(2013) 07 AHC CK 0106

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 53489 of 2010

M/s. Sumitra Nursing Home APPELLANT

Vs

Employees'' Provident Fund Appellate Tribunal and Others RESPONDENT

Date of Decision : 03-07-2013

Acts Referred:

Citation : (2013) 9 ADJ 127 : (2014) 1 ALJ 76 : (2013) 139 FLR 241 : (2014) LabIC 142 : (2013) LLR 1243 : (2013) 3 UPLBEC 2501

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : Shakti Swarup Nigam, for the Appellant; Dhananjay Awasthi and Sachindra Upadhyay, for the Respondent

Judgement

Tarun Agarwala, J.—Three establishments, namely, M/s. Sumitra Nursing Home, Dr. Neeraj Gupta Orthopedic Centre and Kumar Diagnostic Centre are existing and functioning in one premises at Bijnor. It transpires, that an inspection was made in the premises on 25.6.1997 by the Regional Provident Fund authority and found that 22 persons were working in the said premises. Accordingly, a notice dated 2.7.1997 was issued to show cause as to why an order should not be passed holding that the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the ''Act'') is applicable on the said establishment and that the petitioner should pay the contribution as per the provisions of the Act. It further transpires, that based on the inspection note, an ex parte assessment order dated 12.1.1998 was issued u/s 7A of the Act. The petitioner, upon getting knowledge of the said ex parte order, filed an application dated 12.2.1998 for recalling the said order contending that the proceedings were wrongly initiated, inasmuch as, less than twenty persons were employed in the petitioner establishment. Based on the said application, a fresh inspection was made and it transpires that a fresh report was submitted by the authorities again indicating that there were more 20 employees employed in the premises. The petitioner objected to the said report contending that there exist three different establishments in the premises and all the three establishment cannot be clubbed together treating it as one unit. The objection of the petitioner was not considered and the Regional Provident Fund Commissioner passed an order dated 30.11.2000 holding that the three establishments are part of one and the same establishment and consequently, the provisions of the Act of 1952 was applicable. The petitioner, being aggrieved, filed an appeal, which was dismissed by an order dated 9.5.2005. The petitioner thereafter preferred Writ Petition No. 60226 of 2005, which was allowed by a judgment dated 16.9.2005 and the matter was remitted again to the Regional Provident Fund Commissioner to redecide the matter in the light of the observations made by the Court. The writ Court, while quashing the order of the Regional Provident Fund Commissioner and the appellate authority, held--

Now on the touchstone of the aforementioned propositions of law, it has to be seen as to whether amongst three units there is a functional integrality or not. As already mentioned above Regional authority has not undertaken any exercise on this score and has proceeded on the assumption that there is functional integrality in between three units. As far as Clinic Dr. Neeraj Gupta Orthopaedic Centre and Sumitra Nursing Home is concerned, finding has been returned by the Appellate Authority that wife of Dr. Neeraj Gupta also not a qualified doctor, thus it can be safely inferred that Nursing Home is run by him in the name of his wife, and as clinic is in the same premises, as such it can safely be inferred that patients are being treated in the nursing home. In respect of Kumar Diagnostic Centre, it has been mentioned that as Dr. Neeraj Gupta has got 50% share and this Centre is situated in the same vicinity of two other establishments of Dr. Neeraj Gupta, the same clearly establishes that three establishments can be clubbed together, and the same has rightly been done by the Assistant Provident Fund Commissioner. Merely on geographical proximity and situation of premises, presumption has been drawn treating both of them to be one for the purpose of this Act. No exercise, whatsoever has been undertaken to find out "functional integrity" i.e. such functional inter-dependence that on unit cannot exist conveniently and reasonably without the other, and if one unit goes dry, the other cannot exist. If one unit can carry on its business without reference to other, it is prima facie material to treat them separate. Thus, question of "functional integrity" in all eventually had to be adverted to along with the further inquiry that in the matter of finance and employment, the employer has actually kept the two units distinct and integrated. Unity of management, could have been one of the factor for proceeding, but unless positive answer was not there, on these two counts mentioned above, no action could be taken. As far as Kumar Diagnostic Centre is concerned, similarly, no finding has been returned qua the "functional integrity" i.e. that one unit cannot exist conveniently and reasonably without the other, and further question whether in the matter of finance and employment, employer has maintained separate account and list of employees. Categorical statement of fact has been mentioned that only scanning machine was there at the Diagnostic Centre. As to whether the said business was totally dependent on the Nursing Home or it was carrying on its business independently is essentially a question of fact. No finding has been returned that there was any functional integrality between Kumar Diagnostic Centre and Sumitra Nursing Home, and merely because it was situated in one premises, presumption of functional integrality could not have been drawn. Veil could have been pierced peculiar feature of the case can also be taken into account, but before arriving at a certain conclusion authorities were obliged to address themselves on two questions which still holds the field (i) The functional integrality in between three units; (ii) In the matter of finance and employment, the employer has kept the three units separate and distinct. As this finding has not been recorded and as this goes to the root of the matter, as such the decision is clearly vitiated.

