सत्यमेव जयते

BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, ERNAKULAM

Present: Shri.V.Vijaya Kumar, B.Sc., LLM, Presiding Officer.

(Friday the, 18th day of March 2022)

APPEAL No. 253/2019
(Old No. ATA.314(7)2015)

Appellant : M/s. Taj Kerala Hotels and Resorts Ltd.
Shanmugham Road, Marine Drive
Kochi – 682 011.

By M/s. Menon & Pai

Respondent : The Regional PF Commissioner
EPFO, Sub Regional Office,
Bhavishyanidhi Bhavan,
Kaloor, Kochi – 682 017.

By Adv. Sajeev Kumar K Gopal

This case coming up for final hearing on 16.11.2021 and this Tribunal-cum-Labour Court on 18.03.2022 passed the following:

ORDER

Present Appeal is filed from order No. KR/KC/15149/Enf.1 (1)2014/10561 dated 16.12.2014 under Sec 7A of EPF & MP Act 1952 (hereinafter referred to as 'the Act') finalising the clubbing and coverage of the appellant establishment with effect from 31.10.1994.

2. The appellant is a company registered under Companies Act. The appellant company identified 5 hotel projects at Ernakulam, Kumarakam, Varkala, Trivandrum and Thekkady. Each hotel is independent of others and there is no functional integrality between any two units and the terms and services of the employees. There is no mutual interdependence between any of the two hotel units and each hotel can function without the other. Separate accounts are maintained and separate profit & loss accounts are worked out for each hotel. The profit & loss account of all the hotels are consolidated for the purpose of Income Tax Act and Companies Act, since the same company owns all the hotels. Each establishment is distinct and separate and is eligible for infancy protection under the erstwhile Sec 16 of the Act. Vide notice dated 01.08.1996, one of the units namely Taj Residency was directed to furnish the informations to examine the applicability of the Act. The appellant objected on the ground that the hotel started operation only in 10.09.1994 and therefore claimed infancy protection upto 1997. Another notice was issued to Taj Garden Retreat, Kumarakam directing coverage of the establishment from the date of operation. The said hotel also claimed infancy protection.

The respondent authority initiated an enquiry under Sec 7A of the Act and issued an order denying infancy protection to the units at Kumarakam and Ernakulam treating all the units as a department of the same establishment. A copy of the order dated 14.01.1999 is produced and marked as Annexure A1. The appeal filed before the EPF Appellate Tribunal was rejected vide order dated 28.07.2000. A true copy of the said order is produced and marked as Annexure A2. The appellant challenged the order of the EPF Appellate Tribunal before the Hon'ble High Court of Kerala in OP.No. 34304/2000. The Hon'ble High Court after considering the matter on merit held that every hotel is a separate establishment with separate code number and one of the hotel has been given infancy protection. In view of the above, the Hon'ble High Court of Kerala concluded that the clubbing effected by the respondent was not proper and quashed Annexure A1 and A2 orders. The Hon'ble High Court also observed that if the first respondent wishes, he may initiate fresh proceedings and pass fresh orders after giving opportunity to the appellant. A copy of the judgement of the Hon'ble High Court of Kerala is produced and marked as Annexure A3. The respondent authority initiated a fresh enquiry on 02.06.2011. The appellant filed a

detailed statement explaining the factual position. It was contended that the hotels are independent with separate set of employees with different service condition and every hotel is covered with separate code number. It was also contended that EPF Act is applicable to the hotel and not to the company as a whole. The appellant also relied on the decision of the Hon'ble Supreme Court of India in ***Regional Provident Fund Commissioner Vs Dharamsi Morarji Chemicals,*** 1998 (2) SCC 446. A copy of the statement filed by the appellant dated 27.06.2011 is produced and marked as Annexure A4. Ignoring the contentions of the appellant, the respondent issued the impugned order dated 16.12.2014 holding that the appellant company is coverable under the Act and each unit has to comply with the provisions from 31.10.1994 or on the date on which it actually started operation, whichever is later. True copy of the order dated 16.12.2014 is produced and marked as Annexure A5. The contention of the appellant is that each hotel unit, although owned by the same company is totally independent and separate without any interdependence with any of the other units without having any functional integrality. The appellant is entitled to infancy protection for each unit under the erstwhile Sec 16 of the Act which was

