

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

TUESDAY, THE 3RD DAY OF MARCH 2015/12TH PHALGUNA, 1936

WP(C).No. 27790 of 2010 (W)

PETITIONER(S):

**M/S.GEORGE SONS & COMPANY,
K.P.ROAD, ADOOR, REPRESENTED BY ITS MANAGING
DIRECTOR, MR.GEORGE BABY.**

**BY ADVS.SRI.SAJI VARGHESE
SMT.MARIAM MATHAI**

RESPONDENT(S):

- 1. EMPLOYEES PROVIDENT FUND APPELLATE
TRIBUNAL, SCOPE MINAR, CORE-II,
4TH FLOOR, NAGAR DISTRICT CENTRE, LAKSHMI NAGAR,
NEW DELHI-110 092.**
- 2. THE ASSISTANT PROVIDENT FUND
COMMISSIONER, EMPLOYEES PROVIDENT FUND ORGANIZATION,
REGIONAL OFFICE, THIRUVANANTHAPURAM, KERALA.**

**BY ADVS. SRI.N.N. SUGUNAPALAN, SC
SMT.T.N.GIRIJA, SC**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
03-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

msv/

APPENDIX

PETITIONER(S)' EXHIBITS:

- EXT.P1: TRUE COPY OF THE PARTNERSHIP DEED DATED 1.4.2007.
- EXT.P2: TRUE COPY OF THE CERTIFICATE OF REGISTRATION ISSUED DTD.4.12.2002.
- EXT.P3: TRUE COPY OF THE MUNICIPAL LICENSE NO.LA 587/1994-95 DTD.19.10.1994.
- EXT.P4: TRUE COPY OF THE ELECTRICITY BILL/NOTICE DTD.4.10.2007.
- EXT.P5: TRUE COPY OF THE REGISTRATION CERTIFICATE NO.1402-5093
DTD.11.7.2005.
- EXT.P6: TRUE COPY OF THE VAT REGISTRATION CERTIFICATE DTD.15.5.2007.
- EXT.P7: TRUE COPY OF THE RELEVANT PAGE OF THE REGISTER OF WAGES FOR
THE MONTH OF SEPTEMBER, 2007.
- EXT.P8: TRUE COPY OF THE NOTICE DTD.13.5.2008 ISSUED BY THE KSE BOARD.
- EXT.P9: TRUE COPY OF THE MUNICIPAL LICENSE NO.2103/1994-95 DATED 17.10.1994.
- EXT.P10: TRUE COPIES OF THE REGISTRATION CERTIFICATE ISSUED BY THE KVAT
DATED 31.3.2007.
- EXT.P11: TRUE COPIES OF THE REGISTRATION CERTIFICATE ISSUED BY
COMMERCIAL OFFICER, ADOOR.
- EXT.P12: TRUE COPIES OF THE REGISTRATION CERTIFICATES BY THE SALES TAX
OFFICER, ADOOR DATED 30.9.1992.
- EXT.P13: TRUE SSI CERTIFICATE ISSUED TO THE SAID GOVERNMENT OF KERALA,
DEPARTMENT OF INDUSTRIES OF COMMERCE.
- EXT.P14: TRUE COPY OF THE LETTER DTD.9.10.2007 ISSUED BY THE
2ND RESPONDENT.
- EXT.P15: TRUE COPY OF THE PROOF AFFIDAVIT FILED BY THE PETITIONER BEFORE
THE 2ND RESPONDENT.
- EXT.P16: TRUE COPY OF THE ORDER DTD.24.6.2008 OF THE 2ND RESPONDENT.
- EXT.P17: TRUE COPY OF THE CERTIFICATE ISSUED BY THE STATUTORY AUDITORS
DATED 20.11..2009.
- EXT.P17(a): TRUE COPY OF THE CERTIFICATE ISSUED BY THE STATUTORY
AUDITORS DTD.20.11.2009.

