

(1990) 01 RAJ CK 0026
In the Rajasthan High Court
Case No : Civil Writ Petition No. 2772 of 1989

Khoja Lime Udyog

APPELLANT

Vs

R.P.F. Commissioner

RESPONDENT

Date of Decision : 15-01-1990

Acts Referred:

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

Citation : (1991) 62 FLR 252 : (1992) 1 LLJ 903 : (1990) 1 RLW 50 : (1990) 1 WLN 361

Hon'ble Judges : K.S. Lodha, J

Bench : Single Bench

Advocate : S.N. Sharma, for the Appellant; R.R. Vyas, for the Respondent

Final Decision : Allowed

Judgement

K.S. Lodha, J.—By this writ petition, the petitioner has challenged the order of the Regional Provident Fund Commissioner, Jaipur, dated February 15, 1989, by which coverage u/s 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 has been given to Khoja Lime Udyog, village Hariadhana, Tehsil Billara, District Jodhpur.

2. It is alleged that Khoja Lime Udyog is a proprietorship concern owned by Umed Singh, son of Shri Ganga Ram. This Udyog first came in to existence on January 28, 1981 under the name Khoja Lime Industry, but later on its name was changed to Khoja Lime Udyog with effect from February 20, 1981. Some mines were got allotted to this Udyog in the name of Umed Singh. This firm excavates lime stones and prepares lime out of it and sells the same along with lime stones. The firm has got its separate Central Sales Tax and Rajasthan Sales Tax numbers and is also an assessee under the Income Tax Act. The number of its employees is 14.

3. There is another proprietorship firm by the name of Khoja Chemical Limes Industries which is owned by Prema Ram, son of Shri Ganga Ram (brother of

Umed Singh) which came into existence with effect from April 1, 1982. The number of its employees is 8. This firm purchases lime stones from Khoja Lime Udyog though it is separately registered under the District Industries Officer and has also got separate Central Sales Tax and Rajasthan Sales Tax numbers. It is also separately assessed under the Income Tax Act and the proprietor of Khoja Lime Udyog, namely, Umed Singh has no interest in this firm.

4. There is yet another firm by the name of Choudhary Lime Company and it is owned by Ram Prasad, son of Pema Ram (nephew of Umed Singh). The number of its employees is 7. This firm is also separately registered with the Industries Department and has got its separate Central Sales Tax and Rajasthan Sales Tax Numbers and is separately assessed under the Income Tax Act. This firm also purchases limestones from Khoja Lime Udyog and operates its kilns. It is also stated in this petition that in this Umed Singh has no interest.

5. The case of the petitioner is that all these three firms are having their separate accounts, separate management and separate ownership and the latter two have got nothing to do with Khoja Lime Udyog except that the latter two firms purchase lime stones or lime from Khoja Lime Udyog. The case of the petitioner still further is that not only the latter two firms viz. Khoja Chemical and Lime Industry and Choudhary Lime Company purchase lime and lime stones from Khoja Lime Udyog but many other firms operating in the area also purchase lime from Khoja Lime Udyog. These two firms do not have mines of their own. Still, the Regional Provident Fund Commissioner, Jaipur, issued a notice to the petitioner firm mentioning that these three firms constitute common family enterprise, and, thus, constitute one establishment and are covered by the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, (hereinafter called the "Act") as the number of the employees of all the three aforesaid firms jointly is more than 20. It appears that after the issuance of this notice the Provident Fund Inspector inspected the site of these firms and made a report to the Regional Provident Fund Commissioner and relying on that report the said Commissioner came to the conclusion that all the three aforesaid units and mines are situated in the same premises with common gate, common office, common huts, common passage to Kiln and common place for despatch of the product. He was further of the opinion that Khoja Lime Udyog and Choudhary Lime Company do not own mines of their own and use the lime stone taken from the mines owned by Khoja Lime Udyog. He further found that Khoja Lime Udyog is owned by one brother and Khoja Chemical and Lime Industry by another brother and Choudhary Lime Company by son of one of the brothers, and, thus, they constitute a common family enterprise with separate ownership in the name of different members of the family as a camouflage only. He further observed that his conclusion was further strengthened by the fact of common source of raw material, common gate, common office, and common place of despatch etc. and according to him the obtaining of separate Sales Tax number under the Sales Tax Act could not be a conclusion of proof of establishing a separate entity for the purpose of the Act, and, on these findings he came to the conclusion that the

firm Khoja Lime Udyog was covered u/s 7A of the Act and was liable to contribute towards Provident Fund. A schedule of the dues has been appended to the said order.

