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(1987) 03 P&H CK 0115

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 1206 of 1979

M/s. Lachhman Dass Sikri — APPELLANT

Vs

The Regional Provident Fund Commissioner, Chandigarh and Another — RESPONDENT

Date of Decision : 06-03-1987

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3)(b)

Citation : (1987) 03 P&H CK 0115

Hon'ble Judges : D.V. Sehgal, J

Bench : Single Bench

Advocate : N.K. Sodki and Mr. R.N. Rana, for the Appellant; C.D. Dewan and Mr. S.K. Sharma, for the Respondent

Final Decision : Allowed

Judgement

D.V. Sehgal, J.—A firm styled as M/s Sikri Brothers, Coal Merchants, Ferozepur, was an establishment covered by Clause (b) of Sub-section (3) of Section 1 of the Employee''s Provident Funds and Miscellaneous Provisions Act, 1952 (for short ''the Act'') and it was constituted by as many as six partners including Sohan Lal Sikri and Sat Pal Sikri. It is not disputed that this firm was complying with the provisions of the Act and the schemes framed thereunder and paying the requisite contribution to the employees'' provident fund and family pension fund till August, 1967, when it was dissolved. As is detailed in the representation Annexure P.7, addressed by the Petitioner to Secretary to the Government of India, Ministry of Labour and Employment, New Delhi, the said firm was dissolved and ceased to function from 1,9.1967 No dissolution deed was, however, executed. In its place two separate firms came into existence. In the Petitioner''s firm there are as many as three partners including Sohan Lal Sikri and Satya Pal Sikri and a new partner namely Surinder Kumar Sikri. The other firm is styled as M/s Sikri Brothers & Company, Ferozepur City, which consists of some other partners from the old firm. It is averred by the Petitioner that the partnership deed Annexure P. 1, was executed by its three partners on 1.9.1967, while it started its business from 1.5 1967. Right from its inception i. e. 1.5.1967, it has never employed more than 12 persons in its firm. A statement showing the employment strength of the Petitioner is Annexure P. 3.

2. The Regional Provident Fund Commissioner, Chandigarh, Respondent No. 1, issued a notice dated 31.12.1974 Annexure P.4, to the Petitioner stating therein that M/S Sikri Brothers, Ferozepur, stopped functioning with effect from 31.6.1967 and in the same premises the Petitioner is carrying on business with effect from 1.9.1967. Accordingly, the Petitioner will continue to be covered under the Act, with effect from 1.9.1967 and required it to pay upto date provident fund dues and submit returns. The Petitioner sent its reply dated 8.1.197(sic). Annexure P.5, explaining therein that it is not the successor of M/s Sikri Brothers, which stopped functioning on 31.8.1967 and that it is new firm and right from its inception it has not employed 20 or more persons. Respondent No. 1 passed order dated 31.5.1976, Annexure P.6, holding that the Petitioner is successor of M/S Sikri Brothers and is covered by the provisions of the Act, determined the amount due from it for the period September 1967 to January 1976, at Rs. 7231.60 and required it to deposit the same within a period of fifteen days.

3. The Petitioner thereupon made a representation dated 4.10.1976 Annexure P.7, to Respondent No 2, invoking the provisions of Section 1 9-A of the Act, asserting therein that it is not the successor of M/S Sikri Brothers and that it has in its employment persons who are less than 20 all along. This representation was, however, rejected by Respondent No. 2 vide order dated 14.2.1978 Annexure P.8, and the order of Respondent No. 1 Annexure P.6 was upheld.

4. The Petitioner has thus invoked the extraordinary jurisdiction of this Court u/s 226 of the Constitution by filing the present writ petition praying for quashing the orders Annexures P.6 and P.8, passed by Respondents Nos. 1 and 2 respectively.

5. A reply to this writ petition has been filed on behalf of Respondent No. 1. It has been asserted therein that M/S Sikri Brothers ceased to function and the Petitioner is its successor. The fact that the strength of its employee is not more than 12 is not at all material for the reason that the Petitioner is a continuation of the ''old covered establishment''. It is further stated that the Petitioner did not produce the complete record when called upon to do so during enquiry u/s 7-A of the Act. The orders Annexure P6 and P8 have been defended.