Msv/

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**EXT.P18: TRUE COPY OF THE CERTIFICATE ISSUED BY THE MUNICIPAL SECRETARY,
ADOOR MUNICIPALITY DATED 21.11.2009.**

**EXT.P19: TRUE COPY OF THE LIST OF EMPLOYEES AND THE ENQUIRY REPORT OF
THE ENQUIRY OFFICER DATED 25.9.2002.**

**EXT.P20: TRUE COPY OF THE LIST OF EMPLOYEES AND THE ENQUIRY REPORT OF
THE ENQUIRY OFFICER.**

**EXT.P21 SERIES: TRUE COPY OF THE RELEVANT PAGE OF THE MONTHLY
REGISTERED FOR THE 3 ESTABLISHMENTS FOR THE MONTH OF
APRIL, 2004.**

**EXT.P22: TRUE COPY OF THE APPEAL A.T.A.NO.619(7) OF 2008 FILED BY THE
PETITIONER.**

EXT.P23: TRUE COPY OF THE CHALLAN EVIDENCING PAYMENT.

EXT.P24: TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE RESPONDENT.

EXT.P25: TRUE COPY OF THE REPLY AFFIDAVIT FILED BY THE PETITIONER.

**EXT.P26: TRUE COPY OF THE ORDER OF THE 1ST RESPONDENT IN ATA NO.619(7)
OF 2008 DATED 5.4.2010.**

RESPONDENT(S)' EXHIBITS:

NIL

//TRUE COPY//

P.S.TO JUDGE

Msv/

CR

K. VINOD CHANDRAN, J

W.P(C) No.27790 of 2010

Dated this the 03rd day of March, 2015

J U D G M E N T

The petitioner challenges the clubbing effected under Section 2A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short the EPF & MP Act), of two establishments; one a partnership firm and the other a proprietorship concern. The Assistant Provident Fund Commissioner had, by Ext.P16 directed clubbing of the two establishments, which order stands upheld by Ext.P26 order of the 1st respondent Appellate Tribunal.

2. The establishments which were clubbed are M/s George Sons & Company and Kaduvangal Engineering Industry, respectively a partnership and a proprietorship concern. The Managing Partner of the partnership firm, which is the petitioner herein, is

the proprietor of the other concern.

3. The learned counsel for the petitioner on the basis of documents produced as Exts.P1 to P13 would urge that the two concerns are two different establishments having separate legal entity and there could be no functional or financial integration found on the facts disclosed. The learned counsel for the petitioner would rely on **Pratap Press v. Workmen [AIR (1960) SC 1213]**, **Regional Provident Fund Commissioner and another v. Dharamsi Morarji Chemical Company Ltd. [(1998)2 SCC 446]** and **Regional Provident Fund Commissioner v. Raj's Continental Exports (P) Ltd. [(2007) 4 SCC 239]**, to buttress his contentions.

4. The learned Standing Counsel for the respondent Organisation however, would stress on the functional integrality found by the original

authority under Ext.P16. The learned counsel also would invite this Court to look into the counter affidavit. It is urged that the appellate authority has found such integrality between the functioning of the two establishments clearly indicating that they are one and the same, despite it being projected as different establishments. The workmen, employed in both the establishments are stated to be commonly employed in the establishments and is beyond the minimum number of 20, which enables coverage under the EPF&MP Act, on the basis of clubbing of two establishments effected under Section 2A. The learned Standing Counsel would rely on **Regional Provident Fund Commissioner, Jaipur v. Naraini Udyog and others [(1996) 5 SCC 522]**, **Eddy Current Controls (India) v. Regional Provident Fund Commissioner [(1994) 1 LLJ 522 Ker]** to

sustain the orders of the authority.

5. That the two establishments have the identical person, in the status of the Managing Partner and Proprietor, stands undisputed. Ext.P1 is the partnership deed, by which the Managing Partner, his wife and his son constituted themselves into a partnership to carry on the business, dealing in sanitary wares, paints, cements etc., under the name and style of M/s. George Sons and Company; the petitioner herein. Ext.P2 is the registration of the said company under the Kerala Shops and Commercial Establishments Act, 1961 and Ext.P3 is the licence obtained from the Local Self Government Institution. Ext.P4 is the electricity bill evidencing power connection drawn to the petitioner firm. Exts.P5 and P6 are registration obtained by the petitioner under the Central Sales Tax Act, 1956 and

Kerala Value Added Tax Act, 2003. The register maintained in the petitioner company, the extract of which is produced at Ext.P7 indicates that eight employees were paid wages in September 2007.

