

\$~22

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

%

Decided on: 03.02.2020

+ **W.P.(C) 9123/2015 & CM APPL. 23809/2015**

ASST. PROVIDENT FUND COMMISSIONER & ANR..... Petitioner

Through: Ms. Roopali Chaturvedi, Adv.

versus

M/S SHRI KRISHNA POLYURETHANE INDUSTRIES PVT. LTD.

.... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. This writ petition impugns the order dated 22.05.2014 passed by the learned Employees Provident Fund Appellant Tribunal in ATA No. 40 (4)/2002, whereby the assessment order passed by the Assistant Provident Fund Commissioner dated 29.10.2001 was set aside under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (in short 'the Act'). By the said order, two entities i.e. the respondent and M/s Legend Interiors were clubbed together for assessment apropos applicability of the Act, under section 7-A read with section 2-A of the Act. The report of the inspection team dated 09.09.1991, records that 21 employees were found in the premises of the respondent company, which was being shared by the another entity. The learned counsel for the respondent submits that the entity M/s. Legend Interiors permanently closed

its operations w.e.f 31.07.1999. The impugned order has dealt with the issue as under:-

“

5. *Heard the Ld. Counsels for the parties, pursued the records and pleadings filed by the parties. The issues involved are:*

(i) Whether M/s Regend Interior is liable to be clubbed with M/s Shri Kriishna Polyurethane Industries Pvt. Ltd. as per section 2A of the Act? And

(ii) Whether the disputed daily wages mazdoors engaged for collecting construction wastage shall be treated as employees of the appellant or not?

6. *Section 2A of the Act provides as under:-*

2A Establishment to include all department and branches

For the removal of doubts, it is hare by 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.

In the matter of Management of Pratap Press, New Delhi Vs. Secretary, Delhi , [AIR 1960 SC 1213], Hon'ble Supreme Court of India has observed in para 5 of its judgment as under:-

“In all such cases therefore, the court has to consider with care has 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 an employer has kept the two units distinet or integrated”

The Hon'ble Supreme Court in the above case has emphasized two important tests required to be applied for deciding the issue of functional integrality including the test i.e. as to whether the unit sought to be clubbed can exist conveniently and reasonably without the others. Both these test has not applied by the Respondent Commissioner. So merely common ownership of the two units and mere location of the two units in common premises by itself are not sufficient to satisfy the test of functional integrity. The acid test of functional integrality i.e. the test of functional integrality is to be decided whether the unit (clubbed with another for the purpose of applying the PF Act,) would survive in the absence of the other or whether it would continue to do its business when other unit is closed. The Respondent-commissioner has simply made findings in the impugned that..... "Both M/s Regend Interior and M/s Shri Kriishna Polyurethane Industries Pvt. Ltd. are functioning in the same premises and their functional integrity exists between two firms". In my opinion, the Respondent-commissioner has not made any findings that whether the unit survive in the absence of the other or whether it would continue to do its business when other unit is closed. M/s Regend Interior closed permanently with effect from 31.07.1999 and this fact also brought in the Knowledge of the Respondent by fining as affidavit but M/s Shri Kriishna Polyurethane Industries Pvt. Ltd. is continuing to operate, hence M/s Regend Interior was not dependent upon the appellant. Mere EXISTENCE OF COMMON PERSON AS IN THE Company and sole proprietor of another firm and mere location of the units is not sufficient to satisfy the test of the functional integrality. The commissioner has not applied the test of functional integrality i.e. the test of functional integrality is to be decided whether the unit (clubbed with another for the purpose of applying the PF Act,) would survive in the absence of the other or whether it would continue to do its business when other unit is closed. In the

matter of Regional Director, ESI Vs. Aruna Stores, 2005-II-LLJ 629, the court decided the word 'integrality' which indicates there is complete whole and one is included as part of whole. So, that is why Karnataka High Court, after referring various cases, decided in the matter of Davesh Sandeep Associates & Others, 1977 LLR 137 and B Ganapathy Bhandarkar Vs RPFC, FJR (75) 384that.....

“Mere fact of common ownership of the two units and mere location of the two units in common premises by itself are not sufficient to satisfy the test of functional integrality”. The Bombay High Court has also taken same view in the matter of M/s Ebrahim Currim & Sons Versus RPFC, 1994 I LLJ 369 “Mere fact of common ownership by itself is not sufficient to satisfy the test of functional integrality. Similarly mere fact of supply of raw materials or purchase of raw materials for the factory by the petitioner would not be sufficient to satisfy the test of functional integrality. All relevant tests must be considered and applied before deciding the issue as the applicability of section 2A of the Act or of functional integrality between the two units.” In this matter, I do not find any evidence except the common ownership of one Director and common place so these indicia are not sufficient to pass the test of functional integrality. The Hon'ble Supreme Court in the matter of Raj Continental (supra) held that if the accounts, balance-sheet are maintained separately as well as establishments are registered separately under various Act, the two units cannot be clubbed. If I apply the above decisions of the Hon'ble Supreme Court as well as that of Karnataka High Court and Bombay High Court, one will hold that in the present case both the unit are separate for the purpose of invoking the Act.

