**(2013) 01 DEL CK 0405**

**Delhi High Court**

**Case No:** Writ Petition (C) No. 22886 of 2005

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| Indersons Motors Pvt. Ltd. | | APPELLANT |
| | Vs | |
| Regional Provident Fund Commissioner-II and Another | | RESPONDENT |

**Date of Decision:** Jan. 29, 2013

**Acts Referred:**

- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 2A, 7(1), 7A
- Employees State Insurance Act, 1948 - Section 75(2), 78

**Citation:** (2013) 138 FLR 126 : (2013) 3 LLJ 101 : (2013) LLR 631

**Hon'ble Judges:** Vipin Sanghi, J

**Bench:** Single Bench

**Advocate:** Manish Malhotra, for the Appellant; Balraj Dewan, Advocate, for the Respondent

**Judgement**

Vipin Sanghi, J.

The petitioner establishment has preferred the present writ petition to assail the order dated 13.1.2000 passed by the Regional Provident Fund Commissioner (RPFC) u/s 7A of the Employees'' Provident Funds & Miscellaneous Provisions Act, 1952 (hereinafter referred to as, "the Act") as also the appellate order passed by the Employees Provident Fund Appellate Tribunal (for short, "the Tribunal") dated 18.8.2005 whereby the petitioner''s appeal u/s 7(1) of the Act against the order dated 13.1.2000 was dismissed. The case of the petitioner-which is a duly incorporated Private Limited Company, was that the petitioner company was established on 5.9.1985. The petitioner was engaged in the business of dealership of Swaraj Mazda trucks and other vehicles of the same brand. The petitioner submits that when its workforce reached the threshold limit, the petitioner voluntarily covered itself under the Act on 1.11.1988 by furnishing the list of employees on its rolls to the respondent authorities. The application made by the petitioner on

23.12.1988 along with the list of the employees then engaged has been placed on record by the petitioner. The petitioner has thereafter been filing annual returns with the respondent authorities which, inter alia, contain the details of the employees of the petitioner from time to time. Copies of these returns have also been placed on record from the period 1.4.1999 to 31.3.2000 onwards.

2. The petitioner submits that a show cause notice dated 6.5.1989 was issued by the respondent authorities alleging that the petitioner M/s. Indersons Motors Pvt. Ltd. is functioning from the premises No. 17-C, Model Basti, New Delhi, which is the address of M/s. Bombay Okara Carrier (Regd.)-covered under the Act with effect from 15.10.1969. It was alleged that the petitioner is a unit of M/s. Bombay Okara Carriers (Regd.). M/s. Bombay Okara Carriers (Regd.)-respondent No. 2 was required to show cause as to why the petitioner may not be covered from the date of its set up i.e. with effect from 1.8.1988 by resort to clubbing u/s 2A of the Act.

3. Another notice was issued on 9.5.1989-this time u/s 7A of the Act to M/s. Bombay Okara Carriers (Regd.), alleging failure on the part of the said firm to remit the provident fund dues. Respondent No. 2 was called upon to produce the concerned record before the RPFC.

4. Respondent No. 2 sent a reply to the show cause notice on 31.1.1989. The stand taken by it was that M/s. Indersons Motors Pvt. Ltd. i.e. the petitioner was an Independent and distinct establishment from that of respondent No. 2, having no functional integrity with it. Whereas respondent No. 2 was a partnership concern, the petitioner was a company incorporated under the Companies Act, 1956. Respondent No. 2 also requested the authorities to furnish them with a copy of each of the Area Provident Fund Inspector''s report and its supporting data/documents on the basis of which it was proposed to treat the petitioner as an extension of the business-establishment of respondent No. 2.

5. The RPFC passed the order dated 13.1.2000, thereby holding that the petitioner and respondent No. 2 are required to be clubbed in terms of Section 2A of the Act. At this stage, I may quote hereinbelow Section 2A of the Act which reads as under:--

2A. Establishments 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 parts of the same establishment.

