
(2013) 03 MP CK 0095
In the Madhya Pradesh High Court
Case No : W.A. No. 212 of 2006

Mahakoushal Gasolene Enterprises	Vs	APPELLANT
Assistant Provident Fund Commissioner and Another		RESPONDENT

Date of Decision : 05-03-2013

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1, 2(A), 7A
Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 — Section 2(1)

Citation : (2013) 137 FLR 748 : (2013) 2 LLJ 753 : (2013) LLR 579

Hon'ble Judges : S.A. Bobde, C.J.;Rajendra Menon, J

Bench : Division Bench

Advocate : R.N. Shukla and R.B. Tiwari, for the Appellant; Aditya Adhikari, for the Respondent

Final Decision : Allowed

Judgement

Rajendra Menon, J.—This appeal u/s 2(1) of the MP. Uchcha Nyayalaya (Khand Nyay Peeth Ko Appeal) Adhiniyam, 2005, calls in question the tenability of an order dated 29.8.2000 passed by the learned Single Judge in W.P. No. 374/2000.

Appellant herein M/s. Mahakoushal Gasolene Enterprises is a propriety concern engaged in the business of distribution of Liquid Petroleum Gas Cylinder in the township of Jabalpur. It is a case of the appellant that it has awarded the distributorship on behalf of M/s. Hindustan Petroleum Corporation a Government of India undertaking. Distributorship was allotted in the year 1980 and since then the said business is being carried out from the establishment of petitioner situated in Shastri Bridge Road, Jabalpur. It is said that appellant has also received a separate contract from M/s. Bharat Petroleum Corporation Ltd. and M/s. Hindustan Petroleum Corporation for the purpose of transportation of LPG Cylinders and for the said purpose the appellant has deployed six trucks, has engaged drivers and cleaners. It is said that the total strength of the appellant's establishment which has engaged in the business of distribution of LPG was less

than 19. It has never crossed 10 at any point of time. It is stated that on 2.11.1996 certain officer of Provident Fund Department visited the establishment of appellant and thereafter proceedings were initiated for assessment of provident fund dues by clubbing together the business activities of both the different establishments carrying out the work of distributorship and transportation. Proceedings were held u/s 7-A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act of 1952") and by an order dated 14.8.1998 it was held that the establishment of appellant comes within the purview of the Act of 1952 and assessment of provident fund dues were made. As this order was passed ex-parte, without giving due opportunity of producing documents and evidence to the appellant, an application for review was filed which was dismissed on 4.9.1998. Aggrieved by both these orders an appeal was preferred before the Employees Provident Fund Appellate Tribunal, New Delhi and the Tribunal having dismissed the appeal vide order dated 30.11.2009, the writ petition was filed before this Court being W.P. No. 374/2000 and vide order dated 29.8.2000 the writ petition was also dismissed and therefore, this writ appeal has been filed.

It is the case of the appellant that the authorities exercising the powers u/s 7-A for determining the applicability of the Act of 1952 to the appellant's establishment have clubbed together two different business organization of the appellant. It is said that clubbing together has been done in an arbitrary manner without giving due opportunity of defense to the appellant and by holding that appellant has not produced substantial evidence, therefore, liability is imposed.

2. It was the case of the appellant in the proceedings held u/s 7-A that it is owning six trucks which are used for transportation of LPG Cylinders of two different Oil Companies and two contracts have been entered into, and therefore, clubbing together of both the establishment covered under the different contract was said to be not permissible. However, the grievance of the appellant before the Competent Authority, Appellate Authority and in the writ petition before the learned Single Bench was that in the absence of a finding recorded with regard to functional integrity of the different establishments, clubbing of the different establishment for the purpose of coverage under the Act of 1952 only on the ground of common ownership was not permissible. In the writ petition also the ground canvassed was that in the absence of proper enquiry with regard to functional integrity of the establishment clubbing together was not permissible.

