HON'BLE SRI JUSTICE S.V.BHATT

WRIT PETITION Nos.733 and 928 of 2010

COMMON ORDER:

Heard Sri T.Balaji for petitioner and Ms.Manaswini holding for Sri P.Sri Ram for 2nd respondent.

In these two writ petitions, the issue for decision arises under Section 1(3) (b) read with Section 2-A of the EPF and MP Act, 1952 (for short 'the Act'). The Regional Provident Fund Commissioner aggrieved by common order in ATA Nos.288(1) of 2004 and 674(1) of 2005, dated 15-05-2009 has filed these two writ petitions.

The circumstances relevant for disposal are as follows:-

The Assistant Provident Fund Commissioner initiated enquiry by issuing notice under Section 7-A of the Act and treated Shilpa Electronics and Shilpa International as single entity and directed payment of PF dues within ten days from 27-02-2004. Aggrieved thereby, Shilpa Electronics filed ATA Nos.288(1) of 2004 and 674(1) of 2005 before the 1st respondent.

The case of 2nd respondent before the Tribunal/1st respondent is that the order of Assistant Provident Fund Commissioner treating these two distinct and separate entities as one unit is fully flawed, conclusions are drawn without material and on assumptions, liability under the Act has been fastened on the 2nd respondent. It is further contended that the explanation given by the 2nd respondent is not considered and a monotonous conclusion was recorded by Assistant Commissioner, which reads as follows:-

> "Though the decision of clubbing cannot be decided only on the merit of physical proximity and same ownership. However above mentioned observations suggest to a great extent that there is interdependency between the two said units i.e., Shilpa Electronics and Shilpa International. Both the units are dealing in the same type of products, with the only difference of the type of market i.e, one unit selling in domestic market, another one is in international market.
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> It is pointed out that in the case Katari colouring Factory Vs. RPFC (Del HC) unity of purpose, common place of business, common telephone etc were taken as criteria for deciding in favour of clubbing of two different units.
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> Therefore taking above facts into consideration I MANORANJAN KUMAR, Assistant P.F.Commissioner (C&R) CIR II, Hyderabad decide that the units were rightly clubbed and all the benefits of provident fund should be expended to the employees. Therefore, the employer is directed to pay the PF dues within 10 days of the receipt of this order.
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> The permission of 10 days for the payment of dues as mentioned above will not absolve the employer of his liability to pay damages contemplated under Section 14 B of the Act and the other actions as provided under Sections 14 and 8 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 that may be taken against the establishment where the payments are not made within the due date."

The 1st respondent considered the case of writ petitioner as well as 2nd respondent and after taking note of the consideration by the Department as flawed and unsustainable, recorded the following findings:-

> "Since, the norms laid down for determining and clubbing the two establishments are not satisfied in this case. It is evident from the documents filed by the appellant, that the appellant concern has a separate registration under the A.P.Shops & Establishments Act, the accounts are separately maintained, it has separate and distinct Tax Identification Number, Central Excise Registration and is separately assessed to duties under the Central Excies Act. Moreover, as has been noted in the impugned order, Appellant is engaged in the sale of electronic items to the local market and is primarily a retailer. But Shilps International (Impex) Pvt. Ltd. is exclusively an exporter of electronic items. In the absence of an interconnection or mutual dependence of one concern over the other so that one could not function without the other, mere unity of management and control, unity of ownership, unity of finance and geographical proximity are insufficient for treating both the concerns as one establishment. Accordingtly, the appellant cannot be clubbed with M/s.Shilpa International (Impex) Pvt. Ltd. for the purposes of the Act. The orders impugned in these Appeals are accordingly quashed being devoid of merits. The appeals are allowed. Files be consigned to the record room. Copy of the order be sent to both parties."

Hence, writ petitions at the instance of Department.