The submission of the petitioner and respondent No. 2, that there was neither identity of ownership in the two establishments, nor identity of, or dependency of the business of one with the other was rejected by observing that there was substantial commonality of the promoters of the two establishments, and by placing reliance upon the report prepared by the Inspector''s dated 13.9.1988, 28.1.1991 and 23.7.1999. The petitioner''s reliance on the decision of the Supreme Court in the

case of Regional Provident Fund Commissioner and Another Vs. Dharamsi Morarji Chemical Co. Ltd., was rejected on the ground that there was enough material in the report of Shri R.K. Khurana, dated 13.9.1988, such as, the common ownership of the two establishments, common premises, common telephone numbers, and interchangeability of employees, which proved beyond doubt that the petitioner is a concern/branch/department of respondent No. 2.

6. The petitioner preferred an appeal before the Tribunal. One of the grounds taken by the petitioner specifically in the said appeal reads as follows:--

(22) That in the proceedings conducted u/s 7A on 16.11.1988, Shri Parshot Lal, Enforcement Officer representing the Department stated that the factual stand taken by the Department in 7A proceedings can be proved by Shri K.L. Khurana, whose report has been made basis for initiating 7A proceedings for the purpose of coverage of the appellant. Shri Parshot Lal in the said proceedings sought production of Shri K.L. Khurana as departmental witness. His request was allowed by the then R.P.F.C. But the Department failed to produce Shri K.L. Khurana as their witness despite number of opportunities availed by them. Report of Shri K.L. Khurana was not supplied to the appellant or to the respondent No. 2. The appellant as well as respondent No. 2 had been kept in dark about the said report.

[Emphasis supplied]

At this stage itself, I may also quote the response of the respondent to the said ground of Appeal. The same reads as follows:

The content of para 22 is disputed and denied in the manner it has stated. However, it is submitted the proceeding was conducted as per the rule of the Law.

From the aforesaid, it would be seen that one of the grievances of the petitioner was that it was not even provided with a copy of the report of Shri Khurana which was made the basis of initiating proceedings u/s 7A of the Act against the petitioner and respondent No. 2. It was also the case of the petitioner that the said report of Shri Khurana was not duly proved in the proceedings, as the respondent failed to produce Shri K.L. Khurana despite a number of opportunities being availed for the said purpose. The grievance of the petitioner was that the petitioner did get a chance to rebut the said report by cross-examining Shri Khurana, the author of the said report on the basis of which the petitioner was condemned.

7. The Tribunal by the impugned order dated 18.8.2005 has rejected the petitioner''s appeal. Once again, the similarity of the individuals who hold interest in the petitioner with those who held interest in respondent No. 2 has weighed in the mind of the Tribunal. The use of the common telephone numbers, telex, cable port and address has also been held to establish the connection between the two establishments. The Tribunal holds, "in my view because of common ownership and geographical proximity and since common facilities are used probability of

intermixing of staff cannot be ruled out. Not only this, two employees of the respondent No. 2 were also absorbed in the appellant, further more one counsel represented both the establishments during the enquiry."

8. The first submission of learned counsel for the petitioner is that the entire proceedings are null and void and in breach of the principles of natural justice since the material document, namely, the report of Shri Khurana on the basis of which the authorities have proceeded against the petitioner was never provided to the petitioner. The same was not even duly proved before the Regional Provident Fund Commissioner in the proceedings u/s 7A of the Act. The said report could, therefore, not have been made the basis of the original order dated 13.1.2000 or the appellate order dated 18.8.2005.