Consequently, writ petition succeeds and is allowed. The impugned orders dated 30.11.2000 and 9.6.2005 are quashed, the matter is remitted back for being decided afresh by the Assistant Provident Fund Commissioner.

2. The Court held, that the authority was obliged to address and give a finding on the two questions, namely, functional integrality between the three units and in the matter of finance and employment, the authorities had kept the three units separate and distinct.

3. In pursuance of the order of the Writ Court, the petitioner filed the attendance registers of M/s. Sumitra Nursing Home, Dr. Neeraj Gupta Orthopaedic Clinic and Kumar Diagnostic Centre, for the period November, 1995 to January, 1996. The petitioner also filed the dissolution of the partnership deed and also evidence in the form that the nursing home was not only admitting the patient of Dr. Neeraj Gupta, but, the patients of other doctors that was referred to the nursing home. The petitioner also filed the balance-sheet of all the three establishments to prove that there was no financial integrality between the three establishments. The petitioner also filed the income tax returns of all the three establishments, which was duly accepted and assessed by the income tax authorities.

4. Without considering these evidence and without adverting to it, the Regional Provident Fund Commissioner passed an order dated 23.6.2008, holding that the petitioner''s establishment has been rightly brought under the purview of the Act. The Commissioner held, that the three units M/s. Sumitra Nursing Home, Dr. Neeraj Gupta Orthopaedic Clinic and Kumar Diagnostic Centre are functioning in the same premises under the ownership of Dr. Neeraj Gupta and Manju Gupta respectively, and that, the business of these three units are controlled by Dr. Neeraj Gupta. The Commissioner also found that Dr. Neeraj Gupta sits on the ground floor and examines the patient and that the operation theatre, X-ray department etc. of Kumar Diagnostic Centre are also functioning on the ground floor. The Commissioner also observed that there was only one telephone line in the premises for all the three units, which was in the name of Dr. Neeraj Gupta and that all the three establishments have a common Accountant who writes the accounts books of all the three units and whose professional charges are debited as accounting charges in the three establishments. The Commissioner,

consequently, held that since Dr. Neeraj Gupta is one of the partners and all the three establishment is located in the same premises and are fully controlled by Dr. Gupta, the three units, are consequently, inter-dependent and there is functional and financial integrality in addition to geographical proximity of all the three establishments. The Commissioner held, that the establishment was covered under the Act. The petitioner, being aggrieved by the said order, filed an appeal which was rejected by an order dated 12.7.2010. The petitioner, being aggrieved, has filed the present writ petition.

5. Heard Sri Shakti Swarup Nigam, the learned Counsel for the petitioner and Sri Sachindra Upadhyay, the learned Counsel for the Regional Provident Fund Commissioner.