6. Ext.P8 is the power connection obtained in the name of the proprietor of Kaduvangal Engineering Industries, which is a small scale industrial unit registered as such by Ext.P13; engaged in body building of automobiles, steel fabrication and manufacture of wooden and steel furniture. A separate registration has been obtained for the said SSI unit under the KVAT and CST Act, as is evidenced by Exts.P10 and P11 as also a licence from the Local Self Government Institution evidenced at Ext.P9.

7. An inspection was conducted on 25.09.2007 by the officers of the respondent

Organisation, at the premises of the petitioner and a report prepared. The same is produced at Ext.P20. In addition to the two establishments noticed above, the inspection report indicates that there is a hollow brick unit and an automobile unit under the same establishment. The Managing Partner of the petitioner was first issued with a notice at Ext.P14, dated 09.10.2007, wherein it was notified that the coverage under the EPF & MP Act, as also the schemes framed under the said Act, would be applicable to the establishment together with its branches/Departments, with effect from 01.04.2002. Pursuant to the notice issued under Ext.P14, the petitioner was before the Assistant Provident Fund Commissioner (APFC) and a hearing scheduled under Section 7A of the Act.

8. At the hearing scheduled on 01.01.2008,

the petitioner filed an affidavit in objection, before the authority contending that the hollow brick unit is a partnership firm in the name of Shakthi Concrete Industries in which again the Managing Partner of the petitioner was a partner. The firm "Automobile (George Son)" was submitted to be not in existence and two of the employees noted as having been working under the said unit, were said to be the employees of the SSI Unit. It was contended that the three establishments were separate entities, engaged in different business and employing its own workers.

9. On the basis of the inspection report and the submission of the petitioner on record, the authority proceeded to club two establishments, under Ext.P16. A reading of Ext.P16 would indicate that the inspection report had listed a total of 39 employees in the presence of the representative of

the management. Three main establishments were found to be in-existence; two partnership firms and a proprietorship concern. While proceeding with the enquiry, there was no attempt made to club Shakthi Concrete Industries, with the other two establishments. The specific finding was that M/s. George Sons & Company and Kaduvangal Industries are family concerns and are run in two adjoining rooms, in a building owned by Sri.George Baby; the Managing Partner and the Proprietor. The employee strength in the firm was found to be eight and that of the proprietorship to be six; as per the attendance and wages register. Again referring to the employees of M/s. Shakthi Concrete Industries, the employee strength was held to be above 21.

10. The balance sheet for the year 2004-05 was noticed, to find that the provisions for annual

salary is far more than that disclosed in the various registers. It was specifically found that the partnership firm and the proprietorship concern were family concerns and hence there is no hurdle to club those two units. A transaction of Rs.1 lakh in M/s.George Son & Company and Kaduvangal Engineering Industries was found to establish the financial integrality. Ext.P16 order computed the contributions due from the petitioner herein; including all the employees revealed on inspection, to be in the employment of the partnership firm.

11. The Tribunal in Ext.P26 found that the two partnership firms and the proprietorship concern were clubbed together for the purpose of Section 2A of the Act. The appellate Tribunal relied on the geographic proximity, more specifically, the fact that the three establishments were conducted in adjacent

rooms and held that clubbing made by the original authority is only proper. It was also held that the ledger book of the establishment revealed transfer of money from one firm to another and hence there was financial inter-dependence between the establishments.

12. Immediately, it is to be noticed that, contrary to the Appellate Tribunal's understanding; Ext.P16 order intended clubbing of only two establishments. Shakti Concrete Industries was never sought to be clubbed with the other two establishments. The ownership being vested in one family was one of the factors emphasised in Ext.P16; to carry out the clubbing. The counter affidavit filed by the Organisation also reveals that clubbing is sought to be sustained only of the petitioner and Kaduvankal Engineering Industries. Specific

reference is made to the following extract in paragraph 5 of the counter affidavit.

“Hence, these two establishments were clubbed for the purpose of provident fund coverage taking the employment strength together as on 01.04.2004. Accordingly, these two establishments were covered with effect from 01.04.2004 without clubbing other units as the two establishments had been (sic) employment strength of more than 20.”

13. The appellate authority hence has completely misdirected itself in finding that the partnership firm engaged in sanitary wares and partnership engaged in manufacture of cement blocks were clubbed together.