9. Learned counsel for the petitioner submits that, even otherwise, here was no identity of the interest holders in respondent No. 2 and the interest holders in the petitioner. Whereas respondent No. 2 was a partnership concern having four partners, namely, Smt. Basant K. Sud (40%), S. Index Singh (20%), S. Narender Pal Singh (20%) and S. Tarvinderpal Singh (20%), the shareholding in the petitioner company is that of S. Inder Singh and some of his family members. It is pointed out that Smt. Basant K. Sud-who held the largest single share in the partnership i.e. respondent No. 2, had no interest in the petitioner company.

10. Learned counsel submits that the respondent No. 2 continued to exist till 1.7.1986. The petitioner company, though established on 05.09.1985, voluntarily got itself covered under the Act on 1.11.1988. Therefore, the period to which the enquiry could relate was 5.9.1985 to 1.7.1986, whereas the show cause notice has been issued for the period 5.9.1985 to 9.5.1989 without any basis. Counsel points, out that the approach of the Tribunal is flawed inasmuch, as, the Tribunal has proceeded on the basis of mere "probability of intermixing of staff not being ruled out".

11. The orders have been passed on the basis of surmise only and are not founded on cogent evident. He submits that the respondent authorities did not point out a single case of an ex-employee of respondent No. 2 who had been engaged by the petitioner and whose contribution has not been deposited by the petitioner. There were only two employees who had earlier served respondent No. 2, and who had been freshly employed by the petitioner, namely, R.K. Bhatnagar and Gurmeet Kaur.

12. Learned counsel submits that in the application made by the petitioner for registration under the Act, the names and particulars of its employees had been indicated. The annual returns have also been filed by the petitioner from time to time. Despite the same, the respondents have not pointed out a single instance of a common employee, apart from the aforesaid two names which the petitioner has admitted.

13. Learned counsel points out that the proceedings under the Act to fasten liability and effect recovery is not a means to fill up the coffers of the RPFC. It is a beneficial

legislation for the benefit of the workmen to ensure that their provident fund dues are deposited by the employer. Since the authorities had failed to point out even a single instance of an employee of respondent No. 2 whose dues were not deposited, there was no occasion to initiate the proceedings u/s 7A of the Act in the present case.

14. Learned counsel submits that the guidelines to be adopted for invoking Section 2A of the Act have not been met in the present case. It cannot be said that the petitioner is a Department or a Branch of the establishment of respondent No. 2, merely because the petitioner operates from the same address; shares the same telephone numbers and telex numbers. It is submitted that, whereas the petitioner has been covered under clause (xxiv) of para 3(b) of the Employees Provident Fund Scheme, 1952 (the Scheme), respondent No. 2 was covered under clause (xxiv) of para 3(b) of the Scheme. It is argued that since the headings under which the petitioner and respondent No. 2 were covered were different, the said fact also establishes that the respondent authorities acknowledged the fact that the two establishments are carrying on independent and unrelated businesses. Learned counsel for the petitioner has placed reliance on several decisions in support of his submissions, which shall be referred to in the course of the discussion later.

15. Learned counsel for the respondent, on the other hand, emphasized on the identity of the persons having ownership of interest in the petitioner and the respondent No. 2. He submits that Inder Singh is the Managing Director of the petitioner, and was also the managing partner of respondent No. 2. Learned counsel submits that the identity of the address, telephone number, telex and even the counsels who were representing the petitioner and respondent No. 2 shows the deep connection between these two establishments. Learned counsel submits that the petitioner and respondent No. 2 have adopted the modus operandi of incorporating the petitioner only with a view to evade the provident fund dues of the employees. He also places reliance on the observations of the RPFC that there was interchangeability between the employees of the petitioner and respondent No. 2. Learned counsel has placed strong reliance on the decision of the Supreme Court in L.N. Gadodia and Sons and Another Vs. Regional Provident Fund Commissioner, in support of his submissions.

