

(2012) 10 DEL CK 0192

In the Delhi High Court

Case No : Writ Petition (C) No. 198 of 1995

M/s Lakshmi Type Foundary and Others

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 11-10-2012

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A, 7A(3)

Evidence Act, 1872 — Section 106

Citation : (2013) 136 FLR 528 : (2013) LLR 1

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Puneet Sharma, for the Appellant; Shivanath Mahanta, for the Respondent

Judgement

Hon'ble Ms. Justice Mukta Gupta

1. The Petitioners challenge the order dated 12th December, 1994 passed by the Respondent wherein the Petitioners were brought under the

provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (in short EPF & MP Act) and the schemes framed there

under. The facts leading to the filing of the present petition are that the Petitioner No. 1 was established in the year 1957 and since then it has been

manufacturing and marketing printing types at Okhla Industrial Area. It had 11 employees. Gian Chand Aneja and Vinod Kumar Aneja were its

partners. This unit was closed down on 11th April, 1990. In the year 1966 the Petitioner No. 2 was established which carried on the business of

sole selling agents in India and Chinese printing, binding and allied machinery and also as sole selling agents of lazer printers from USA etc. It had 6

employees. Gian Chand Aneja and Mrs. Veena Aneja were its partners. This

concern closed down on 30th December, 2003. The Petitioner No.

3 was established on 2nd April 1979 and was involved in marketing of machinery and equipments and were the sole selling agents for Northern

India of offset machinery in Ahmedabad and Bangalore. It had 6 employees. Gian Chand Aneja (HUF), Vinod Kumar Aneja (HUF) were its

partners. It closed down on 30th September, 1997. On 3rd July, 1989 a letter was received by the Petitioners from the Respondent informing the

Petitioners that they were covered under the provisions of EPF & MP Act and the schemes framed there under on the basis of the report of the

enforcement officer dated 30th June, 1989. As per the letter dated 3rd July, 1989 it was stated that the factory was engaged in manufacturing of

printing type which was included in Schedule I, it had employed 22 persons as on 1st April, 1989 and had completed its infancy period. The

Petitioners vide their separate letters replied that they were not covered under the Act and the schemes for the reason that the firms were distinct,

separate, self-integrated entities which are independent of each other not only constitutionally but even operationally and functionally; report of the

enforcement officer was not made available, reasonable opportunity to place all facts and records should be granted, and partners being common

do not mean that the firms were inter-connected. On 20th February, 1990 again a letter was sent by the Respondent stating that the case of the

Petitioners was examined and they were rightly found to be under the purview of EPF & MP Act. The Petitioners again replied reiterating their

contentions. On 31st May, 1990 a letter was received from the Respondent giving the reasons for clubbing the three firms i.e. (a) all the three units

were operating from the same premises and engaged in related activities similar to each other, (b) all the firms were owned, managed and

controlled by closely related sets of persons with Mr. G.C. Aneja as partner in all the three firms and (c) all the firms were managed and controlled

by G.C. Aneja either in the capacity of partner or karta. On 19th July, 1990 summons were sent to the Petitioners to appear in person or through

authorized representative along with attendance register, membership eligibility register, cash book and vouchers, payment register/ pay bills and

any other documents necessary for ascertaining the attendance, payments, etc. Pursuant to the summons, an affidavit of Shri G.C. Aneja was filed

on behalf of the Petitioners. The Petitioners were granted opportunity to cross-examine Mrs. S. Sharma the enforcement officer and written

arguments were filed by the Petitioners. The impugned order was passed on 12th December, 1994 holding that since the three establishments are

one integrated whole for the purposes of coverage under the EPF & MP Act and as on 1st April, 1989 the combined employment strength of the

firm was 22 persons, the establishment was covered under the provisions of EPF & MP Act and thus the Petitioners were summoned to come

with records for determination of the dues. The Petitioners impugned the order dated 12th December, 1994 before this Court when this Court

directed that though the proceedings under the aforesaid Act will go on but demand if any raised shall not be enforced.

2. Learned counsel for the Petitioners assail the impugned order on the ground that the conclusion arrived at by the Respondent is contrary to the

law laid down by the Hon"ble Supreme Court. The reasons for passing the impugned order were not part of either the show cause notice or the

enquiry. The case of the Petitioners in written submissions has not been dealt with and thus there is a violation of Section 7A(3) EPF & MP Act

and fourthly that there was ample bias in the mind of the Respondent inasmuch as that he had disclosed his mind even without enquiry and thus he

was inclined to arrive at the same conclusion which he had stated in his previous letters. As regards the first ground that there was no evidence to

come to the conclusion arrived at by the Respondent, it is stated that in the cross-examination Mrs. S. Sharma the enforcement officer has

admitted that when she visited for the purpose of survey she did not examine the records whether the employees of one firm have ever been

transferred to another firm, or whether their service conditions are such that their services are inter-transferable from one establishment to another.