6. In reply to this writ petition the respondents have reiterated the findings of the Regional Provident Fund Commissioner.

7. I have heard the learned counsel for the parties and perused the record.

8. The contention of the learned counsel for the petitioner is that the findings of the Regional Commissioner are based on mere conjectures and only due to the fact that the three concerns are owned by the members of the same family and that the offices of all the firms are situated in the same building. According to learned counsel, this could not be sufficient to hold that all these three concerns are jointly owned by one family or they jointly form an establishment within the meaning of the said Act, especially when the three firms are separately owned by three individuals, they kept their accounts separate and are separately assessed under the Central Sales Tax and Rajasthan Sales Tax Act and the Income Tax Act. Not only this, there is absolutely nothing on record to suggest that there is a functional integrality or integrity of finance and employment between these three concerns. In this respect the Regional Commissioner appears to have merely relied on the ipsi dixit of the Inspector who in his turn also did not collect any material and merely mentioned in his report Annexure R-1, that besides unity of ownership, financial integrity also noticed between the above 3-4 establishments and in his report Annexure R-2 in almost all the columns he has mentioned "to be verified". That means he was not sure of the report made by him and his report was subject to further verification. He, therefore, urges that in these circumstances, the petitioner firm could not have been covered u/s 7A of the Act. On the other hand, the learned counsel for the respondent has strenuously urged that the circumstances pointed out by the Regional Commissioner clearly go to establish that these firms have common ownership, there is financial integrity in as much as Khoja Lime Udyog excavates lime stone and prepares lime which is sold to the other two firms and other two firms did not have their own kilns and as the offices of the three firms are situated at the same place and have a common gate, and common places for despatch of the material, they must be deemed to be an establishment within the meaning of the said Act. He places reliance upon Section 2A where the establishment has been explained -

2-A. Establishment to include all departments and branches -

"For the removal of doubts, it is hereby 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 part of the same establishment."

9. In order to support their respective contentions, both the learned counsel cited *Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers' Union and Its Workmen*, and the learned counsel for the respondent

further relied upon *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, and *Mridang Cinema v. Union of India* 1980 (2) RLR. 834; *Royal Pharma v. Regional Provident Fund Commissioner* D.B.C.W. No. 6177/88 decided on June 11, 1987 by the A.P. High Court and *Karachi Bakery v. R.P.F. Commissioner* S.B.C.W. No. 6233/79 decided on November 11, 1985 by the A.P. High Court.

10. During the course of arguments the learned counsel for the respondent also raised a plea by way of preliminary objection that the petitioner had a remedy u/s 19A of the Act, and, therefore, this Court should not entertain this writ petition.

11. I have given my careful consideration to the rival contentions and I find considerable force in the contention raised by the learned counsel for the petitioner. However, before coming to the merits of the case, I may dispose of preliminary objections raised by the learned counsel for the non-petitioner. Section 19-A lays down:

" 19-A. Power to remove difficulties -

If any difficulty arises in giving effect to the provisions of this Act, and in particular, if any doubt arises as to -

(i) Whether an establishment which is a factory, is engaged in any industry specified in Schedule I;

(ii) Whether any particular establishment is an establishment falling within the class of establishments to which this Act applies by virtue of a notification under clause (b) or Sub-section (3) of Section 1; or

(iii) the number of persons employed in an establishment; or

(iv) the number of years which have elapsed from the date on which an establishment has been set up; or

(v) whether the total quantum of benefit to which an employee is entitled has been reduced by the employer, the Central Government may, by orders, make such provision or give such direction, not inconsistent with the provisions of this Act, as appears to it to be necessary or expedient for the removal of the doubt or difficulty; and the order of the Central Government, in such cases, shall be final."