Hence, two establishments cannot be treated as one.

6. In respect of second issue regarding employment strength, I have examined attendance register for month of September 1991 and other documents of the establishment which was submitted during 7A inquiry.

Out of seven employees, two employee S/Shri M. Vijayan and Jawahar were absent in the month of September 1991 and both were also absent on the date inspection. This fact clearly evident that squad had not done physical counting/verification of employee indication their name, father's name, date of joining, designation and address. It was statutory duty of the Enforcement Officer that they were required to do physical counting of employees, who were at the time of inspection by noting their name, father's name, date of joining, designation and address. In the matter of the ESIC Vs. Karnataka, [1991 LLR775], it was held that list of employees prepared by inspector must contain the name, father's name place from the employee hails, designation, the length of service, salary and wages, signature of the employees. Moreover, squad noted down the name of daily wages S/Shri Ram Asre, Babu Lal, Ram Sharma, Gianshyam, Krishna and Govind who were not connected to manufacturing activity and this dispute was raised by the appellant during 7A inquiry. The respondent relied only one evidence in whole matter since the list was signed by Mr. Sanjay Mukin, the Act is applicable whereas the Respondent, being quasi-judicial authority, had to summon these disputed employees. The Act, being social Act, cannot be implemented for unknown persons or persons used for those activity which is not connected with main manufacturing activity. In the matter of Regional Provident Fund Commissioner, Bhuvneshwar Versus Rameshwar Lal Mali Ram, [2001 LLJ 1231], the Hon'ble Orissa High Court decided in para no.10. "In case of Provided Fund Inspector Versus T Hariharan [1971-1-LLJ 416 (SC)], it has been held, the word 'employment' means the employment in regular course of business of the establishment and such employment will not include employment of few persons for a short period on account of facing necessity or some temporary emergency beyond the control of the establishment". In the

present matter, few persons were used for collecting the construction waste material so these persons cannot be treated for regular course of employment.”

2. In the cross examination, the officer of the petitioner has admitted as under:-

“STATEMENT OF SHRI PARSHOT LAL, AAO RECALLED FOR CROSS EXAMINATION ON S.A.

CROSS EXAMINATION BY SHRI. M.R. MALHOTRA

Shri Sanjay Mukim prepared the list of those 21 persons whom we found working during our physical verification. We did not require from any of the 21 person or from Shri Sanjay Kukim as to whether the employees were employed with Legend Interior or Shri Krishna Polyurethane or as to whether there were more than one unit in the said premises bearing A-47 Mangol Puri Indl. Area. I do not remember if any of squad members signed the attendance register produce before us, in token of having inspected the register. We have not mentioned in our report that we inspected the attendance register. Nor we have mentioned in our report that we made physical verification and that Shri Sanjay Mukim reduced name of 21 persons in writing on our asking do not remember the name of the E.O. forming part of our squad who made Shri Sanjay Mukim to sign the information and list of 21 persons. I cannot say if the list of 21 persons written at our instance by Shri Sanjay Mukim included the name Legend Interiors.”

3. The Court would note that the Division Bench of the Karnataka High Court in *Employees’ State Insurance Corporation vs. Karnataka Asbestos Cement Products*, 1991 SCC OnLine Kar. 226, has held *inter alia* as under:-

3. The learned Employees' Insurance Court, on the basis of the evidence placed before it, came to the conclusion that the respondent had not employed more than six persons relying on

the attendance registers A1 to A5 produced by the employer. At the same time, the trial Court totally disregarded the report Sled by the Inspector and his oral evidence. The report was rejected, relying on a decision of this Court in the case of Employees' State Insurance Corporation v. Subbaraya Adiga [1988-II L.L.N. 452]. In the said decision, it was held as follows in Para. 5, at page 454:

“... A list of employees prepared by the Employees' State Insurance Inspector in the course of his visit to an establishment, in order to find out whether the provisions of the Employees' State Insurance Act are attracted to it, must contain the name, father's name, place from which the employee hails, the designation, the length of service, emoluments and the signature or thumb impression of the employee, as the case may be. If at that time other persons other than the employees are present, the names and addresses of at least two of them with their signatures and also the signature of the proprietor or manager or the person in charge of the establishment should be obtained at the end of the list and a copy of which be furnished to the establishment...”