It was further admitted that in the course of her visit she did not come across any transaction whereby it could be proved that out of the three

establishments operating at the same premises there is inter-transaction of sale and/or purchases of the same type of commodity. She further

admitted that she had not examined the sales-tax registration certificate of all the three establishments. According to her, since the three

establishments were operating from the same premises, she gave her report accordingly. She admitted that in the coverage report dated 30th June,

1989 she did not indicate anywhere that the establishment had not submitted certain records which were desired by her and in the report she had

mentioned that the activities of all the three establishments were correlated.

3. Learned counsel for the Petitioners strenuously contends that from the cross-examination of the enforcement officer Mrs. S. Sharma it is evident

that no enquiry was conducted by her to establish unity of employment among the three firms. The Respondent overlooked the fact that the firms

were registered separately under the Partnership Act, the income tax Act, the Sales Tax Act and the Shops and Establishment Act which was a

strong factor to come to the conclusion that they were not one. Reliance is placed on Regional Provident Fund Commissioner and Another Vs.

Dharamsi Morarji Chemical Co. Ltd., , New Pai Sales Corporation and Anr. Vs. Regional Provident Fund Commissioner 1996 (73) FLR 1283,

Sunder Transport & Anr. Vs. RPFC 1993 (66) FLR 528. It is further contended that in the absence of any evidence of supervisory, managerial or

financial control between the units, mere common ownership by itself is not sufficient to hold the firms to be one. Reliance is placed on M/S.

Ebrahim Currim & Sons Vs. RPFC Maharashtra 1993 (67) FLR 1124, Magestic Trading House & Anr. Vs. Union of India 1990 (60) FLR 793 ,

Regional Director, Employees" State Insurance Corporation and Others Vs. Ram Kumar Suresh Kumar Timber Merchant, . It is submitted that no

single test is final and the predominant test is functional integrity to see whether there is mutual interdependence of one over the other and in the

absence of one the other cannot survive. Reliance is also placed on Isha Steel Treatment, Bombay Vs. Association of Engineering Workers,

Bombay and Another, . A perusal of the cross-examination of Mrs. S. Sharma the enforcement officer shows that no proper examination of the

books of the Petitioners was conducted and there was no material to come to the conclusion that there was common supervisory and financial

control thereby fastening the liability on the Petitioners. Reliance is placed on M/ S. Khoja Lime Udyog Vs. RPFC 1992 (1) LLJ 903. It is further

contended that written submissions of the Petitioners were not considered and thus the same violates the provisions of Section 7A(3) of the EPF &

MP Act. Reference is made to E. Hill & Company Ltd. Vs. RPFC, U.P. Varanasi 1998 1 LLJ 76 , Emmanuel Public School Society Vs.

Regional Provident Fund Commissioner, , Polo Amusement Park Ltd. Vs. EPF Applt. Tribunal and Another, and Surya Charitable Welfare

Society Vs. Central Board of Trustees and Another, . The Hon''ble Supreme Court laid stress on the necessity of a speaking and reasoned order

in Union of India (UOI) and Others Vs. Essel Mining and Industries Ltd. and Another, . In Glamour Proprietors Seth Hassaram and Sons (India)

Pvt. Ltd. Vs. RPFC & Ors. 1975 LAB IC 954 this Court held that whether the alleged establishment was covered under the Scheme and the Act

is a jurisdictional fact, and in the absence of an enquiry and proper opportunity to dispute the report the concern cannot be held to fall within the

ambit of the Act and the scheme.

4. Reliance is placed on Regional Provident Fund Commissioner and Another Vs. Dharamsi Morarji Chemical Co. Ltd., , Regional Provident

Fund Commissioner Vs. Raj''s Continental Exports (P) Ltd., , Rollatainers Limited Vs. Commissioner of Central Excise, Delhi-III, , Isha Steel

Treatment, Bombay Vs. Association of Engineering Workers, Bombay and Another, , Haran Haldar & Ors. Vs. UOI 150 (2008) DLT 277 to

contend that even unity of ownership, supervision and control are not sufficient to hold functional integrity and number of factors are required to be

looked into.

5. As regards bias, it is alleged that the Respondent had already formed an opinion when the show cause notice was issued and thus issuance of

summons and the inquiry pursuant thereto was a sham as the Respondent was a Judge in his own cause. Reference is made to Cantonment

Executive Officer and Another Vs. Vijay D. Wani and Others, and Naren Chandra Naskar Vs. Arun Bhattacharya and Others, .