3. Shri R.N. Shukla, learned Senior Counsel placing reliance on various judgments submits that clubbing together of the establishment were not proper. The judgments relied upon are: Regional Provident Fund Commissioner and Another Vs. Dharamsi Morarji Chemical Co. Ltd., Regional Provident Fund Commissioner, Jaipur Vs. Naraini Udyog and Others, Kadamba Sub-Urban Transport Corporation Ltd. Vs. Assistant Provident Fund Commissioner, & Union of India and Others Vs. A.S. Amarnath, Accordingly, it is argued that when these submissions were made in the writ petition before the learned Single Judge, the

learned Single Judge rejected the objection mainly on the ground that these objections were never raised either before the Assistant Provident Fund Commissioner, but was raised for the first time before the Employees Provident Fund Appellate Tribunal. Shri R.N. Shukla, learned Senior Counsel submits that when the law contemplates applicability of provisions of the Act of 1952 only to an establishment wherein 20 or more employees are working, it was the burden on the department to show that in the establishment of the petitioner more than 20 persons are working and for arriving at the strength of the employees, if the different establishments were to be clubbed together then a finding with regard to functional integrity should have been recorded. The burden of discharging this liability was primarily on the respondent department and the same cannot be shifted on the employer i.e. the appellant. It was argued that in the absence of there being evidence to show that there was functional integrity between the two establishments the act of making applicable the provisions of the Act of 1952 was unsustainable. Shri R.N. Shukla, learned Senior Counsel argued that the learned Single Judge did not consider this aspect of the matter and shifted the burden on the petitioner which was not correct.

4. Shri Aditya Adhikari, learned Counsel for respondent No. 1 refuted the aforesaid and argued that when show cause notices were issued u/s 7-A and when the proceedings were held before the learned Competent Authority of the department, the petitioner never raised the ground of functional integrity or applicability of the Act of 1952 and therefore, in rejecting the grounds which were raised for the first time before the Appellate Tribunal and the Writ Court, no error has been committed,

5. Having heard learned Counsel for the parties and on going through the record, we find that the petitioner's establishment has been held, liability to pay the provident fund dues and the determination of dues u/s 7-A is undertaken on the ground that about 20 persons are working in the establishment. However, it is seen that under the ownership of a petitioner, two establishments are functioning and it is by clubbing together both these establishments the total strength of the employees determined. Coverage of the establishment is determined on the basis of clubbing together of both these establishments. However, in the order passed u/s 7-A, there is nothing to say as to how and in what manner, there is functional integrity between the two establishments. The learned Single Judge has held that the petitioner has not raised this ground or before the Competent Authority in the proceeding u/s 7-A and therefore he was prevented from raising the same in the appeal and the writ petition for the first time. u/s 1 sub-section 3(b) of the Act of 1952, the Act of 1952 is made applicable to every establishment employing 20 or more persons or class of such establishment as may be notified by the Central Government. When determination of provident fund dues from a employer is undertaken u/s 7-A, the burden of showing that the Act of 1952 is applicable to the particular employer has to be discharged by the authority who is conducting the enquiry u/s 7-A. Merely because the employer has not raised any objection, that does not mean that the Act would

become applicable and even for the purpose of clubbing together of various establishment, an enquiry and determination has to be made with regard to the functional integrity of the establishment and in the absence of any material being available to show functional integrity, assessment of the liability is not proper. In the present case only on the ground that the petitioner has failed to produce relevant records, the liability is imposed by clubbing together the activities of two different establishment, one engaged in the business of Gas distribution and the other for transportation of two different companies. Even if any document or material was not produced by the appellant, the authorities conducting the enquiry was required under law to first determine as to whether the provisions and requirement of section 1 sub-section 3(a) or (b) is made out and then only make assessment. Without discharging this burden and recording a finding with regard to applicability of the Act on the petitioner's establishment proceeding with the matter was not permissible. Even otherwise, if the provisions of section 1 sub-section 3(a) and (b) along with section 2(A) of the Act of 1952 is taken note of, it would be clear that the section itself contemplates that the Act would be made applicable only if the eventualities contemplated therein with regard to the number of employees are fulfilled and the question of applicability of the Act is therefore primarily to be determined by the department and the same cannot be shifted to the assessee.

