged *inter alia* in the business as wholesalers and retailers of sarees and wedding lehengas; Kunj is the owner of prime commercial showroom space at E-24, NDSE, Part-II, New Delhi and had been carrying on business therein of sale of women's salwar kameej, children's wear and shawls. The two came together for mutual commercial benefit.

4. An agreement titled as 'Selling Agency Agreement' was entered into between the parties first, on 27th November, 1996 and on expiry of the term thereof on 31st October, 1997. A copy of the agreement dated 31st October, 1997 has been placed on record. The arrangement between the two as emerging from the said agreement was:-

- (i) Roop providing its goods on consignment basis to Kunj.
- (ii) Kunj displaying/ exhibiting the same from a designated portion of its showroom aforesaid.
- (iii) The sales of the said goods being effected by Kunj and Kunj being liable for issuing of invoices, collection and deposit of sales tax.
- (iv) Kunj after retaining its agreed commission amount, on a daily basis, paying the balance amount of sale of products of Roop, to Roop.
- (v) The sale was to be conducted by Kunj but Roop is entitled to assist in the said sale by deputing its Manager or an accountant to oversee the sale of their products from the showroom aforesaid of Kunj.
- (vi) Roop assuring Kunj of sales of their products of a minimum amount and assuring Kunj of commission thereon.
- (vii) Roop was not to acquire any right, title or interest in the showroom and Kunj was entitled to sell non competing goods from the remaining portion of its showroom.

5. The Regional Provident Fund Commissioner in his order dated 20th September, 1999 has found that both the petitioners were situated in the same premises i.e. E-24, NDSE, Part-II, New Delhi, having common entrance; that the business of the two was inter dependent on each other; that in comparison to the sales for the year 1998-99 by Kunj of the value of Rs.3,69,40,455/- of the products of Roop, Kunj sold goods of others of Rs.76,19,597/- only; that Kunj is dependent on Roop for its business; that Kunj was employing only one salesman, five staff boys and five peons and not employing any cashier, AC operator, accountant; on the contrary Roop was employing two accountants, one delivery boy, one peon, five salesmen and nine staff boys but no cashier; that the security guards deployed at the showroom were not mentioned in the list of employees by either of them. In these facts & circumstances, the Commissioner held Roop & Kunj to be one and the same. It was further found that the employee strength of 18 of Roop was precariously close to coverage under the Act. It was also held that the two have functional integrity having inter-dependence, common supervision and common business interest.

6. The Appellate Tribunal also found functional integrity between the two and held the fact of Kunj also selling menswear of another supplier from the same showroom and also having a tailoring shop in its showroom did not change the nature of relationship between the two. It was further held that the staff for running the showroom was provided partly by each of the petitioners and it was held to be a reason for clubbing the two together.

7. I may notice that this Court recently in ***Regional Provident Fund Commissioner Vs. EPF Appellate Tribunal*** 2007 LLR 350 was faced with a near similar factual position. In that case one was doing the work of grinding of spices exclusively for the other. The Commissioner held the employees of the one carrying on grinding to be employees of the seller of the said spices. The Appellate Tribunal however on appeal held the two to be different entities on the basis of their respective income tax returns. This Court dismissed the challenge to the finding of the Appellate Tribunal. This Court held that there were several other grinding mills in the market and the seller of spices was free to get the grinding work done from any other grinding mill. Similarly, it was held that the one carrying on grinding activity can procure business from other sellers of spices or could grind something else. It was held that outsourcing is one of the modes of doing business; several ancillary units exclusively work for big automobile companies and engineering companies and are dependent on said big automobile companies and engineering companies though they are independent business entities. It was held that they could not be clubbed with the main company for the purpose of the Act. It was further held that where the contractor is an independent contractor who contracts to deliver finished goods and products to the establishment, employees of such a contractor cannot be clubbed with the main organization to count the employee strength of the main organization. It was further held that only where two establishments are in fact one, can they be clubbed together; else, two independent establishments cannot be clubbed together only because they are interdependent on each other.

8. Sale/retail/marketing, has in the recent times become an independent sector of industry. A person having business acumen in manufacturing / procuring may not have the same acumen in sale of the same products. Sale is also largely dependent on location. Not all markets have as high footfalls as the South Extension Market in Delhi and it caters to a particular strata of society. Any manufacturer/supplier of goods / products intended for / aimed at such strata of society necessarily wants a foothold / presence in such a market, not only to boost its sales but also as an advertisement. A large section of the patrons would not treat the brand Roop as upmarket or befitting a particular sections/strata of the society if its products were not available in such a market.