6. Learned counsel for the Respondent on the other hand contends that the learned counsel for the Petitioners is erroneously treating the summons

dated 19th July, 1990 as show cause notice. In fact summons were issued to the Petitioners and they were directed to produce the attendance

register, membership eligibility register, cash book and vouchers, payment register/ pay bills and any other documents necessary to ascertain the

attendance and payments etc. Since the Petitioners failed to give the necessary documents, the Respondent came to the conclusion on the basis of

the documents supplied that there was a functional integrity and the Petitioners

No. 2 & 3 were part of Petitioner No. 1 establishment. The allegation that the Respondent acted as a Judge in his own cause is contrary to the law as the Respondent was vested with both the capacities. No bias can be alleged to the Respondent as he was acting both in administrative capacity before issuance of summons and thereafter in his quasi-judicial capacity. The enforcement officer visited the establishment, inspected the records and submitted the report that there was common management, ownership, financial control and employees etc. Thus the Petitioners were covered under the EPF & MP Act and the schemes there under. Reasonable opportunity was granted to the representatives of the establishments to present their evidence and a common affidavit and written arguments were filed by Shri G.C. Aneja who subjected himself to cross-examination. The authority came to the conclusion for the applicability of Section 7A of the EPF & MP Act for the reason that all the three units were operating from the same premises, they had similar activities i.e. trading and printing, machinery and equipments, and allied machinery, the three units were controlled by Shri G.C. Aneja, no documentary proof was made available that the capital investment in the three units were by the partners from their own sources and the combined strength of employees with the Petitioners was 22 as on 1st April, 1989. Thus, the impugned order demonstrates geographical proximity of the three units as they are operating from the same premises, share common address for correspondence, share a common telephone and the three units failed to produce separate electricity bill, water connection, house tax etc. Further, the financial integrity among the three units can be inferred from sharing same premises for their operation and the fact that the Petitioners failed to produce separate rent receipts/ rent agreement. Moreover, the capital investment in the three units was common from single source which can be inferred from the fact that the Petitioners failed to produce documents that establishes capital investment. Further, filing of a common affidavit and Shri G.C. Aneja representing all the three units showed common financial, managerial and supervisory control. The functional integrity can be inferred between two units; as one unit manufactures and the other two deals in marketing and trading of the same. Reliance is placed on The Associated Cement Companies Limited, Chaibassa Cement

Works, Jhinkpani Vs. Their Workmen, , L.N. Gadodia and Sons and Another Vs. Regional Provident Fund Commissioner, , Rajasthan Prem

Kishan Goods Transport Company Vs. RPFC 1996 SCC (L & S) 1265, RPFC Vs. Hooghly Mills Company Ltd. & Ors. (2012) 2 SCC 489

and Saraswati Construction Vs. Central Board of Trustee 2010 (171) DLT 3.

7. I have heard learned counsel for the parties at length. First of all dealing with the issue of the Petitioners that the impugned order is motivated by

bias it may be noted that bias has to be alleged specifically and the person against whom bias or malafide is alleged has to be made a party by

name so that he can file his affidavit and rebut the same. Shri Raminder Singh, the Regional Provident Fund Commission, though made a party was

subsequently deleted. Further there are no specific allegations of mala fide and bias except stating that he was the same authority which issued the

summons and passed the impugned order. Thus, this ground cannot be looked into.

8. Before dealing with the issue on merits it is necessary to consider whether an adverse interference can be drawn against the Petitioners for not

giving the complete documents. In this regard it would be relevant to note that the impugned order returns a finding that the Department has

successfully proved that all the three units are operating from the same premises. They have similar activities i.e. trading and printing, machines &

equipments and allied machinery. It was further held that all the three units are being controlled by Shri G.C. Aneja who is the partner in all the

three units. Further, the establishment did not produce any documentary proof which could establish that the capital investment in three units by the

partners was from their own sources and what were those sources. This finding of the Respondent that the establishment could not come with the

documentary proof which could establish that the capital investment in the three units were by the partners from their own sources and what were

those sources is a gross illegality and perversity, as there is nothing on record to show that the Petitioners were asked to produce these documents

and they failed to produce them. In fact Mrs. S. Sharma the officer who prepared the coverage report was cross-examined by the Petitioners.

Mrs. S. Sharma admitted that during her visit for the purpose of survey she did not examine from records that employees were inter-transferable.