And relying on this provision the learned counsel for the respondent urged that the petitioner could have approached the Central Government for clarification whether the establishment is covered under the Act or not and he further places reliance on the decision of this Court in *Ess Dee Carpets v. Union of India* (decided on October 15, 1984. Reported in 1985 RLR 74).

12. In my opinion, in the circumstances of the case, the petitioner need not have resorted to this remedy in as much as the question does not appear clearly to be covered by any of the items mentioned u/s 19-A. Here the question precisely is whether these three concerns form one establishment or not, and, that is the

question of fact to be decided on the facts of a particular case. Again in the authority relied upon by the learned counsel referred to above also, the matter has been decided on merits by this Court and it was only in passing that a reference to Section 19-A of the Act was made which in my opinion must be taken to be only obiter dicta, the case having been decided on merits. Therefore, this preliminary objection appears to be without substance.

13. Now coming to the merits of the matter. Term "employee" has been defined u/s 2F of the Act to mean -

"2-F. "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets his wages directly or indirectly from the employer, and includes any person -

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment".

The same term has been defined under the Employees State Insurance Act, 1948:

2.(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and -

(i) Who is directly employed by the principal Employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution of sale of the products of, the factory or establishment; but does not include -

(a) any member of the Indian naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed one thousand and six hundred rupees a month;

Provided that an employee whose wages (excluding remuneration for overtime work) exceed one thousand and six hundred rupees a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;

14. A bare perusal of these two different definitions would go to show that under the two Acts the definitions of the same term are different. Definition u/s 2 of the Act appears to be narrow and limited whereas under the Employees State Insurance Act, 1948, it appears to be wider. I have purposely referred to these two definitions because learned counsel for respondent had placed much reliance upon *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, which appears to have been decided under the Employees State Insurance Act and from the two definitions mentioned above it would clearly appear that a decision under the Employees State Insurance Act cannot fully and wholly govern a case under the Act. One of the essential conditions for being employee under the Act is that the employee gets his wages directly or indirectly from his employer. These words do not find place in the Employees State Insurance Act, 1948, and unless it is established that the employees of these three concerns get their wages directly or indirectly from the same employer, it will be difficult to hold that they jointly form an establishment within the meaning of term establishment under the Act. Apart from this, it also directly appears that in the present case the owners of these three concerns are separate although they may be closely related and are members of the same family. It will be pertinent to remember here that members of a Joint Hindu Family can have their own separate business, separate income and therefore, unless it is established that these three different owners of the three concerns pool their income and the employees are paid out of that joint or pooled income, their employees cannot form an establishment within the meaning of the Act. It has not been denied before me that these owners of the concerns are separate assesseees under the Income Tax Act as also the Central Sales Tax Act and the Rajasthan Sales Tax Act. This would necessarily mean that they maintain their separate accounts and there is no joint fund. There is also no denial of the fact that the mines are owned by Khoja Lime Udyog and not by the other two concerns. They only purchase lime stone and lime from Khoja Lime Udyog as the other establishments purchase from that unit. There is a specific mention in para No.9 of the writ petition that there are so many other firms operating in the area which also purchase lime from the petitioner firm and they only own their kiln and Bhattas but do not own mines. No specific reply has been given to this part of the para, therefore, it must be deemed to have been impliedly admitted. There is a bare denial of the whole para No. 9 and then a reference has been made to some other points raised in this para, but the fact that firms other than these two firms purchase limes from Khoja Lime Udyog has not been specifically denied.

15. The learned Regional Commissioner does not appear to have made any independent inquiry and has based his conclusion on the mere report of the Inspector. I have already mentioned that this report also is not based on any