16. Having heard learned counsel for the parties, I am of the view that the proceedings initiated against the respondent No. 2 and petitioner u/s 7A of the Act were illegal and the impugned orders are liable to be quashed. Firstly, in my view, the proceedings initiated u/s 7A of the Act were hit by the principles of natural justice inasmuch, as, the reports relied upon by the respondent authorities including the one prepared by Shri K.L. Khurana of 13.9.1989 were neither provided to the petitioner to enable the petitioner to meet the same, nor duly proved in the proceedings before the RPFC before passing the impugned orders dated 13.1.2000 and 18.8.2005. The said report has not even placed before this Court by the

respondent.

17. Though the strict provisions of the Evidence Act may not be applicable to proceedings under the Act, there has to be at least some semblance of compliance of the basic principles of the Evidence Act which enshrine the principles of natural justice. It is well settled that nobody can be condemned unheard, and a party is entitled to get an opportunity to meet and deal with the material which may be relied upon by an authority to arrive at a decision ad-verse to the party. In the present case, respondent No. 2 had sought the reports relied upon by the respondent authorities as early as on 31.1.1989. There is nothing to suggest that the same were provided to respondent No. 2 or to the petitioner. The order passed by the RPFC also does not betray the fact that the said inspection reports were provided to the petitioner. The petitioner raised a specific ground in its appeal before the Tribunal in para 22 as extracted above. In response to this ground, the stand of the respondent authorities was not that the petitioner, or respondent No. 2, had been provided with the inspection reports, or that the said reports had been duly proved in the proceedings u/s 7A. Had the said reports been produced, the petitioner and respondent No. 2 would have had the opportunity to point out therefrom how, or why, they could not have been relied upon, or explained the incriminating findings/observations, if any, contained therein. If the authors of the reports would have appeared to prove them, the petitioner and respondent No. 2 would, have had the opportunity to confront them with their observations/findings. These are vital and precious rights which have been denied to the petitioner and respondent No. 2.

18. The observations made by the Tribunal to the effect that the order passed u/s 7A is not only premised on the reports, would not take away the prejudice that the petitioner has obviously suffered on account of the reliance placed by the authorities on the inspection reports. The allegation that there was interchangeability of employees between respondent No. 2 and the petitioner is as vague as it could be, since the name of not a single person has been provided except the two names aforesaid of Shri R.K. Bhatnagar and Ms. Gurmeet Kaur who, according to the petitioner, had been freshly appointed by them after discontinuation of their service with respondent No. 2. The absence of the inspector''s reports assumes even greater significance in the light of such vague and non-specific allegations with regard to interchangeability of the employees. In my view, on this short ground, the impugned orders cannot be sustained and are liable to be quashed and set aside.

19. Even otherwise, I find merit in the petitioner''s submission that there is no identity or similarly (ic similarity) in the two establishments-One run by respondent No. 2 and that established by the petitioner. The issue of clubbing of two establishments/unit/branches was considered by the Supreme Court in Dharamsi Morarji Chemical Co. Ltd. (supra). In that case, it was the same establishment which

had set-up two units-one factory was located at Ambarnath established in the year 1921, while the other factory was established at Roha, in July, 1977. The Ambamath factory was engaged in the manufacture of inorganic chemicals and fertilizers, while the Roha factory was manufacturing organic chemicals. The products manufactured by these two factories were, thus, separate, distinct and different. The Supreme Court held that if an establishment is found, as a fact, to consist of two different departments or branches, and if the departments and branches are located at different places, the establishment would stilt be covered by the net of Section 2A and the branches and departments cannot be said to be, only on that ground, not a part and parcel of the parent establishment. The Court held that the only connecting link which could be pressed in service was the fact that the respondent company was the owner of both the factories. On the basis of common ownership it was claimed that, necessarily, the same Board of Directors could control and supervise the working of both the factories. It was argued by the Department that this showed that there was inter-connection between the Ambamath factory and Roha factory and thus there was supervisory, financial and managerial control of the same Board of Directors in the two factories. This submission was, however, rejected by the High Court and also by the Supreme Court by holding that there was no evidence to indicate any such inter-connection between the two factories in the matter of supervisory, financial or managerial control. Merely because the two units were held by the same owner was not sufficient, by itself, to establish supervisory, financial or managerial common control. Independent evidence was required to be led to show that there was interconnection between the two units which was missing in that case.