subsequently repealed. The contention of the appellant is that the impugned order is contrary to the decisions of Hon'ble Supreme Court of India in ***RPFC and Another in Dharamsi Morarji Chemical Co. Ltd.*** 1998 (2) SCC 446 and the ***Regional Provident Fund Commissioner Vs Raj's Continental Exports Pvt. Ltd.,*** 2007 LLN 67. The Hon'ble High Court of Kerala, in Annexure A3 judgement, held that whether an establishment is a branch or department for the purpose of Sec 2A of the Act has to be considered taking into account the very many factors which would conclusively prove the functional integrality between two or other establishments. Mere common ownership will not be a conclusive proof. The fact that for the purpose of Income Tax assessment and the Companies Act, the accounts of all these establishments are put together also may not be a conclusive proof of interdependence. These are all incidents of common ownership issues. It is clear from Sec 1(3) of the Act that the provisions of the Act applies to the establishments and not to the owners. Unless there is functional integrality and interdependence between the two units, they cannot be clubbed under Sec 2A of the Act. Except for the top level management to whom long term agreement is not applicable,

no employee is transferred from one hotel to another. In the long term agreement there is a clause which enables the management to transfer employees from one hotel to another hotel. The respondent ignored the specific finding of the Hon'ble High Court that as far as the company is concerned it is only the owner of various establishments situated in various places having independent existence. Hotel Taj Residency commenced its operation on 10.09.1994 and is entitled to infancy protection under Sec 16 (1)(d) and the provisions of the Act would be applicable after 09.09.1997. The findings regarding the commencement of operations on the basis of the boat division of the company in the year 1991 has no basis, as the Hon'ble High Court was not inclined to accept the contention of the respondent. Annexure A5 order issued by the respondent is contrary to the Annexure A3 judgement of the Hon'ble High Court of Kerala. Having accepted the fact that all the hotels are covered independently and the service conditions of the employees are different, the respondent authority ought to have provided infancy protection to its hotels. The respondent authority did not consider Sec 1(3) read with Sec 16 of the Act. The appellant is

entitled for separate code No. and infancy protection as per the provisions of the Act.

3. The respondent filed counter denying the above allegations. M/s. Taj Kerala Hotels and Resorts Limited started operations from 1991 and was brought under the provisions of the Act w.e.f. 31.10.1994 after giving infancy protection under Sec 16 of the Act. Accordingly, the appellant was directed to implement the provisions of the Act treating hotels at Kumarakam and Ernakulam as units of M/s. Taj Kerala Hotels and Resorts Ltd. and the appellant was directed to comply w.e.f. 31.10.1994. Various hotel divisions of the appellant were covered under Sec 2A of the Act. The company disputed the clubbing and claimed separate infancy protection to each unit. The matter was decided under Sec 7A by the respondent authority vide order dated 14.01.1999. The EPF Appellate Tribunal upheld the order of the respondent authority. The appellant establishment approached the Hon'ble High Court. The Hon'ble High Court vide its judgement dated 20.10.2010 quashed the orders of the respondent authority and EPF Appellate Tribunal and directed the respondent authority to initiate fresh proceedings. Accordingly a fresh notice was issued to the appellant on

02.05.2011 fixing the hearing on 18.05.2011. The learned Counsel appearing for the appellant filed a detailed written statement pleading that each unit is independent as the service conditions of the employees are distinct and separate and also pointing out that there is no mutual interdependence between any of the hotel units. After hearing the appellant, as directed by the Hon'ble High Court the respondent authority issued the impugned order confirming the coverage w.e.f. 31.10.1994. The appellant company was incorporated vide memorandum dated 07.10.1990 between Indian Hotels Company Ltd. (IHCL) and Department of Tourism, Government of Kerala. As per the agreement, the properties including land and building owned by the Tourist Resort (Kerala) Ltd (TRKL) at Ernakulam, Kumarakam and Varkala were transferred to the newly established company. Taj group of hotel on behalf of IHCL brought the finance. Majority of the supervisory staff were deputed from other Taj group of hotels. The business activity of the new company, TKHRL, commenced during 10/1991 with the starting of the Boat Division. The infancy protection of the appellant company came to a close during 10/1994 and since the employment strength of the appellant company was beyond 20, the

appellant establishment was covered w.e.f. 31.10.1994. As per the Annexure to the settlement dated 21.10.1994 under sub-clause (6) of Clause 18 of the Memorandum of Settlement in respect of Taj Residency Hotel, Ernakulam;

1. The term Employer is defined as "Taj Kerala Hotels and Resorts Limited" having its registered office at Marine Drive, Shanmugham Road, Kochi – 682 011.

