

(1994) 04 BOM CK 0045
In the Bombay High Court
Case No : Writ Petition No. 384 of 1991

C. Dhanvantrai and Co. and others	Vs	APPELLANT
Mahesh Kumar and others		RESPONDENT

Date of Decision : 13-04-1994

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A, 7A(2)

Citation : (1994) 04 BOM CK 0045

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Judgement

D.R. Dhanuka, J.—By this petition filed under Article 226 of the Constitution of India, the petitioners have impugned order dated 18th April 1990 and order dated 21st October, 1992 passed by respondent No. 1. By order dated 18th April, 1990 passed u/s 7-A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 the respondent No. 1 has held that the petitioner No. 1 was liable to be clubbed with respondent Nos. 4 to 7 for purpose of applicability of the said Act from inception. By order dated 21st October, 1992, the respondent No. 1 has quantified the amount payable.

2. This petition was argued at length by learned counsel for all the parties.

3. The respondent No. 1 desires to rely on additional material in support of the main order dated 18th April, 1990. The learned counsel for respondent No. 1 has tendered an affidavit in this behalf. The petitioner and respondent Nos. 4 to 7 also desire to rely on additional material not relied upon in the impugned proceedings. It is in interest of justice that both sides be allowed to lead additional evidence in fresh enquiry to be held on remand.

4. In my opinion, the respondent No. 1 ought to have confronted the petitioner and respondent Nos. 4 to 7 with the material sought to be relied upon by the department and given an opportunity to the parties concerned to give their explanation. I shall illustrate the point. It is observed in the impugned order

dated 18th April, 1990 that there was unity of finance as the source of finance has been pulled out from the group of companies as alleged to be evidence from the loan account of various parties. Section 7-A(2) of the Act confers power on respondent No. 1 to record evidence of the parties on affidavits and even compel their attendance for examination on oath. Principles of natural justice require that no one should be taken by surprise. In my opinion, the procedure followed by respondent No. 1 was defective.

5. The respondent No. 1 has applied several tests for purpose of determining the question of clubbing. It was held by this Court in the case of Ebrahim Currim and Sons Vs. Regional P.F. Commissioner and Another, that the Court has to consider the issue of functional integrality also with reference to the tests as to whether one unit can exist conveniently without the other. Such a test was laid down by the Supreme Court in terms in the case of Management of Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers' Union and Its Workmen, . It appears to me that this test has not been considered or applied at all by respondents No. 1 in this case. The learned counsel for the respondent No. 1 has heavily relied upon the ratio of the judgment of this Court in the case of J. G. Vakharia v. Regional Provident Fund Commissioner, Bombay, reported in 1975 I LLJ 448. It was held in this case that if various units were artificially set up by the members of the same family with a view of defeat the provision of the Act and the Court came to the conclusion that the formation of various firms was nothing but subterfuge to defeat a social legislation, the Court not permit such subterfuge. It is alright for the learned Counsel for the respondent No. 1 to cite the authority for the purpose for highlighting the principle. I do not find any finding in the impugned order that the various firms were formed as a subterfuge in order to defeat the provisions of the Act. I am making various prima facie observations with a view to focus the attention of the respondents No. 1 on the various issues involved which have remained undecided.

6. In view of the above, it is in the interest of justice that the impugned order is set aside and the proceedings are remanded to respondent No. 1 with appropriate directions of this Court for fresh hearing and fresh determination. If the petitioner and respondents Nos. 4 to 7 have paid any amount in pursuance of the impugned order, the same need not be refunded at this stage.

7. The Court is informed that on the basis of the impugned orders, prosecutions have been launched. If so, the said prosecutions shall be withdrawn and shall not be pursued further.

8. In result, the petition is allowed. Rule is made absolute. The impugned orders dated 18th April, 1990 (Exhibit "I" to the petition) and the impugned order dated 21st October, 1992 are quashed. The proceedings commenced by the respondent No. 1 for determination of the question of clubbing u/s 7-A of the Act was revived. The respondent No. 1 shall follow the following directions of the Court while deciding the matter in issue on remanded and may evolve further procedure as deemed fit in accordance with the provisions of the Act, Rules and

principles of natural justice.

(a) The respondent No. 1 shall disclose to the petitioner and respondent Nos. 4 to 7 all the material on which the Department proposes or rely upon.

(b) The respondents No. 1 shall be entitled to call upon the petitioner and respondents Nos. 4 to 7 to produce the necessary documents or books of accounts for the purpose aforesaid.

(c) The respondents No. 1 shall confront the petitioner and respondent Nos. 4 to 7 with material circumstances appearing against them and give an opportunity to the petitioner and respondent Nos. 4 to 7 to give their explanation. For this purpose the respondents No. 1 shall record the necessary statements of witnesses on either side whatever relevant and necessary. Both parties shall be at liberty to lead such evidence as they deem fit and shall rely on such documents as they desire.

(d) The Respondent No. 1 shall apply all relevant tests as far as possible including the test indicated above and the test laid down in various other judgments including the test laid down by this Court in the case of *Sunder Transport & Anr. v. The Regional P. F. Commissioner*, 1992 2 CLR 977, If it is the case of the respondents No. 1 that all these firms were formed as subterfuge from inception, the necessary particulars in respect of the said allegation shall be furnished to the petitioner and respondent Nos. 4 to 7.

(e) The respondents No. 1 shall endeavor to complete the enquiry and pass the order by 31st December, 1994.

9. The learned counsel for respondents Nos. 4 to 7 relied on the judgment of Justice Dudhat in *Damjibhai L. Shah Vs. Regional Provident Fund Commissioner and Another*, . In this case decided by Dudhat, J., it was held by the Court that before passing order u/s 7-A, respondents No. 1 has to give reasonable opportunity to the parties affected. In my opinion grant of such reasonable opportunity shall include the obligation to confront the party concerned with the material circumstances which appear to respondent No. 1 to be against the said parties and seek their explanation.

10. The Bank guarantee furnished by the petitioner is discharged with immediate effect.

11. Issue of certified copy expedited.