6. I have heard the learned Counsel for the parties. The learned Counsel for the Petitioner has contended that it is an establishment carrying on the business of coat merchants. No doubt two of its partners are out of the six partners to the defunct firm M/S Sikri Brothers. It is, however, stated that only two of the many employee of M/S Sikri Brothers joined the Petitioner firm after their services were finally dispensed with after payment of requisite dues by M/S Sikri Brothers. The mere fact that business is being carried on by the Petitioner at the same

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premises where M/s Sikri Brothers functioned is not material for the reasons that the premises is taken on lease. No doubt it is mentioned in the order Annexure P.1, that the Petitioner is having with it the almrah and furniture etc. which was earlier used by M/s Sikri Brothers, but this hardly amounts to its succeeding to the assets of the old firm. It is further pointed out that some of the other old partners of M/s Sikri Brothers are carrying on separate business in the name and style of M/s Sikri Brothers and Company. The old firm ceased functioning, its partners separated and its former partners came to carry on business by constituting two separate firms even by inducting some outsiders. The learned Counsel for the Respondents on the other hand, has seriously disputed the above contentions. His submission is that ownership of an establishment is not a material factor to decide whether it is the same establishment or a new one. He has placed reliance upon Sayaji Mills Ltd. v. Regional Provident Fund Commissioner A. I. R. 1985 S. C. 323 Regional Provident Fund Commissioner, Punjab and Another Vs. Lakshmi Ratten Engineering Works, Ltd., and Radha Kishan Bal Kishan Muchhal and Co. Vs. Regional Provident Fund Commissioner,

7. After giving my thoughtful consideration to the rival contentions of the parties. I am of the view that the orders Annexure P.6 and P.8 do not proceed on the correct principles of law. The old M/s Sikri Brothers admittedly ceased functioning on 31.8.1967. It had six partners. Only two of its partners joined in constituting the present firm, the third being a new entrant. Another firm by the name and style of M/s Sikri Brothers & Co. was formed by another set of partners of the old firm Since it was an establishment within the meaning of Clause (b) of Sub-section (3) of Section 1 of the Act, it is not shown that it came to own and possess the assets of the old firm. In fact, the Petitioner being a firm of coal merchants, there could hardly be any assets. It is mentioned by the Petitioner in its representation Annexure P.7, that the Bank account of the old firm is still in existence. No doubt, the old firm had a number of employees and was covered by the aforesaid provisions, but, it has not been seriously disputed that the Petitioner has at no time more than 12 employees right from its inception till now. It is to be noted that when the old firm was dissolved and the Petitioner and another firm constituted by another set of partners of the old firm were constituted, Section 1(5) of the Act, which is to the following effect, was operative:

(5) An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty.

Provided that where, for a continuous period of not less than one year the number of persons employed therein has been less than fifteen, the employer in relation to such establishment may cease to give effect to the provisions of this Act and any scheme framed thereunder, with effect from the begining of the month following the expiry of the said period of one year, but he shall within one month of the date of such cessation, intimate, by registered post, the fact

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thereof to such authority as may be specified by appropriate Government in this behalf.

The proviso to it was deleted only by Act No. 16 of 1971. It cannot, therefore, be said that old firm was closed and a new firm came into existence to circumvent the provisions of the Act. Had the strength of the employees of the old firm been reduced to less than fifteen, it could very well have sent an intimation to Respondent No. 1 in this behalf as contemplated by the provisions reproduced above. The learned Counsel for the Respondent, infact could not impute any motive to the Petitioner for having started the new firm. The following observations of a Single Judge of the Madras High Court in Vittaldas Jaganathadas v. Regional Provident Fund Commissioner 1966 I L.L.J. 240, were quoted with approval by the Supreme Court in The The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry,

If, in a particular case, it appears that the new establishment is not genuinely such, but is only an old one formally resusciated in order to avoid the legal obligation, it is always open to the Court to hold that it is the old establishment which is substantially continuing, and that the liability to contribute must be affixed to the apparently new firm also. But where, in reality the old establishment has come to an end and, there is a new establishment, this establishment is entitled to infancy protection in its own right, even if it happens by coincidence to have employed a large part of the personnel of the previous establisment.

The final Court then observed as under:

This principle, applied to the facts of the present case, can only lead to the conclusion that the N. S. S. Co-operative Society had set up a new establishment and the provisions of Section 16(1) (b) of the Act have to be applied on the basis that the new establishment was set up in June or July 1961, so that there was no liability to pay Provident Fund contributions or to file the various returns during the period to which the prosecutions related.