2. At item No. 7(H) "Every employee is liable to be transferred at any time from one type of work to another type of work, from one department to another department, from one Section to another Section in the same hotel or establishment or be transferred from one hotel/establishment to another controlled/operated/managed/owned by the company or its associated whether in existence at present or taken over or acquired at a later date, at any place whether in this country or abroad. Upon such transfers, the employees will be governed by the terms and conditions of the service rules and regulations etc., as may be applicable to the employees of his category at the place of his transfer".

3. As per clause 5(b) the word 'management' shall for all purposes means the management of the Hotel namely M/s.Taj

Kerala Hotels and Resorts Ltd and shall include General Manager or any other person or persons authorised by the company to discharge management function relating to the establishment.

From the above provisions it is clear that the employees are transferable and the management and control of all the units are one and the same. M/s. Taj Kerala Hotels and Resorts Ltd is providing manpower, finance and infrastructure to all the units under its control. All the units are engaged in the same line of business. The decision relied on by the appellant clearly shows that it is rendered in the light of the peculiar facts and circumstance of the case and therefore no law is laid down. The decision of the Hon'ble Supreme Court in ***Regional Provident Fund Commissioner and Another Vs Dharamsi Morarji Pvt. Ltd*** is also on entirely different facts and circumstances. In the present case, the appellant company established all the units. The units at Kumarakam and Ernakulam are established for the same purpose. Finance provided to both the units was by the appellant company which is clear from the annual reports. The income generated in the respective units are taken into the total earnings of the company. The expenses incurred for

establishing the units were taken from the common pooled account of the establishment. The business income earned by the appellant from the units are all deployed by the appellant and the units have no control over the finance. Thus the unity of management, supervision and control and general unity of purpose, unity in employment and financial control existed in the present case. The claim of the appellant that the Hon'ble High Court in its judgment held that the units cannot be clubbed is not correct. The Hon'ble High Court quashed the earlier order and directed the respondent authority to initiate fresh proceedings and issue fresh orders. The respondent authority issued the impugned order as directed by the Hon'ble High Court after verifying all the documents produced before him. The respondent never accepted that every hotel is independently coverable as separate establishment. If that be the case, there cannot be any dispute regarding the question of clubbing and granting infancy protection. In ***Hotel Jaipur Ashok and another Vs Miss K P Sarojini***, 2004 (02) LLN 984 the Hon'ble High Court of Delhi held that the balance sheet and profit & loss A/c of the establishment though independently maintained forms part of the balance sheet and profit & loss account of ITDC

Ltd. The facts of the above case are similar to the present case. For deciding the question of clubbing, the ownership, control and supervision, finance, management and employment, Geographical proximity and general unity of purpose are the relevant factors. The appellant company is deriving business income from its units and deploying in other projects. The appellant has supervisory control over the activities of its units. As per the press advertisement (tender notice) of 2000, Taj group of hotels, including that of Taj Kerala Hotels and Resorts Ltd. purchased consumables and groceries on annual rate contract basis for all the units. The Regional Materials Manager at Ernakulam accepts the quotations. Admittedly the managerial staffs are transferable from one unit to another and they are also employees under Sec 2(f) of the Act. Transferability of employees has not only been provided in the settlement but also is being practiced among the hotels. The date of commencement of appellant company is not disputed by the appellant. The claim of the appellant that all the units are covered as separate units is not correct. It is pointed out that w.e.f 22.09.1997, there is no infancy protection consequent to the repeal of Sec 16(1)(d) of the Act.