The witness also admitted that she did not come across any transaction whereby it could be proved that out of the three establishments operating, there is inter-transaction of sales or purchase of the same type of commodity. She also stated that in the coverage report 30th June, 1989 she had not indicated that the Petitioners did not submit the record asked for. Further no material has been placed on record by the Respondent that the Petitioners failed to produce the documents asked for. The documents having not been asked for, the Petitioners cannot be fastened the liability that they failed to produce the documentary proof to establish the capital investment and thus no adverse inference could be taken against the Petitioners. The Respondent cannot improve his case now in the present petition. As a matter of fact this ground has not even been taken in the counter affidavit to the writ petition.

9. In *Mohinder Singh Gill & Anr. Vs. Chief Election Commissioner* AIR 1978 SC 581 their Lordships held that the validity of an order is to be justified on the basis of the grounds on which it has been passed. Further, this plea having not been taken even in the counter affidavit, the same cannot be considered as the Petitioners had no chance to meet it. Thus in terms of the decision in *Piara Singh Vs. State of Punjab*, and *Bharat Singh and Others Vs. State of Haryana and Others*, the Respondent's counsel cannot urge the same now at the time of hearing. This finding of the Respondent in the impugned order is further based on no evidence as the enforcement officer Mrs. S. Sharma herself stated in her coverage report that she has not indicated anywhere that the establishment had not submitted certain records which were desired by her.

10. The contention of the learned counsel for the Respondent that in terms of Section 106 of the Evidence Act the onus was on the Petitioners is also misconceived. The Petitioners were not asked for the relevant documents. Thus, no adverse inference can be drawn against the Petitioners. In *Food Corporation of India Vs. Provident Fund Commissioner and Others*, the Hon'ble Supreme Court held:

9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not

abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen.

The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the

legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning

evidence from a particular person.

11. The reliance of the Respondent on the decision of this Court in Saraswati Construction Company to the extent it says that the onus lays on the

Petitioners is wholly misconceived. In the said case the Petitioner therein was given innumerable opportunities from 8th January, 1993 till 20th

August, 1999 but still it failed to produce on record any cogent document on the basis of which the Regional Provident Fund Commissioner could

have come to the conclusion that the management was not employing 20 or more employees in their establishment. In the present case no

documents were sought from the Petitioners. Rather in the present case the Petitioners requested the Commissioner for permission to place the

documents on record.

12. Excluding the ground that the establishment failed to produce any documentary proof to establish that the capital investment in the three units

were by the partners from their own sources, the other reasons for passing the order are same premises, similar activity, unity of control by G.C.

Aneja and that the premises is let out by the Petitioner No. 2. However, no evidence has been collected that the other two units i.e. Petitioners No.

1 & 3 were sublet and were paying rent to Petitioner No. 2.

13. As regards common premises their Lordships in Isha Steel Treatment, Bombay Vs. Association of Engineering Workers, Bombay and

Another, it was held:

7. In the above decision this Court has held that the unity of ownership, supervision and control that existed in respect of the two mills involved in

that case and the fact that the conditions of the service of the workmen of the two mills were substantially identical were not by themselves

sufficient in the eye of law to hold that there was functional integrality between the two mills. It held that it was a clear case of closure of an

independent unit and not of a part of an establishment. The decision of the

learned Single Judge of the High Court that the fact that the two units were situate in a distance of 200 metres, the fact that both the units were controlled by the same employer and that the business of heat treatment processing carried on in the two units was identical had left no room for doubt that the two units were really integral cannot be sustained. The decision in S.G. Chemicals and Dyes Trading Employees' Union Vs. S.G. Chemicals and Dyes Trading Limited and Another,] is not of much assistance to the workmen. The management in that case was running its business in pharmaceuticals at three places. The Pharmaceutical Division was at Worli, the Laboratory and Dyes Division was at Trombay and the Marketing and Sales Division was at Churchgate. In 1984 the company which was managing the said three divisions of business was sold out. As the buyers proposed to handle the future sales of the Company through their own distribution channels, they found that the services of the staff working at the Churchgate office were no longer required. Therefore, the management closed down the office at Churchgate. The question was whether there was functional integrality between the office at the Churchgate and the factory at Trombay. This Court on a consideration of the material before it in that case, held that the functions of the Churchgate division and the Trombay factory were neither separate nor independent but were so integrally connected as to constitute the Churchgate and the Trombay factory into one establishment, because the Churchgate division used to purchase the raw material required by the Trombay factory for producing or processing the goods, it used to market and sell the goods so manufactured or processed by that factory and it also used to disburse the salary and other employment benefits and maintain accounts etc. of the workmen. These were considered to be integral parts of the manufacturing activities of the factory at Trombay, because the factory, could never have functioned independently without the Churchgate division being there. It is not the case of the workmen in the present case that the II Unit could not continue to function after the closure of the I Unit. As already mentioned, the II Unit is continuing to function as usual even now notwithstanding the stoppage of the activities at the I Unit. The question of application of Section 25-G of the Act arises only when the services of the workmen are retrenched. In Santosh Gupta Vs. State Bank of Patiala,]

