(2015) 09 BOM CK 0278

In the Bombay High Court

Case No : Writ Petition No. 5442 of 2014

Central Board of Trustees and Others APPELLANT

Vs

Hotel Pacific and Others RESPONDENT

Date of Decision : 30-09-2015

Acts Referred:

Citation : (2015) 09 BOM CK 0278

Hon'ble Judges : A.S. Chandurkar, J.

Bench : Single Bench

Advocate : S.D. Sirpurkar, Advocate, for the Appellant; A.N. Vastani, Advocate, for the Respondent

Judgement

A.S. Chandurkar, J.—Rule. Heard finally with the consent of the learned Counsel for the parties.

2. The petitioners are aggrieved by the order dated 4-4-2014 passed by the learned Presiding Officer, Employees Provident Fund Appellate Tribunal, New Delhi in an appeal filed under Section 7-I of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for short the said Act) thereby allowing said appeal and setting aside the order dated 10-8-2005 passed by the Assistant Provident Fund Commissioner, Nagpur.

3. The proceedings in question arose under Section 7A of the said Act which were initiated for deciding the date of applicability of the said Act to the establishments, M/s. Hotel Pacific and Relish Restaurant. Pursuant to notice issued under Section 7A of the said Act, the respondents appeared before the Assistant Provident Fund Commissioner, Nagpur. After grant of opportunity to the respondents to place on record necessary documents, the learned Assistant Provident Fund Commissioner by order dated 10-8-2005 came to the conclusion that in terms of Section 1(3) of the said Act, the provisions of the said Act would be applicable from 1-10-1997. It was further held that the two establishments namely Hotel Pacific and Relish Restaurant satisfied the test of functional

integrality under Section 2A of the said Act. Accordingly, a sum of Rs. 9,52,876/- was found due from the establishment for the period from October 1997 till March, 2005.

4. The respondents being aggrieved by aforesaid adjudication filed an application for review under Section 7B of the said Act along with various documents. The Assistant Provident Fund Commissioner, Nagpur by order dated 4-10-2005 rejected the review application on the ground that there was no error or mistake on the face of the record and that no ground for review had been made out.

The respondents had filed Writ Petition No. 5746/2005 challenging both the aforesaid orders. On 25-11-2009, said writ petition was disposed of by granting liberty to the present respondents to approach the Appellate Tribunal and invoke the appellate remedy against the order dated 10-8-2005. It was also prima facie observed that the Assistant Provident Fund Commissioner had arrived at a conclusion regarding functional integrality and therefore the documents filed by the respondents along with review application could also be considered by the Appellate Tribunal.

5. The respondents accordingly filed appeal before the Appellate Tribunal and by the impugned order dated 4-4-2014, the learned Presiding Officer allowed the appeal and set aside the order dated 10-8-2005 passed by the Assistant Provident Fund Commissioner, Nagpur. Hence, this writ petition.

6. Shri S.D. Sirpurkar, learned Counsel for the petitioners submitted that the Appellate Tribunal was not justified in setting aside the order passed by the Assistant Provident Fund Commissioner. According to him, the order dated 10-8-2005 passed by said Authority had considered the report of the Enforcement Officer along with the books of account that had been produced before it. It had on that basis concluded that the Act would be applicable to the establishment from 1-10-1997. It was submitted that after considering the books of account, it had been held that both the establishments had no independent existence and, therefore, the test of functional integrality had been satisfied. The Appellate Tribunal, however, without considering all the material available on record set aside the said order without any justifiable basis. It was submitted that the Appellate Tribunal was required to consider the entire record that was available and thereafter decide the appeal. The material found reliable by the Assistant Provident Fund Commissioner has been brushed aside without assigning any reasons. It was, therefore, submitted that the order passed by the Assistant Provident Fund Commissioner deserves to be restored and the impugned order passed by the Appellate Tribunal deserves to be set aside.

7. Shri A.N. Vastani, learned Counsel for the respondents supported the impugned order. According to him, the Appellate Tribunal had rightly applied the proper legal tests while setting aside the order dated 10-8-2005. It had been found that there was no functional integrality between the two establishments and merely because both the establishments were owned by members of one

family, they could not be clubbed together under Section 2A of the said Act. It was submitted that this conclusion had been arrived at after examining the entire material on record. It was then submitted that the legal position in this regard is well settled and that there being no functional interdependence between the units, they could not have been clubbed together. In that regard, the learned Counsel placed reliance on the following decisions:

[1] Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers'' Union and Its Workmen, .

[2] K.V. Ratnam v. Govt. of India and another, 1987 LAB.I.C. 1288.

[3] M/s. Niton Industries Vs. The Union of India and others, .

[4] Sunder Transport and Another Vs. The Regional P.F. Commissioner, .

[5] Sumitra Nursing home v. Employees Provident Fund Appellate Tribunal, New Delhi and Anr.

[6] Ebrahim Currim and Sons Vs. Regional P.F. Commissioner and Another, .

[7] Regional Provident Fund Commissioner and Another Vs. Dharamsi Morarji Chemical Co. Ltd., .

[8] Hotel Yamuna Villa Vs. Regional Provident Fund Commissioner and Others, .