6. The Employees Provident Fund and Miscellaneous Provident Fund Act, 1952 provides for initiation of the Provident Fund, Pension and Deposit Link Insurance Fund for employees in factories and in other establishment as specified in the Schedule to the Act. Section 1(3) of the Act provides that subject to exclusion of establishments mentioned in section 16 of the said Act, the Act applies to every establishment, which is a factory engaged in any factory prescribed in Schedule-I, in which 20 or more person are employed and to such other establishment employing 20 or more persons or class of such establishment, which the Central Government may by notification in the official Gazette specify in this behalf. The aforesaid provision indicates that the Act would be applicable to an establishment specified in Schedule-I and such establishment which employs 20 or more than 20 persons. Section 2A of the Act is relevant for the purpose of this case and the same is extracted hereunder:

2-A. 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 parts of the same establishment.

7. The said provision indicates, that it would be open to the Provident Fund authority to include all departments or branches of an establishment situate in the same place or in different places to be treated as part of the same establishment.

8. In order to determine, whether different units or branches of an employer constitute one establishment or separate establishment, various tests have been applied. This Court, in the earlier round of litigation, had dealt the matter in detail and contended that in order to find out whether different units constitutes one establishment or not in a given case, integrality of ownership, management and control, could be a decisive factor, while in another case functional integrality and general unity could be a decisive factor and yet in another case unity of employment could be a decisive factor.

9. In Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers'' Union and Its Workmen, the Supreme Court held, that where two units

belong to a same proprietor there is most likelihood of unity of management and, in such cases, the Court has to consider as to how there is functional integrality between the two, meaning thereby, that one has to see functional inter-dependence between the two units. The Supreme Court held, that one has to find out as to whether both the units could exist conveniently and reasonably without the other. The Supreme Court further held, that in the matter of finance and employment, the authorities were required to find out whether the two units were distinct or integrated and these two tests was to be applied before proceeding to consider the unit as one for the purpose of the applicability of the Act of 1952. The same view has been expressed by the Supreme Court in various cases thereafter from time to time.

10. In the light of the aforesaid, and in view of the direction given by this Court in the earlier round of litigation the Provident Fund authorities were required to satisfy the test of financial integrality and see whether the three establishments functioning in the same premises could survive independently or the three units were inter-dependent on each other. The authorities were also required to find out whether in the matter of finance and employment the employer had actually kept the two units distinct or integrated.

11. In instant case, the Regional Provident Fund Commissioner has applied the fact of common ownership of all the three units and location of the three units in the common premises. In the opinion of the Court, the test applied is not a relevant factor for applicability of section 2A of the Act. The mere fact of common ownership of the three units and mere location of the two units in the common premises by itself is not sufficient to satisfy the test of functional integrality and mere common object of the three units could also not answer the test of functional integrality. The first and foremost test to establish the test of functional integrality would be whether the other establishments could survive in the absence of the first establishment, namely, if the petitioner''s establishment closes down irrevocably, could the 2nd or the 3rd establishment continue its business activity. The Regional Provident Fund Commissioner has failed to consider this aspect of the matter inspite of specific directions given by the Court.

12. The mere fact that there also exists a common telephone line and there is a common Accountant, who is keeping the books of account and is being paid accounting charges, does not prove the functional integrality between the three units. It is clear that the Accountant is not on the pay roll of either of the three units, but the Accountant is being paid accountancy charges separately by the three units. The Accountant/Chartered Accountant are hired by an establishment to look after their accounts and/or audit the balance-sheet. Such hiring of these professionals does not, by any standard, draw a conclusion to the authority to hold that there is a functional integrality between all the units where a common Accountant is engaged. Such reasoning is patently absurd. In the light of the aforesaid, the Court is of the opinion, that the order of the Regional Provident Fund Commissioner holding that the Act was applicable does not satisfy the test

of functional integrality as elucidated by the Supreme Court in the case of Pratap Press (supra) and subsequent decisions. Since the test has not been satisfied, the order of the Regional Provident Fund Commissioner and the appellate order cannot be sustained and is quashed.

The writ petition is allowed.