it is laid down that if the termination of service of a workman in a given case falls either u/s 25-FF or u/s 25-FFF of the Act it would not be a

termination falling u/s 25-F of the Act. This Court has observed in that case that after the enactment of Section 25-FF and Section 25-FFF

retrenchment included every kind of termination of service except those not expressly included in Section 25-F or not expressly provided for by

other provisions of the Act such as Sections 25-FF and 25-FFF. Hence if the case is one of genuine closure then the question of applying Section

25-G of the Act which is applicable to a case of retrenchment would not arise.

14. As regards operation by the common ownership it may be noted that Shri G.C. Aneja is a common partner in the three firms. However, the

other partners are different. In Regional Provident Fund Commissioner and Another Vs. Dharamsi Morarji Chemical Co. Ltd., it was held:

4. It is true that if an establishment is found, as a fact, to consist of different departments or branches and if the departments and branches are

located at different places, the establishment would still be covered by the net of Section 2-A and the branches and departments cannot be said to

be only on that ground not a part and parcel of the parent establishment. However, on the facts of the present case, the only connecting link which

could be pressed in service by the learned counsel for the appellant was the fact that the respondent-Company was the owner not only of the

Ambarnath factory but also of Roha factory. On the basis of common ownership it was submitted that necessarily the Board of Directors could

control and supervise the working of Roha factory also and therefore, according to the learned counsel, it could be said that there was

interconnection between Ambarnath factory and Roha factory and it could be said that there was supervisory, financial or managerial control of the

same Board of Directors. So far as this contention is concerned the finding reached by the High Court, as extracted earlier, clearly shows that

there was no evidence to indicate any such interconnection between the two factories in the matter of supervisory, financial or managerial control.

Nothing could be pointed out to us to contraindicate this finding. Therefore, the net result is that the only connecting link which could be effectively

pressed in service by the learned counsel for the appellant for culling out interconnection between Ambarnath factory and Roha factory was that

both of them were owned by a common owner, namely, the respondent-Company and the Board of Directors were common. That by itself cannot be sufficient unless there is clear evidence to show that there was interconnection between these two units and there was common supervisory, financial or managerial control. As there is no such evidence in the present case, on the peculiar facts of this case, it is not possible to agree with the learned counsel for the appellant that Roha factory was a part and parcel of Ambarnath factory or it was an adjunct of the main parent establishment functioning at Ambarnath since 1921.

15. As regards fiscal control, it may be noted that the finding of the Respondent in the impugned order is without any basis and has been rendered on the basis that the Petitioners have failed to produce the documents which is a perverse finding in view of the fact that there is nothing on record that these documents were ever demanded from the Petitioners and they failed to supply the same. A perusal of the cross-examination of the enforcement officer clearly reveals that the report was based on her visit to the Petitioners' premises where she did not examine any of the records relating to financial transaction, sales-tax registration or whether the service conditions of the employees of the Petitioners was such that their services were inter-transferable from one establishment to another. The enforcement officer also admitted that she did not come across any transaction whereby it could be proved that out of the three establishments operating from the same premises there is inter-transaction of sale and/or purchases of the same type of commodity.

16. Learned counsel for the Respondent strenuously stated that once the Petitioner No. 1 which was a manufacturing unit closed down, the Petitioners No. 2 & 3 also closed down, thus the three units were carrying on allied and inter-connected activities. However, this submission is also incorrect. The Petitioner No. 1 factory closed down on 11th April, 1990 whereas the Petitioners No. 2 and 3 closed down on 30th December, 2003 and 30th September, 1997 respectively. Thus, it would be seen that even after closing down of the manufacturing unit in the year 1990 the Petitioners No. 2 & 3 continued to perform their activities for 13 and 7 years thereafter. Thus, they were not dependent on the Petitioner No. 1.

Thus, in view of the settled legal position that merely on the basis of common

premises or common ownership, it cannot be held that there is a functional integrity in the establishments, the impugned order cannot be sustained. The impugned order is set aside. The matter is remanded back to the competent authority to decide the case afresh after affording a reasonable opportunity of hearing and seeking relevant documents from the Petitioners. Petition is disposed of accordingly.