4. The appellant floated few hotels such as Hotel Taj Residency at Ernakulam, Hotel Taj Garden Retreat at Kumarakam etc. Other projects also came up later. After verifying the records of the appellant, the respondent directed the appellant to start compliance w.e.f 31.10.1994. The appellant disputed the coverage. Accordingly the matter was taken up under Sec 7A and the respondent authority after examining the rival contentions came to the conclusion that the appellant establishment is required to be covered w.e.f 30.10.1994 on completion of infancy protection admissible under Sec 16 of the Act. It was also decided that the Kumarakam unit of the appellant can request for a separate code number for operational convenience. The appellant establishment challenged the above said order before the EPF Appellate Tribunal in ATA 7(20)1999 and the Tribunal dismissed the appeal. The appellant challenged both the orders of the respondent authority as well as EPF Appellate Tribunal before the Hon'ble High Court of Kerala in OP No. 34304/2000 (H). The Hon'ble High Court vide its judgement dated 20.08.2010 set aside the orders of the respondent authority under Sec 7A as well as the order of EPF Appellate Tribunal under 7(I) of the Act and remitted back the case with

an observation that "if the first respondent so wishes, he may initiate fresh proceedings and pass fresh orders after affording an opportunity of being heard to the petitioner". The respondent authority initiated fresh proceedings under Sec 7A of the Act and concluded vide the impugned order holding that the hotels run by the appellant company, the Taj Kerala Hotels and Resorts Ltd, are coverable under the provisions of the Act and each hotel unit has to comply under the Employees Provident Fund Act 1952 from 31.10.1994 or the date, on which it actually started operation whichever is later. This order of the respondent authority is under challenge in this appeal.

5. The facts of the case are generally admitted. M/s. Taj Kerala Hotels and Resorts Ltd was incorporated under Companies Act on 17.05.1991. As per the memorandum of understanding between Indian Hotel Company Ltd and Department of Tourism, Government of Kerala, the properties including the land and building owned by M/s.Tourist Resorts (Kerala) Ltd. at Ernakulam, Kumarakam and Varkala are transferred to the new company. The Taj group invested money for improving the infrastructure. According to the learned Counsel for the appellant, each unit hotels under the

appellant establishment are distinct & separate and therefore eligible for infancy protection under erstwhile Sec 16 of EPF and MP Act. According to the learned Counsel for the respondent, there is unity of purpose, management and transferability of employees and therefore the different units under the appellant establishments cannot claim infancy protection.

6. The relevant provisions of the Act are Sec 1(3)(b), Sec 2A and Sec 16(1)(d). According to Sec 1(3)(b), "Subject to the provisions contained in Sec16, it applies to any other establishment employing 20 or more persons or class of such establishments which the Central Government may, by notification in the official gazette specify in this behalf". As per Sec 2A, "Establishments to include all departments and branches. For the removal of doubts, it is hereby declared that where an establishment consist 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 part of the same establishment." Sec 16(1)(d) as it existed prior to its repeal "Act shall not apply to any other establishment employing fifty or more persons or twenty or more, but less than fifty persons until the expiry of three years

in the case of former and five years in the case of latter, from the date on which the establishment is, or has been set up". The main contention of the learned Counsel of the appellant in this case is that the different unit hotels of the appellant establishment cannot be treated as branches of the appellant and they are independent and there is no interdependency between the branches and the appellant. The question of clubbing of two establishments was an issue of constant dispute prior to 22.09.1997 till Sec 16 (1)(d) of the Act is repealed. The Hon'ble Supreme Court of India considered the question in ***Associate Cement Company Ltd. Vs Its Workman***, AIR 1960 SC 56. The Hon'ble Supreme Court held that "the Act not having prescribed any specific test for determining what is "one establishment", we must fall back on such consideration as in the ordinary industrial or business sense to determine the unity of an industrial establishment, having regard, no doubt, to the Scheme and object of the Act and other relevant provisions of the Mines Act, 1952 or the Factories Act, 1948. What then is "one establishment" in the ordinary industry or business sense? The question of unity or oneness presence difficulty when the industrial establishment consist of parts, units, departments, branches etc. If it is

strictly unitary in the sense of having one location and one unit only, there is little difficulty in saying that it is “one establishment”. Where, however the industrial undertaking has parts, branches, departments, units etc with different locations near or distant, the question arises what test should be applied for determining what constitute “one establishment”. Several tests were referred to us during course of arguments before us, such as geographical proximity, unity of ownership, management and control, unity of employment and conditions of service, functional integrality, general unity of purpose etc.