It was then submitted that the wage registers for the period from December 1995 to March 1999 pertaining to respondent No. 1 could not be produced due to passage of time. Similarly, the attendance registers for the period from 1-4-1998 to 31-3-2004 had been produced by respondent No. 2 and some records for a short intervening period were not produced. It was also submitted that it was neither mandatory nor compulsory for the guests of Hotel Pacific to have food from Relish Restaurant and both the entities were distinct and separate. Even in matters of finance and employment, both the units were distinct and the aspect of unsecured loan transactions between the parties was not at all relevant. The learned Counsel, therefore, submitted that there was no case made out to interfere in writ jurisdiction.

8. I have carefully considered the respective submissions and I have gone through the documents filed on record. In proceedings under Section 7A of the said Act, the Assistant Provident Fund Commissioner came to the conclusion as regards the applicability of the Act by relying upon various wage registers and books of account. Similarly, inspection reports dated 26-8-1997 and 30-10-1998 were also considered. It was then found that in April, 2000 there were twelve employees with respondent No. 1 and twelve employees with respondent No. 2. It was observed that the respective employment strength for the period prior to 1-4-1998 had not been produced on record and, therefore, relying upon the books of accounts the employment strength of both the establishments in April, 2000 had been taken as twenty four. Thereafter, by considering the wages paid by both the establishments, the date of applicability was fixed at 1-10-

1997. In so far as the applicability of Section 2A of the said Act is concerned, the Assistant Provident Fund Commissioner examined books of accounts of respondent No. 1 from 1997-1998 as well as 1999-2000 and noticed receipts from respondent no.2 in the account of respondent No. 1. Thereafter, by observing that both the establishments were in the same building and catering to the needs of the customers in hospitality industry found that the test and criteria of functional integrality had been satisfied. On that basis, the amounts due were calculated.

Aforesaid, therefore, indicates a detailed consideration of all the documents filed on record along with the report of the Enforcement Officer before passing the order under Section 7A of the said Act.

9. This Court while disposing of Writ Petition No. 5746/2005 had prima facie considered aforesaid findings and had then observed that these findings along with the documents that were sought to be relied upon by the respondents by filing review application and the correctness of the conclusion regarding functional integrality could be appropriately dealt with by the Tribunal in exercise of appellate jurisdiction.

The Appellate Tribunal in paras 1 to 4 has referred to the respective submissions of the parties. In paras 5 to 7, the Tribunal has referred to the legal position that common ownership of different establishments by itself is not sufficient to establish interconnection. Thereafter, in para 8 of the impugned order, it was observed that the learned Commissioner did not find whether any integrity existed between two establishments except that both the establishments were owned by the members of one family. It then observed that there was no doubt that the Restaurant could function without the existence of the Hotel and that there was no evidence to establish that there was commonality in the management and labour affairs. On that basis, the impugned order before it was set aside.

10. The aforesaid adjudication indicates that the Appellate Tribunal decided the appeal filed under Section 7-I of the said Act without even referring to or considering the material available on record which found favour with the Assistant Provident Fund Commissioner. Though the legal proposition that common ownership of both establishments by itself would not establish interconnection, said position was required to be considered in the light of material available on record. When the Assistant Provident Fund Commissioner after considering the entire material on record had come to the conclusion that clubbing of both establishments under Section 2A of the said Act was necessary and when it had also indicated the basis for coming to said conclusion, said finding could not have been set aside merely by observing that the aspect of common ownership was not sufficient. It is to be noted that the Appellate Tribunal was considering a statutory appeal and if it wanted to reverse the order passed by the first Authority, it ought to have considered all the material available on record. The impugned order does not reflect due consideration of the

entire material on record and only by referring to certain legal principles, the order passed by the Assistant Provident Fund Commissioner has been set aside. The same cannot be said to be a satisfactory manner of deciding a statutory appeal more so when the order passed by the first Authority was being reversed. Moreover, the observations of this Court in Writ Petition No. 5746 of 2005 cannot be lost sight of when it was observed that all material could be appropriately dealt with by the Tribunal in exercise of appellate jurisdiction. The impugned order also does not indicate the material relied upon by it for allowing the appeal.

11. In so far as the decisions relied upon by learned Counsel for the respondents, it is not necessary at this stage to go into said aspect on merits as it has been found that the Appellate Tribunal has not considered the entire material available on record while deciding the appeal and, therefore, it has been found necessary to remand the proceedings to the Tribunal for fresh adjudication. Applicability of aforesaid law can be urged before the Tribunal which can consider the same after considering all relevant facts.

12. In view of aforesaid discussion, the following order is passed:

(1) The order dated 4-4-2014 passed by the Appellate Tribunal in ATA No. 867(9) of 2009 is set aside. The proceedings are remitted to the Appellate Tribunal for fresh consideration in accordance with law and after taking into consideration the observations made herein above.

(2) It is clarified that the impugned order has been set aside on the ground that the material available on record has not been considered. The appeal shall be decided on its own merits in accordance with law.

(3) As the appeal pertains to the year 2009, same shall be decided expeditiously and preferably by the end of March, 2016.

(4) Rule is made partly absolute in aforesaid terms with no order as to costs.