6. In the case of Dharamsi Morarji Chemical Co. Ltd. (supra), it has been held by the Supreme Court that in the absence of supervisory, financial or managerial control, two units cannot be treated as one merely on the basis of common ownership. In the case of The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, it has been held by the Supreme Court that the burden for establishing applicability of the Act and questions with regard to an old establishment being closed and continuation in the form of new establishment was on the provident fund authorities and such a burden cannot be shifted. In the case of Karachi Bakery Vs. Regional Provident Fund Commissioner, a Division Bench of Andhara Pradesh High Court has held that the burden of proving that two different establishments under a single ownership and there is functional integrity between the two is on the authority exercising the powers u/s 7-A and such a burden cannot be shifted on the assessee. Similar is the view taken by the Division Bench of the Rajasthan High Court in the case of Aditya Synthetics Pvt. Ltd. Vs. Union of India (UOI) and Another,) Again in the case of Bhaskara Ceramic Industries Vs. Regional P.F. Commissioner, Division Bench of Andhara Pradesh High Court has held that the burden of establishing the effect of clubbing together of establishment in an enquiry u/s 7-A is on the statutory authority, namely the Provident Fund authorities and not on the assessee. It is therefore, clear from the combined reading of all these judgments particularly in the case of Dharamsi Morarji Chemical Co. Ltd. (supra), that common ownership of two establishment is not the only decisive factor. There has to be substantial evidence with regard to common supervision, financial integrity and managerial control of two

establishment and a burden of proving all these factors is on the departmental authorities which cannot be shifted. Even the Kerala High Court in the case of K.B. Jacob v. R.P.F. Commissioner, 1986 (2) CLR 475 (Ker.) has held that it is for the authorities conducting the enquiry to establish the question of functional integrity. That being so, in this case the burden of establishing the functional integrity has been shifted on the assessee and merely on the basis of a common ownership of two establishment clubbing together of the units is undertaken which is not permissible. It is a case where no proper enquiry was conducted by the competent authority exercising powers u/s 7-A and only because the appellant did not appear, without conducting any proper enquiry the matter is decided and the learned Appellate Tribunal and learned Single Judge have infact shifted the burden of proof on the appellant by holding that no such plea was raised by the appellant. The appellant is required to raise the plea only if the burden of establishing coverage by clubbing together of both the establishment is discharged by the department. The department itself having failed to discharge the burden, the assessment made cannot be upheld. Even in the proceedings held before the Appellate Authority, the perusal of the order passed by the appellate authority as contained in para 5 goes to show that without conducting any enquiry into the matter merely on the basis of some letters written by the appellant on letter heads an arbitrary decision is taken to hold that appellant has employed more than 20 persons. Finding recorded by the Appellate Tribunal in para 5 of its order Annexure P/21 dated 30.11.1999 is without any basis which is a perverse finding which is not borne out from the material available on record.

7. Accordingly, we are of the considered view that the learned Single Judge also committed an error in holding that the petitioner did not raise the ground with regard to functional integrity before the competent authority conducting the proceedings u/s 7-A therefore he cannot be permitted to do so . It was a case where the question of clubbing together of various establishment and the question of functional integrity goes to the root of the matter and even if such a question was not raised by the employer it was duty of respondents to first record a finding in this regard.

8. Accordingly, it is a fit case where the impugned order should be quashed and the matter is remanded back to the authority exercising powers u/s 7-A to redetermine the matter and record a finding with regard to functional integrity and the question of clubbing together two different establishments and thereafter to assess the provident fund dues in accordance to law. With the aforesaid, this appeal stands allowed and disposed of.