It is perhaps, impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relationship between the parts, the branches, units etc. If in their true relation, they constitute one integrated whole, we say that the “establishment is one”; if on the contrary they do not constitute one integrated whole, such unit is a separate unit. How the relation between the units will be judged must depend on the facts proved, having regard to the Scheme and object of the statute which give the right of the unemployment, compensation and describes a disqualification

thereof. Thus in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test, and in still another case the test may be the unity of employment. Indeed in a large number of cases, several tests may fall for consideration at the same time. The difficulty of applying these tests arises because of the complexities of modern industrial organisations; many enterprises may have functional integrality between factories which are separately owned; some may be integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned". In ***Wipro Ltd. Vs Regional Provident Fund Commissioner***, 1995 (1) LLJ 120, the Hon'ble High Court of Karnataka held that to determine whether different units of one employer constitute one establishment or separate establishment, various tests such as unity of ownership, management and control, unity of employment, functional integrality and general unity of purpose will have to be applied. In ***Rajasthan Prem Krishan Goods Transport Company Vs Regional Provident Fund Commissioner,*** 1996 (2) LLN 287, the Hon'ble Supreme Court held that the finding recorded by the Regional Provident Fund

Commissioner after thorough enquiry on the facts that there was unity of purpose between two entities in question and both were liable to be clubbed together for the purpose of determining the number of employees for the applicability of EPF Act could not be overturned. In ***Regional Provident Fund Commissioner Vs Naraini Udyog,*** 1996 (2) LLN 904, the Hon'ble Supreme Court applied the test of functional unity to uphold the clubbing of two separately registered companies under the Companies Act. The learned Counsel for the appellant relied on the decision of the Hon'ble Supreme Court in ***Regional Provident Fund Commissioner Vs Dharamsi Morarji Company Ltd.***, 1992 SCC 446. The Hon'ble Supreme Court held that unless there is clear evidence to show that there was supervisory, financial or managerial control, two establishments cannot be clubbed under Sec 2A of the Act. He also relied on the decision of the Hon'ble Supreme Court in ***Regional Provident Fund Commissioner Vs Rajs continental exports (Pvt) ltd*** 2007 3 LLN 67. Hence it is clear from the various decisions discussed above that there cannot be a straight jacket formula to decide the question of clubbing between the two establishments under Sec 2A of the Act. A broad criteria emerging out of the above conspectus of

case law is that in order to hold two units or branches as one establishment, the unity of ownership, management and control, unity of employment and conditions of service, functional integrality and general unity of purpose between the units will have to be established. In one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test; and in still another case the important test may be the unity of employment. There cannot however be a straight – jacket formula.

7. Having extracted the law as laid down by the Hon'ble Supreme Court as well as various High Courts, it may be relevant to examine the facts of the present case in the background of the impugned order issued by the respondent authority as directed by the Hon'ble High Court in OP No. 34304/2000. The appellant started its activities during October 1991 by operating the boat division for tourists. The annual report for the financial year ending 31.03.1992 establishes the above fact. The appellant is the owner of the Taj Residency at Ernakulam and Taj Garden Retreat, Kumarakam. There is no dispute regarding this point. According to the settlement dated 21.10.1994, the term