14. Section 2A provides that where an

establishment consists of different departments or branches, in the same place or different places, such establishments are treated as the same establishment for the purpose of deciding the coverage under the EPF & MP Act. **Pratap Press** (supra) was a decision in which the Hon'ble Supreme Court had considered the issue and held so as to the resolution of the issue of clubbing:-

“The question whether the two activities in which the single owner is engaged are one industrial unit or two distinct industrial units is not always easy of solution. No hard and fast rule can be laid down for the decision of the question and each case has to be decided on its own peculiar facts. In some cases the two activities each

of which by itself comes within the definition of industry are so closely linked together that no reasonable man would consider them as independent industries. There may be other cases where the connection between the two activities is not by itself sufficient to justify an answer one way or the other, but the employer's own conduct in mixing up or not mixing up the capital, staff and management may often provide a certain answer."

15. The specific question of unity of ownership was considered in the following words:

"Unity of ownership exists ex-hypothesie. Where two units

belong to a proprietor there is almost always likelihood also of unity of management. In all such cases therefore the Court has to consider with care how far there is "functional integrality" meaning thereby such functional interdependence that one unit cannot exist conveniently and reasonably without the other and on the further question whether in matters of finance and employment the employer has actually kept the two units distinct or integrated."

16. Therein the issue was with respect to the clubbing of a press and an establishment which published a newspaper. It was found that there was nothing to show that one could not exist without the

other. It was found that there is no functional interdependence between the press unit and the newspaper unit to reasonably consider the same as forming one industrial unit.

17. Mere common ownership was held to be not sufficient to draw an inference that the unit established later, was not a new establishment, but was a part and parcel of the older one; in **Dharamsi Morarji Chemical co.Ltd.** (supra). Therein the owners of a factory engaged in manufacturing activities, started a new factory at another place with separate registration under the Factories Act. Separate set of workers were engaged in both the factories and they had separate profit and loss accounts and separate managers and supervisors. The mere fact of a common ownership was held to be insufficient, by itself, to club the two industries under

the EPF & MP Act.

18. The aforesaid two decisions were followed by the Hon'ble Supreme Court in **Raj's continental Exports (P) Ltd.** (supra) In almost an identical situation, as herein, a Company and a proprietorship was sought to be clubbed under the EPF&MP Act. The Managing Director of the Company was also the sole proprietor of the other concern. The activity carried on by the two were identical. However, on facts it was found that there was no “functional or financial integrality” and the two were different legal entities, existing without any “functional inter-dependence”.

19. **Naraini Udyog and others** (supra) was a case in which the High Court upset the factual findings of the authority under the EPF& MP Act, as to the financial integrality of two concerns. Therein

the Commissioner had noticed that both the concerns have a common Head Office at New Delhi and common branch at Mumbai, with common telephone numbers. Office of one of the concerns was situated in the premises of the other and the accounts of the two concerns were maintained by the same set of clerks. The Division Bench of the High Court however, found that since two different registrations were obtained under the Companies Act, the fact that the two companies were managed by the very same persons, members of the same family, cannot lead to a clubbing under Section 2A. The Hon'ble Supreme Court overturned the decision of the High Court, since, the compelling facts, in the order of the Commissioner, commended that the coverage under EPF & MP Act be extended especially in the context of the statute under which the coverage is made

being a beneficial legislation.

20. **Eddy Current Controls** (supra) was a case in which two factories of the very same company, one in Kerala and the other in Tamil Nadu was sought to be clubbed under Section 2A. The Division Bench on a reading of Section 2A framed the question to be decided as to whether the Tamil Nadu factory is a branch or department of the factory in Kerala. It was held that the principle under which clubbing could be made under Section 2A could not be stated in a strait-jacket formula. Though various factors like geographical proximity, unity of ownership, employment and purpose, functional interdependence, financial integrality etc. could be taken into consideration, essentially what is to be found out is whether on facts two establishment could be considered as one integrated whole.

Therein the unity in management and activity, the registered office being one and the managerial staff operating the accounts being the same and the financial transactions between the two companies as also the fact of the employees of one factory working in the other, were found to establish the factum of the two factories being an integrated whole.

21. On the strength of the afore stated precedents it has to be stated that common ownership would not commend, by itself, an inference that two establishments are in fact one. At the same time, the mere fact that separate registrations were obtained and separate legal identity is maintained cannot be the sole reason for absolving two concerns having common owners, from a joint coverage under the Act, if there is functional inter-dependence and financial integrality, between the two. No single

factor can validly commend a clubbing under Section 2A.