9. It is for this reason that commercial / showroom spaces in such markets are not only available at a premium but are scarce. The rates for prime commercial property in Delhi are amongst the highest in the world today. The owners of showrooms in such markets attempt to reap maximum benefit of such position being enjoyed by them today. Gone are the days when a particular showroom would be faithful to one brand/manufacturer. The owners of such showrooms, as Kunj is, attempt to have as many brands as they can in their showroom, also to provide variety to a customer. This is what makes a retailer distinct from the manufacturer /supplier. While the manufacturer/supplier is interested in the sale of its own products only, a retailer is only interested in sale, whosoever's product it may be. Such is the nature of the agreement between the two petitioners in this case.

10. The owners of such showroom space, instead of letting out their showroom at fixed rent to any one manufacturer of goods also desire to earn more by way of commission/share of sale proceeds of goods of different manufacturers. A manufacturer/supplier, as Roop is, has to take commercial space available in the market on the terms offered. If the showroom owner is not willing to let out the showroom or any portion thereof to enable Roop to sell there-from but wants to carry on the business of sale itself, Roop will have no choice in the matter. There may also be cases of retailers who may not themselves be owners of the showroom space; the margin of profit in the

business traditionally carried on by them may have with the changing times dried up. They may be interested in selling the goods of another which may have a demand at the time; however, the terms of their occupation may be prohibiting them from putting such manufacturer/seller into possession of the showroom space or any part thereof; such retailers have to necessarily enter into agreements of the nature aforesaid.

11. From the above discussion and the factual position found by the Commissioner, it does not appear that the intent behind the manner in which the two petitioners are carrying on business was to escape the provisions of the Act. They have taken a decision to carry on business in the manner aforesaid but it can by no stretch of imagination be said that they constitute one establishment. As noted above by this Court in judgment (supra) these are now modern forms/modes of carrying on business with the changing times/needs. They cannot be viewed on the same parameters as of the old school of business.

12. The counsel for the respondent has contended that the Act is a beneficial / social piece of legislation and the interpretation thereof should be to bring the benefit of the said legislation to the maximum number of employees / workers. He relies upon the clause of the agreement whereby the Roop has been permitted to depute specialized sales persons, a manager and an accountant to the showroom of Kunj for affecting the sales. It is contended the same is to avoid payment of PF. I do not agree. The terms /clauses of the agreement pointed out are only aimed at enhancing the sales and do not amount to two independent establishments becoming one. The counsel for the respondent also relies on *The Associated Cement Companies Ltd. Vs. Their Workmen* AIR 1960 SC 56, *Noor Niwas Nursery Public School Vs. Regional Provident Fund Commissioner* 2000 IX AD SC 369 & *Mohan Brothers Vs. Regional Provident Fund Commissioner* 2003 III AD (Delhi) 677. In *The Associated Cement Companies Ltd.* (supra), the Mine unit providing raw material and the factory unit were held as one establishment because of unity of ownership, management and control. Similarly in *Noor Niwas Nursery Public School* (supra), the same society was running schools under two different names in the

same premises with one Head Mistress, one teacher, one peon and one Aaya and in these circumstances, the two were considered as one establishment. In *Mohan Brothers* (supra) sale of men's garments on the ground floor and sale of ladies garments and tailoring on the first floor of the same showroom though by different firms was held to constitute one establishment for the reason of common cash memos being issued and the customers being informed by notices put up in the showroom that one was the department of the other. However, there is nothing of the nature in the present case. The business of the two petitioners are different, though inter linked. Kunj is concerned only with its commission of 7 to 8 % percent from the sales of the products of Roop and has been assured that considering the demand and goodwill of the products of Roop in the market, by stocking the products / goods of Roop and not stocking competing product it would earn certain minimum amount; else it is carrying on other businesses also from the said showroom.

13. The modern times are marked by the trend towards specialization. Gone are the days when the farmers would not only till the land but also sow the seeds, reap the harvest, carry the produce and sell the same in the market. Today's farmer may give the work of tilling to one, sowing to another, harvesting to a third and leave the sale to the other large chains specializing in stock carriage / movement of such produce to the retail destination for sale thereof. Merely because the ultimate sale of the goods can be linked to the tilling of the land and the different players are to form part of one chain would not make them one establishment.

14. The counsel for the petitioners has filed a synopsis of submissions with a large compilation of judgments. Need is not felt to refer to each one particularly in the light of the recent judgment (supra) of this Court itself.

15. I, therefore find the foras below to have applied the wrong principles in clubbing the two petitioners for the purpose of the Act. The two are independent establishments, one selling the product of the other. No case of the same being camouflage has been

proved or made out. If the departments/courts find that there is only a façade of two establishments and an attempt to camouflage the same identity, the department/courts would certainly pierce such a veil and club together the two as one. That is not the case here. The petitions therefore succeed. The orders of the Commissioner and the Appellate Tribunal are set aside. It is found that the two petitioners are not liable to be clubbed together for the purpose of the Act. The petitions are disposed of. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

January 21, 2010/*gsr*