Sri Balaji for petitioner firstly contends that the findings recorded by the Tribunal are erroneous and there is sufficient material for the Assistant Provident Fund Commissioner to come to conclusion that the 2nd respondent in these two writ petitions is in fact one entity employing more than twenty persons and is under statutory obligation to file returns under the Act. According to him, the reliance placed by the 1st respondent on the decision reported in *REGIONAL PROVIDENT FUND COMMISSIONER Vs. DHARAMSI MORARJI CHEMICAL CO. LTD.*,[1] is unsustainable, for according to him, the fact situation of the reported case is different and distinguishable from the case on hand. He alternatively submits that the obligation of an employer to contribute under the Act is dependent on the number of employees employed by the employer. If the finding of the 1st respondent namely that the evidence now available is insufficient for treating both the concerns as one establishment, He requests the Court to set aside the order impugned in the writ petitions and remit the matter to primary authority for disposal afresh.

Ms.Manaswini contends that the 2nd respondent in the enquiry held under Section 7-A of the Act has given explanation to the notice issued by the Assistant Provident Fund Commissioner. Unfortunately, the Assistant Provident Fund Commissioner has selectively considered the reply or the documents placed by the 2nd respondent and arrived at erroneous finding that these two entities are to be treated as single unit for the purpose of EPF Act. According to 2nd respondent, these two entities from the perspective of Shops and Establishments Act, Central Excise Act, Sales Tax Act are treated as separate entities and the nature of business is separate and distinct. The fact that the persons who are

[1] (1983) 3 LLJ 932

holding the respective organisations are husband and wife or the business operations are undertaken from one premises, which is owned by HUF, is not the conclusive and determinative factor to treat the 2nd respondent in these two writ petitions as single entity.

The counsel places strong reliance upon the findings of fact recorded by the 1st respondent and submits that unless and until an exception to the finding of fact recorded by the Tribunal attracting the judicial review under Article 226 of Constitution of India is pointed out by petitioner, these findings cannot be as a matter of course appreciated to set aside the order and remit to primary authority for fresh consideration. The counsel prays for dismissing the writ petitions.

The counsel fairly states that on the applicable principle namely inter connection or mutual dependency, the 2nd respondent is not joining issue but the case of 2nd respondent is that it has been clearly demonstrated that these are two separate and distinct entities under applicable statutes and therefore, for the purpose of the Act the entities can't be treated as one single entity. Therefore, prays for dismissing the writ petitions.

I have heard learned counsel appearing for parties. Perused the material available on record.

The short point for consideration is whether the petitioner has made out a case for interfering with the order dated 15-05-2009 in ATA Nos.288(1)/2004 and 674(1) of 2005 of 1st respondent or not ?

It is to be prefaced that on the applicable principle or the test for treating Divisions/shadow limbs under same management, the learned counsel are at *ad idem.* The disputed area between the parties in these writ petitions is about the discharge of proof on the test followed by 1st respondent. The circumstances asserted by the Department or explained by the 2nd respondent are stated in detail in the preceding paragraphs. For brevity, I am not proposing to refer to the circumstances once again.

This Court is now concerned with the conclusion recorded by the 1st respondent, namely that for stating that these two entities are inter-connected or mutually depended, the evidence is insufficient is the finding of fact.

The petitioner can successfully challenge this finding if it draws the attention of the Court to some evidence which is before 1st respondent which either missed the attention of the 1st respondent or that the evidence, which is required to be considered is not considered by the Tribunal or there is perverse consideration of evidence. The Tribunal under the Act is conversant, with the scope, purpose and principles, examined the case of both the parties and recorded the finding that these two entities cannot be treated as single entity. This finding is recorded by noticing that the evidence or circumstance relied upon by Department is insufficient. Unless it is pointed out as observed above that this reasoning is incorrect, the issue does not call for further deliberation. The petitioner failed to make out case for interfering with the impugned orders.

Mr.Balaji submits that the assessment was proceeded on the conclusion recorded by the Assistant Provident Fund Commissioner that these two entities are single entity. Now the finding of the 1st respondent that these are two distinct entities is confirmed, he seeks clarification that the petitioner is not precluded from independently examining obligation of payment of PF by these two entities and taking appropriate decision. It is needless to observe that once the findings are confirmed, if these two entities are otherwise under the scope and obligation of the Act, the Department can certainly issue notice and proceed independently against these two entities.

With the above observation, the writ petitions are dismissed. No order as to costs.

Miscellaneous petitions, if any, pending, shall stand closed.

S. V. BHATT, J

Dt: 09-02-2017
Prv