The above principle has been followed by the Full Bench of Kerala High Court in T.A. Zainulabdeen v. Regional P.F. Commissioner Kerala and Anr. 1975 Lab I.C. 412, and it has been observed thus:

These rulings have no bearing on the question as to whether an original establishment ceased to be and gave rise to a new establishment as in the case in The The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry, or whether the original establishment got disintegrated and gave birth to distinct and separate establishments pursuant to a real and bona fide partition effected as in the case decided by this Court in Mohammed Kutti (K.M.) Vs. Regional Provident Fund Commissioner and Others, We do not find anything in the Supreme Court decisions that have shaken the authority of the pronouncement in Mohammed Kutti (K.M.) Vs. Regional Provident Fund Commissioner and Others,). On the other hand, we feel that the

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principle of the decision has been fortified by what their Lordships said in The Provident Fund Inspector, Trivandrum Vs. The Secretary, N.S.S. Co-operative Society, Changanacherry,

In Pratap Ch. Sukhani v. Regional Provident Fund Commissioner 7, a learned single Judge of the Calcutta High Court has observed thus:

There is no provisions in the P. F. Act which lays down that an establishment covered by the Act and the Scheme there under can never be disrupted or dissolved or that the assets of such an establishment, if utilised in another establishment, would make the latter a part or continuation of the former. Therefore, where the original partnership business is dissolved and its assets are divided and allotted to the partners and subsequently another business is started in the same name and in the same place as that of the original business, the ownership and organisation of the new business and its establishment are entirely different from the original business and establishment. Even if some of the employees of the original establishment have been employed in the subsequent establishment it will not follow that the two establishments are one and the same or that the latter is a continuation of the earlier.

Keeping in view the law discussed above, I have no doubt in my mind that the Petitioner firm is not the successor of the old firm M/S Sikri Brothers in fact two of its partners started business by constituting Petitioner firm after associating a third partner when the old firm ceased to function. It thus cannot be said that the Petitioner firm is an establishment in continuation of the establishment M/S Sikri Brother which was covered by the provisions of the Act.

8. The reliance placed by the learned Counsel for the Respondents on Sayaji Mills Ltd. case (supra), Regional P. F. Commissioner''s case (supra) and M/s Radha Kishan Bal Kishan Muchhal & Co.''s case (supra) is mis-placed. None of these judgments has any bearing on the points in dispute before me. In Sayaji Mills Ltd (supra) an existing textile mill was closed and was ordered to be wound up. It was purchased by the Appellant company. The old workers were discharged. The factory started functioning once again. It was claimed that the Appellant therein had invested some fresh capital in the business, renovated the machinery and also employed workmen on fresh contracts though about 70 percent of the workman were formerly working in that factory. The Appellant claimed exemption from the operation of the Act relying upon Section 16 (1) (b) thereof, on the ground that for a period of three years from the date of its establishment i. e. when the Appellant restarted the factory, the Act is not applicable to it The final Court held that the Act being a beneficial statute and Section 16 thereof being a clause granting exemption to the employer from the liability to make contribution, Section 16 should receive a strict construction. If a period of three years has elapsed from the date of the establishment of a factory, the Act would become applicable provided the other conditions are satisfied. The cirterion for earning exemption u/s 1 6(1) (b) of the Act, is that a period of three years has not yet elapsed from the date of establishment of the factory in question. The

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work in a factory which is once established may be interrupted on account of factory holidays, strikes, lock outs, temporary break down of machinery in the factory non-avilability of rawmaterials, paucity of finance etc. It may also be interrupted on account of an order of Court. Even a change of its ownership will not make any difference. Same view was taken in the other judgments cited by the learned Counsel for the Respondents.

9. In the case in hand, the Petitioner has not claimed exemption u/s 16 (1) (b) of the Act In fact, the strength of its employees, according to its assertion has never been more then twelve since its constitution as a firm, vide partnership deed dated 1. 9. 1967 Annexure P1. I am, therefore, of the view that the closure of the old firm M/S Sikri Brothers, and coming into existence of two firms constituted by its ex-partner including some outsiders, in no way makes the Petitioner a successor of M/S Sikri Brother There is another aspect of the matter. Respondent No. 1 served a notice Annexure P. 4, on the Petitioner after more then 7 years of its coming into existence. Had the Petitioner been made aware of the stand of Respondent No. 1 that he is treating the Petitioner as a successor of M/S Sikri Brothers, well in time the Petitioner would have availed of the proviso of Sub-section (5) of Section 1 of the Act, which was operative at the relevant time and after giving due intimation to the Petitioner, would have absolved itself of the liability under the Act. It is, however, not necessary to dilate on this matter any longer as I am of the firm view that the Petitioner is not the successor of the old firm M/S Sikri Brothers.

10. I, therefore, allow this petition leaving the parties to bear their own costs and quash the orders Annexure P 6 and P 8 passed by Respondents No. 1 and 2 respectively. Since, however, it is observed in the order Annexure P . 6 that the Petitioner did not produce the relevant record before it, Respondent No. 1 shall be at liberty to make necessary enquiry by calling for the record of the Petitioner any if it is found that the Petitioner has not employed 20 persons or more with effect from the date of constituting of the Petitioner firm at and time till today, it shall hold the Petitioner as not liable to payments of contribution under the Act in the light of the decision rendered by me above.

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