20. From the above judgment, it would appear that common ownership of the two establishments, by it-self, is not a sufficient ground to conclude that the two units/establishments are liable to be clubbed u/s 2A of the Act. There should exist independent evidence to establish supervisory, financial or managerial control over the two or more units/establishments in question before they can be clubbed u/s 2A of the Act. In the present case, there is no evidence to establish supervisory, financial or managerial control of the same management over the establishment of respondent No. 2 and that of the petitioner. The ownership of the respondent No. 2 firm is not the same as that of the petitioner. The largest stake holder in the respondent No. 2 firm Mrs. B.K. Sud (40% share holder) was not an interest holder in the Petitioner Company. The activities carried out by Respondent No. 2 were of transportation business, whereas the business of the Petitioner to run the dealership of Swaraj Mazda vehicles. Only because they both involve commercial vehicles is no reason to draw a conclusion of similarity of the businesses. It cannot be said that the two establishments are interdependent, or even one is dependent on the other for its business. Whereas the business of Respondent No. 2 was to offer and sell its services, that of the Petitioner was to sell vehicles, i.e., goods. They are markedly different. The respondent authorities have not established on the

record that the employees of Respondent No. 2 and those of the petitioner were performing the same functions. The business of respondent No. 2-being to run a transport company, its workmen would be, inter alia, running commercial vehicles on highways, booking and delivering the goods and doing other related jobs. On the other hand, the workmen of the Petitioner would be accepting bookings for commercial vehicles, receiving them from the supplier and selling them to the customers. Mere sharing of the address, telephone and telex codes, or even the advocates does not lead to the conclusion of supervisory, financial or managerial control. Neither of these factors can be said to lead to an inference of supervisory, financial or managerial control by the same establishment. It is not the claim of the Petitioner, or Respondent No. 2, that these entities are complete strangers. What needs to be examined from the point of view of applicability of Section 2A of the Act is, whether the business/activity of one unit/establishment is closely intertwined with or complimentary to that of the other, because the object of Section 2A is'' to club the different units/branches of the same establishment. Therefore, the same or complimentary activity, supervision finance and management should imbue both the units/branches, just like a tree has the same set of roots nourishing the different branches-each of which are performing the same function of carrying out photo synthesis for the sustenance and growth of the tree. The mischief that Section 2A seeks to remedy has to be kept in sight, when considering the question whether, or not, one establishment is a unit/branch of the other.

21. I find force in the submission of learned counsel for the petitioner that the same entrepreneur may set up establishments in wholly unrelated fields of activity. If the interpretation sought to be advanced by the respondent authorities were to be accepted, it would become a grave impediment for any such entrepreneur to establish different and unconnected businesses as, by the method of clubbing u/s 2A of the Act, even a fledgling establishment-which is otherwise not liable to be covered under the Act, would get covered and the entrepreneurs/owner would be saddled with liabilities under the Act. This is not what the law contemplate.

22. In Sunder Transport and Another Vs. The Regional P.F. Commissioner, , the Bombay High Court was dealing with a case where the petitioner M/s. Sunder Transport-a partnership firm, was carrying on business of transport of chassis and trucks and products of Bharat Petroleum. There was another entity M/s. Bafna Motors-also a partnership firm. It was holding a dealership of international tractors and parts thereof. M/s. Bafna Investment Industries was another partnership firm in the field of investments. M/s. Bafna Finance was yet another partnership firm. There was some commonality between the partners of these firms. What is important is that they were operating from the same office premises and using the same/common telephone numbers and post box numbers. They were also using the services of the same persons to write accounts. The Provident Fund authorities sought to invoke Section 2A in respect of these establishments. The Bombay High Court after examining the businesses carried on by these firms turned down this

move of the authorities. The Bombay High Court, inter alia, observed as follows:

...The factors, such as, situation of the office of these firms is one premises, user of a common telephone number and post box number and employing the services of the same person to write the accounts, on which reliance has been placed by the Regional Provident Funds Commissioner for the purpose of clubbing together these four firms and treating them as one establishment within the meaning of section 2A of the Act are, in my opinion, not relevant once they are considered in the background of the totality of the facts and circumstances of the cases....