'employer' relating to all the units and the management will be M/s. Taj Kerala Hotels and Resorts Ltd. As per Clause 7(H), all the employees are transferable between different units of the appellant establishment. According to the learned Counsel for the appellant, only the management staffs are transferable and the other employee's are not transferred though there is a clause in the settlement. The Hon'ble High Court of Kerala also in its judgement in OP No. 34304/2007 observed that "I am of opinion that unless at any time the petitioner has transferred one employee atleast from one establishment to another simply because long term agreement contains a clause enabling the management to transfer an employee is not conclusive proof of interdependence or functional integrality between the two. Neither in Exhibit P7 nor in Exhibit P9 is there any finding to the effect that there was infact a transfer of employee at any time". In the impugned order, the respondent authority has specifically stated that "it is on record of EPFO that Mr. Sabu T, S/o – Thambi and Mr. Sibi, S/o V K Sukumaran were transferred from Taj Garden Thekkady, a unit of M/s. Taj Kerala Hotels and Resorts Ltd. to Taj Residency Ernakulam, another unit of the same company". This finding by the respondent authority

in the impugned order is not challenged by the appellant. This apart the transfer of managerial staff is admitted by the appellant establishment. They are also employees of the appellant establishment under the Act. Further in clause 5(b) of the settlement, it is clarified that "***management means*** the management of Hotel, namely Taj Kerala Hotels and Resorts and shall include General Manager and any other persons authorised by the company to discharge management functions". Further as per sub clause 6 of Clause 18 of the Service Rules of Taj Residency, the term employer is defined as M/s. Taj Kerala Hotels and Resorts Ltd., the appellant.

8. On the facts and circumstances of the present case, the test that can be applied to decide the issue whether the appellant company is entitled for infancy protection for its units in different locations are the unity of ownership, management and control, transferability of employees and the integrality of finance. The unity of ownership is admitted by the appellant and there is no dispute regarding the same. With regard to the financial integrality, the Hon'ble High Court of Kerala pointed out that a common balance sheet is an incidence of common ownership and therefore a common balance sheet cannot be a ground for clubbing two units

under common management. The respondent authority in the impugned order has examined this aspect in detail and according to him, as per annual report for 1993 -1994 the income generated in the respective units are taken to the total earning of the appellant company. Further he also pointed out that the expenses incurred for establishing different hotel units are taken from the common pool account of the appellant company. He further pointed out that as per the advertisement, tender notice of 2000, the purchase of consumables and groceries on annual rate contract basis for all units is done by the Regional Materials Manager at Ernakulam and the quotations are accepted by him. The above facts proved before the respondent authority would clearly establish the financial involvement of the appellant company with its branch units situated in different locations. As already pointed out, as per settlement dated 21.04.1994, Clause 18, sub-clause (6) employer relating to all units and management will be Taj Kerala Hotels and Resorts Ltd. and as per clause 5(b) of the settlement, the word management means the management of Taj Kerala Hotels and Resorts Ltd and include General Manager or any other person authorised by the appellant. This would clearly establish the fact that the

appellant company is the employer for all the employees employed in various units and the appellant including its General Manager is the management of all the units of the appellant establishment. As admitted by the appellant, the management staff is transferable between the units. The respondent authority on facts found that other employees are also transferred between the units. Hence all the tests for clubbing various units are clearly established, in this case.

9. In similar facts and circumstances of the present case, the Hon'ble High Court of Rajasthan in ***UP Hotels ltd Vs State of Rajasthan***, 1999 (1) LLR 597, held that all hotel units are one establishment as there is functional integrality, common control management, and finance though they are separately registered. The Hon'ble High Court held that "The UP Hotel is a parent establishment which opened various branches of their hotel in the name of hotel establishment as has been done in Varanasi, Agra, Lucknow and Jaipur. All are under the control of UP Hotels. There is functional integrality, the financials are supplied by UP hotels even though they are registered separately under the Companies Act or under the local laws as required by the state laws such as Shops and Commercial Establishments Act etc. They do

not lose the character of being part and parcel of UP Hotels and cannot be considered as an independent new establishment".

10. Further there is a clear finding by the respondent authority that the appellant company started its operations in 10/1991 with the commencement of the Boat Division. Hence the appellant establishment is coverable from 10/1994 after completion of their infancy. According to the learned Counsel for the appellant, this issue has already been settled by the decision of the Hon'ble High Court in OP.No.34304/2000. However on a perusal of the judgement of the Hon'ble High Court, it is seen that the issue is neither raised nor decided by the Hon'ble Court.

11. Considering the facts, circumstances, pleadings and evidences in this appeal, I am not inclined to interfere with the impugned order.

Hence the appeal is dismissed

Sd/-

(**V.Vijaya Kumar)**
Presiding Officer