4. The report furnished by the Inspector, RW1, did not contain the details which it was required to contain and, therefore, the learned Judge was correct in rejecting the report. Only other evidence available was to be found in exhibits A 1 to A 5, the attendance registers produced by the employer which has not been impeached and which disclose that the applicant had not employed more than six persons.

5. Learned counsel for the Corporation, Sri R. Gururajan, submitted that the Employees' Insurance Court erred in setting aside the demand of contribution for the period 1 January, 1986 to 31 May, 1986, relying on the evidence relating to earlier period. That argument overlooks the fact that the entire

proceedings initiated was on the basis of the report of the Inspector in regard to the previous periods. If that report had to go, all that followed on account of the report should also go.

4. What emanates from the preceding discussions is that the officers did not ascertain the most important questions apropos the employment of the said 21 persons in the factory visited by them i.e their names; father's name; address; the period from which they were working in the premises; the nature of their respective duties, the length of service and other relevant information. Their signatures too were not taken on any document. The respondent management had contended that six persons had come for inspection. That being the position, the officers ought to have asked each of the alleged workman/employee as to on what capacity they were working in the premises of the respondent management. Therefore, the report itself is either incomplete and erroneous apropos the requisite assessment to be made. Therefore, it cannot form the basis of any sustainable order under 7-A of the Act. Interestingly, the two establishments represented before Assessing Officer were two different establishments working in the same premises. There was no proven inter dependency between them. They carried out separate businesses. M/s Legend Interiors was dealing in the business of wooden furniture whereas M/s Shri Krishna Polyurethane was engaged in manufacturing polyurethane mouldings. The Director of the respondent company had stated in his affidavit before the petitioner as under:-

“Affidavit

I Sanjay Mikim, Director- M/s Shri Krishna Polyurethane Industries Pvt. Ltd. E-812, DISDC Industrial Complex, Nerela Delhi- 110040 do hereby solemnly (illegible)& declare as under :-

1. *That the deponent was made director of M/s Shri Krishna Polyurethane Industries Pvt. Ltd w.e. 1-8-1986 as is evident from Form No. 32 & resolution of Board of directors dated 1.5.86 copy of which as Annexure- A-1 (Colly) and the above company is an incorporated company under the Companies Act as is evident from certificate of incorporation, copy of which is annexed as Annexure A-2.*

2. *That the deponent floated a sole propriety firm in the name & style M/s The Legend Interiors and it had seen a SSI unit as is evident firm annexure A-3 and this firm had been registered under Sales Tax Act as Proprietor firm as is evident form annexure A-4. M/s. the Legend Interiors had been permanently closed w.e.f. 31/7/1999 intimation of (illegible) establishment had been delivered in the office of the Regional Director (illegible) is annexed as Annexure A-5.*

3. *That as on 9/9/91M/s. The Legend Interior and M/s. Shri Krishna polyurethane Industries had been functioning & operating from the premises bearing No. -47, Mangol Puri industrial Area Phase-II New Delhi.*

4. *That as on 9/9/91 following employees were employed with M/s. Shri Krishna Polyurethane Industries Pvt. Ltd.*

1. *Mr. M. Vijayan.*
2. *Mr. M.C. Gupta*
3. *Mr. Jawahar Lal*
4. *Mr. Krishna Kumar*

5. Mr. Ran Sewak
6. Mr. Makhan Lal
7. Mr. Siya Ram

Photocopies of the attendance-cum-wages register for Sept. 91 of the above said company are annexed herewith as Annexure A-6(colly) Total seven employees were employed were employed with the above company as on 9/9/91.

5. *That as on 9/9/91 following employees were employed with M/s. The Legend*

1. Mr. M.K. Saini
2. Mr. Nar Singh
3. Mr. Arjun Singh
4. Mr. Vinod
5. Satveer Singh
6. Mr. Sukh Pal
7. Mr. Bhundu

Photocopies of the Attendance-cum—wages Register of the employees of M/s. The Legend Interiors for Sept, 91 are annexed as Annexure A-7(colly).