.....Each firm is separately registered with the Registrar of Firms and under alt other relevant enactments. The income of all these firms is also being assessed under the income Tax Act treating them as separate firms. On the face of these facts, it is difficult or rather impossible to hold that any of these firms is a branch of department of the other. The respondent in this case has clubbed the three firms, namely, (1) M/s. Bafna Motors, (2) Bafna investment and (3) M/s. Bafna Finance with M/s. Sunder Transport, meaning thereby that they are branches or departments of Sunder Transport. This action, on the face of it, is not tenable because at no stretch of imagination, the three firms can be said to be branches or department of the firm M/s. Sunder Transport. The partners of each of these three firms are different from those of Sunder Transport. In fact, none of these firms is a branch or department of the other. They are in no way dependent on each other for their existence or functioning. They are carrying on separate and independent businesses. All these circumstances clearly go to show that these four firms are distinct and separate firms.

23. It is quite possible that two or more wholly unrelated or unconnected establishments (whose owners may not be even known to each other) may furnish the same contact details-such as that of a Business Centre to the outside world. They may have no interest in the business of the Business Centre. Would that mean that they would be clubbed u/s 2A of the Act? The answer has to be an obvious "No." I also find merit in the petitioner''s submission that it was for the respondent authorities to point out as to in respect of which of the employees of respondent No. 2, the provident fund dues had not been paid on account of the same being allegedly absorbed by the petitioner. This Court in Hindustan Times Ltd. Vs. Employees State Insurance Corporation and Another, while dealing with a case falling under the Employees State Insurance Act, 1948, observed that the corporation had to collect information itself initially, and make a provisional demand on the basis of the information collected by it. In this regard, reliance was placed on the Supreme Court decision in The Employees State Insurance Corporation, Bhopal Vs. The Central Press and Another, . In this judgment, the Supreme Court while dealing with the Employees State Insurance Act, held as follows:

We find that section 75(2) of the Act provides, inter alia, that a claim for the recovery of contributions shall be decided by the Employees'' Insurance Court. Not only is the

mandatory duty cast upon it to decide such disputes, but it is armed with the powers of a Civil Court, including summoning and enforcing the attendance of witnesses, compelling the discovery and production of documents and material objects, u/s 78 of the Act.

I see no reason why the same principle would not apply even in respect of the provisions of the Act.

24. In Employees State Insurance Corporation v. Om Prakash, (FAO No. 401/2002 and connected appeals) decided on 13.8.2009, this Court also took the view that initial onus is upon the ESIC to prove that the establishment had employed the requisite number of employees for the purpose of applicability of Employees State Insurance Act. The same obligation binds the authorities under the Act as well. In my view, in the present case, the respondent authorities have miserably failed to discharge the said onus.

25. As pointed out by learned counsel for the petitioner, the respondent have not even cared to examine the returns filed by respondent No. 2 and by the petitioner to point out even a single Instance of interchangeability of employees, apart from the aforesaid two cases. Even the aforesaid two cases are not those of interchangeability. They are cases of resignation from the establishment of respondent No. 2 and fresh appointment in the establishment of the petitioner.

26. For all the aforesaid reasons, the impugned order dated 13.10.2000 of the RPFC and the appellate order dated 18.08.2005 of the EPFAT cannot be sustained and are set aside. The parties are left to bear their respective costs. The petition stands disposed of.