22. In the present case, it is an admitted fact that the Managing Partner of the partnership firm is the proprietor of the other concern. At the risk of repetition, M/s. George Sons & Co. and Kaduvankal Engineering Industries were sought to be clubbed together, under Ext.P16. However, the employees of Shakthi Concrete Industries were also sought to be included to effectuate the coverage. Despite the fact that ExtP16 has found commonality only insofar as M/s. George Sons & Co. and Kaduvankal Engineering Industries, no such specific finding is entered with respect to Shakthi Concrete Industries. The inspection report produced at Ext.P20 discloses that there are eight employees in the petitioner firm and nine in the SSI Unit. Two

employees shown under the SSI unit have not put their signatures in the report. However, even according to the petitioner two employees shown under the automobile unit are employees who are working under the SSI Unit. The employees, even as per the inspection report are shown under four units. If the employees under Shakti Concrete Industries are excluded then the two establishments sought to be clubbed under Section 2A, put together employs only 17, short of the minimum requirement for coverage under the EPF & MP Act.

23. As for the hollow brick unit, 18 workers are said to be engaged therein, but a reading of Ext.P16 would indicate that no clubbing of that partnership industry was specifically made by the authority under the EPF & MP Act.

24. Further M/s. George Sons & Co. and

Kaduvankal Engineering Industries, though ownership is common; are different legal entities registered independently for the purpose of obtaining licence, registration under the relevant sales tax laws as also using different power connections. But for the fact that, the two establishments are functioning in one building, the inspection report also does not reveal that there is functional interdependence insofar as there being inter-change of employees between the establishments, or the activity of one being not independent of the other.

25. Even the inspection report lists out the employees under the separate units. There is no finding on the aspect of any interchange of employees or the presence of any employee of one concern in the premises of the other, at the time of inspection. The same could be easily detected since the inspecting

authorities had listed out the name of the respective employees on a verification of the wage register, of the two concerns.

26. Coming to the aspect of financial integrality, as found in Ext.P16, the same is on the ground of a single transaction on 5.9.2006. The certificates issued by the Chartered Accountant of the petitioner, produced as Ext.P17 and P17(a) indicate that the Managing Partner of the petitioner had withdrawn Rs.1lakh from his Capital Account on 5.9.2006 and had brought the same in to the capital account of the Proprietary concern. This solitary instance cannot evidence the functional integrality when the managing partner of one concern is the proprietor of the other concern. The capital in each of the said concerns could be adjusted to the convenience of the owner and in accordance with

financial exigencies existing in one or the other establishments. That alone cannot lead to an inference of financial integrity.

27. The provision for salary, shown in the Profit And Loss account being more than that disclosed in the wage register, has been explained by the petitioner that the provision in the Profit and Loss Account shows the incentives paid to the employees over and above the salary.

28. As was found in **Pratap Press** (supra), no inter-dependence can be found, of the two establishments, herein. George Sons & Co. is a dealer in hardware, paints and cements, while the SSI unit is engaged in manufacture of automobile bodies and fabrication of steel and wooden furniture. It cannot at all be said that one could not exist without the other.

29. It is beyond the pale of dispute that, in deciding such issue of clubbing, under a beneficial legislation, the reigning consideration of this Court would be the intention of the legislature, being the protection and welfare of the employees. However, it cannot be lost sight off, that, the statute itself provides for certain minimum requirements insofar as coverage is insisted upon. When there is no mandate to cover all establishments coming under a common owner; every employer is well within his rights to arrange his affairs in such a manner, to fall outside the coverage. Till the legislature takes into account that situation and by a deeming fiction direct coverage; it would not be for the authority under the Act or this Court to so do. Till then, the tests as laid down in the various precedents referred to above and **Associated Cement Companies Ltd.**

(Chalbasa Cement Works, Jhinkpani) vs. Their Workmen [1960 (1) LLJ 1] has to be followed. If on facts, no functional inter-dependence or financial integrality is found, there could be no clubbing effected under Section 2A.

30. In the circumstances noticed above, this Court does not find any reason to commend clubbing of the two establishments and the orders at Ext.P16 as confirmed in Ext.P22 are set aside.

Writ petition is allowed. Parties are left to suffer their respective costs.

Sd/-
(K. VINOD CHANDRAN, JUDGE)

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P.A to Judge