definite and clear material and all columns of the report have been left to be verified. The main emphasis by the Inspector in his report (... illegible). Inspector has further mentioned that besides this, unity of ownership, financial integrity is also noticed, but how he came to notice financial integrity has not at all been mentioned. On the other hand, from what has been stated above, it clearly appears that there is no financial integrity because accounts are separately maintained and the employees are not paid out of consolidated fund of the three concerns. There also does not appear to be functional integrality. It has not been shown in any manner that the one concern depends upon the other for any activity concerned with his own unit or that one concern carries out an activity which is ancillary or incidental to or a part of the other concern. There is also nothing to show that the employees of one concern work in connection with the other concern. It will be relevant to point out here that in *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, the case related to a cycle stand and a canteen running in a cinema house and in the circumstances of that case their Lordships were of the opinion that the cycle stand and the canteen cannot be said to be independent of the cinema house. The canteen and cycle stand are leased out to the contractor under the instrument of lease. The work of the canteen or the cycle stand was in connection with the work of the cinema house, as it was an amenity or facility to the customers of the cinema house. The case, therefore, is clearly distinguishable. Similarly, the authority reported in *P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others*, relied upon by the learned counsel for the respondents is also distinguishable in as much as it related to a Beedi manufacturing concern and, on facts it was found that there were requisite degree of supervision and control of the factory over the home workers who received raw material from the factory and delivered the rolled beedies to the factory which had a right to reject. The case of *Mriding Cinema (supra)* relied upon by the learned counsel is also distinguishable on facts as that of the Supreme Court case *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, And also the other case relied upon by the learned counsel in *Royal Pharma v. The Commissioner (supra)* by the A.P. High Court is distinguishable. In that case Their Lordships observed that the partners were factually the same in the different concerns. Here the owners are not the same; admittedly, they are different persons, though belonging to the same family.

16. So far as the fact that the two concerns, namely, Khoja Chemical & Lime Industries and Choudhary Lime Company purchase lime and lime stones from Khoja Lime Udyog goes, it cannot be said that there is functional integrality between them in as much as it is not necessary for them to purchase lime and limestones from Khoja Lime Udyog only. They can very well purchase these materials from other mining concerns if they so chose. It is not incumbent upon Khoja Lime Udyog to sell all its product to these concerns. As already stated above other concerns also purchase lime and lime stones from Khoja Lime Udyog. It is not always necessary that a person who excavates lime stone must

himself use limestone or must make bricks by having his own kilns and Bhattas. These activities can be carried out independently by different concerns, and, therefore, merely purchase of the raw material by these two concerns from Khoja Lime Udyog cannot lead to the conclusion that the work of Khoja Lime Udyog is ancillary or incidental to the work of the other two concerns.

17. As already stated above, both the learned counsel relied upon Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers' Union and Its Workmen, That was a case where the entrepreneur owned a press as also published a news paper and the question was whether these two units are one establishment or are distinct and separate units and their lordships laid down the criteria for testing whether the units is one or they are separate units. The most important test pointed out by their lordships was that of functional "integrality" i.e. of the unity of finance and employment and of labour. In that case, unity of ownership existed ex-hypothesi but there should have been such functional inter-dependence that one unit could not exist conveniently and reasonably without the other and their finances and employment should have been integrated in order to make them one unit of establishment. I have already referred to the question of functional Integrality and unity of finance and so far as the question of ownership is concerned, in our case there is no such unity of ownership as such and it has been clearly shown that the three proprietors of the three different concerns are different and independent entities. Thus, this case as a matter of fact helps the learned counsel for the petitioner and not the learned counsel for the respondent.

18. The learned Regional Commissioner has relied upon R. Ramakrishna Rao Vs. State of Kerala, but that case is (SIC) quishable inasmuch as it was also case of common ownership.

19. The learned counsel for the respondent in the last urged that the petitioner did not produce the relevant record and therefore the Regional Commissioner had to act upon the report of the Inspector. I am not impressed by this argument. As already stated no independent inquiry was made by the Commissioner. There is nothing to show that any notice was issued to the petitioner for producing any record. Therefore he cannot be blamed for not producing the record. The Regional Commissioner was bound to make a proper enquiry.

20. From what has been stated above, it is clear that the learned Regional P.F. Commissioner was not justified in holding that Khoja Lime Udyog along with other two concerns was liable to be covered u/s 7A of the Act. His order is, therefore, liable to be (SIC).

21. The writ petition is, accordingly, allowed and the order of the Regional P.F. Commissioner, Jaipur dated February 15, 1989 is quashed. The petitioner shall be entitled to refund of the amount which he may have deposited in pursuance of the said order.