6. *That on 9/9/91 few official of the P.F Organization visited the premises A-47, Mangol Puri Industrial Area Phase-II and the deponent was present there One of them prepared a list of 21 persons and compelled me to write these names on the letter head of M/s. Shri Krishna Polyurethane Ind. Pvt. Ltd. Shoeing. That they are working as on 9/9/91 as employees.*

The deponent explained them that all of them were not employees of M/s. Shri Krishna Polyurethane Industries Pvt. Ltd. and that they include persons who had come to the premises to collect wastage of building material for outward carriage and also that they were found present and the deponent had to write their

names. The learn of officials created an awful atmosphere compelling the deponent to accept their dictates and to reduced in writing the names from the list of 21 persons prepared by them on the letter head of M/s. Shri Krishna polyurethane Ind. Pvt. Ltd. Actually the said list of 21 persons included name of sershri Nar Singh, Arjun Singh, Sukh Pal & Bundu Employees of M/s. The legend Interiors and they were not employees as on 9/9/91 of M/s. The Legend Interiors as on 9/9/91 and prior 9/9/91 they are to be excluded from the list of 21 persons depicted as employees of M/s. Shri Krishna Polyurethane Industries Pvt. Ltd.

Further there was one Sunil Kumar who was on trail on 9/9/91 with M/s. Shri Krishna Polyurethane Industries Pvt. Ltd. and the Management, after trail had offered him salary a Rs. 895/- per month & service from 10.09.1991 but he did not turn up on the next day form joining service.

Further there were persons/ Mazdoor namely sukhai, Ram Asre, Babu Lal, Ram Saharan. Ghansyam, Krishna & Govind present as on 9/9/91 who were hired to collect wastage of construction material but they could not be termed as employees of M/s. Shri Krishna Polyurethane Ind. Pvt. Ltd. the manufacture activities of M/s. Shri Krishna Polyurethane Industries Pvt. Ltd. & that on M/s. The Legend Interiors are mentioned in the rejoinder dated 17.11.93 and the hiring of the mazdoors Sukhai & others as on 9/9/91 was nothing to do with the core or manufacturing activities of M/s. Shri Krishna Polyurethane Industries Pvt. Ltd.

That is to be submitted that the above mentioned Sarvshri Arjun Singh. Nar Singh, Sukh Pal & Bhundu figuring in list of 21 persons were regular employees of M/s. The legend Interiors and their date of appointment are evident from the revelant column of

Attendance-Cum-Wages Register for Sept, 91 annexed as Annexure A-7.

The name of Jawahar Probably repeated twice in the list(missing)

7. *That the deponent in rejoinder dated 17.11.1993 to the counter reply had explained that there used to be no similarity between the business/manufacturing/activities of M/s. Shri Krishna Polyurethane Ind. Pvt. Ltd. & M/s. The Legend Interiors. The written submissions, protest letters & rejoinder of the establishment signed & submitted by the deponent be read as the part of this affidavit as the same contained true facts.*

8. *That total 7 employed as on 9.9.91 with M/s. Shri Krishna Polyurethane Industries Pvt. Ltd.*

9. *That since closure of M/s. The legend Interiors w.e.f. 31.7.99 M/s. Shri Krishna Polyurethane Industries Pvt. Ltd. had been operating & functioning without any problem as function/activities of The Legend Interiors & M/s. Krishna Polyurethane Industries Pvt. Ltd. were independent as not interdependent. There was no functional integrality between the two.*

Deponent”

5. With the aforesaid information available with the petitioner, it was easy for the petitioner to ascertain whether the business of two companies was separate or not. Whether there was interdependency upon each other and whether there was functional integrality about the business of two companies. But , these essential elements which were neither examined nor considered. The petitioner went ahead only with the impression that since 21

persons were working in the premises, therefore each of them would be considered to be working for the two entities which could be clubbed together. However, the essential test for clubbing, as noted hereinabove was not conducted or ascertained. Therefore, section 2-A would not be applicable. The two entities being separate would have to be treated separately. These aspects have been duly dealt with in the impugned order as noted hereinabove and do not call for any interference. Furthermore, in their counter affidavit the respondent-management has refuted the contention as under:-

“18. That the fact that both the companies maintained separate accounts, balance sheet, registered separately as SSI Units, having separate excise and sales tax numbers, established categorically that the two companies in question existed at independent and separate entities. Further, the attendance register and salary register of both the establishments were maintained separately. Income Tax of both the establishment was also assessed separately. All these point to the independent and separate existence of the two establishments.”

6. It is not a case that the respondent-management closed the business with M/s Legend Interiors immediately upon the information being conducted. Indeed, the business activities were carried on till 31.07.1999, that is for 8 years thereafter. Both the respondent-management and M/s Legend Interiors had separate income tax numbers, separate Excise and Sales Tax numbers, individual SSI Unit nos. and their Balance Sheets were also separate. Income tax of both the establishments was also assessed separately. They maintained separate sets of registers. That being the position, they ought to have been treated separately.

7. In view of the above, the impugned order does not call for any interference.

8. The petition is without merit and is accordingly dismissed.

NAJMI WAZIRI, J

FEBRUARY 03, 2020

kb

