(2006) 12 KL CK 0050

In the High Court Of Kerala

Case No : W.A. No. 2091 of 2006 with W.P. No. 27541 of 2006

Ali APPELLANT

Vs

Recovery Officer, E.P.F. Organisation and Others RESPONDENT

Date of Decision : 19-12-2006

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 15(2), 17, 17(5), 2
Income Tax (Certificate Proceedings) Rules, 1962 — Rule 73(1)

Citation : (2007) 1 ILR (Ker) 238 : (2007) LabIC 899

Hon'ble Judges : M.N. Krishnan, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : Philip T. Varghese and Thomas T. Varghese, for the Appellant; Joy Thattil Ittoop, for the Respondent

Judgement

K.S. Radhakrishnan, J.—Writ Appeal arises out of the interim order dated October 19, 2006 passed by a learned single Judge in W.P(C) No. 27541/2006 directing the appellant to pay an amount of Rs. 2 lakhs so as to avert his arrest and detention due to non-payment of an amount of Rs. 4,59,885/- due to the recovery officer under the Employees Provident Funds and Miscellaneous Provisions Act, 1952. When the Writ Appeal came up for hearing we called for the Writ Petition also and we are disposing of both the cases together.

2. Writ Petition was preferred seeking a writ of certiorari to quash Exhibit P-4 order directing the petitioner to pay the above mentioned amount within fifteen days from the date of the order, failing which, it was stated that recovery proceedings would be initiated. Exhibit P-2 is a notice dated September 21, 2006 directing the petitioner to show cause why a warrant of arrest should not be issued and why he should not be committed to civil prison in execution of the certificate issued by the Authorised Officer, Employees'' Provident Fund Organisation, Kottayam.

3. Counsel appearing for the petitioner submitted that before issuing show cause

notice for arrest of the petitioner the procedure contemplated u/s 8B read with Section 8G of the Act was not followed. Counsel submitted, when Section 8G is applied, the recovery officer is bound to follow the provisions contained in Second and Third Schedule of Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962. Consequently, the show cause notice issued for arrest of the petitioner at the instance of the recovery officer cannot be sustained since the above mentioned provisions were not complied with.

4. Counsel appearing for the respondent submitted that previsions of Section 8G would apply only in case of other mode of recovery is not resorted to u/s 8 of the Act. Counsel submitted, since the recovery proceedings were initiated by the recovery officer on a certificate issued by the authorised officer u/s 8B of the Act on failure to pay the amount it is open to the recovery officer to take steps for arrest and detention of the employer. Mode of recovery of moneys due from employers is dealt with in Section 8 of the Act. Recovery in the mode referred to in this Section has to be on the basis of a certificate issued to the Recovery Officer as defined u/s 2(kb). Section spells of the modes of moneys due from employers. Section applies in case of recovery from the employer in relation to an establishment to which any Provident Fund Scheme applies and from the employer in relation to an exempted establishment to which exemption has been granted u/s 17 of the Act. As regards an employer in relation to an establishment to which any Provident Fund Scheme or Insurance Scheme applies, the recovery extends in respect of any contribution payable to the Provident Fund, or the Insurance Fund; damage recoverable u/s 14B; accumulations required to be transferred under Sub-section (2) of Section 15 or under Sub-section (5) of Section 17 or any charge payable by such employer under any another provisions of the Act or of any provision of the Provident Fund Scheme or the Insurance Scheme. Section 8B to 8E are necessary and incidental provisions made in relation to the certificate of recovery and the powers and functions of the recovery officer. Section 8B deals with the issue of certificate to the recovery officer which is extracted hereunder for easy reference:

8B. Issue of certificate to the Recovery Officer:

(1) Where any amount is in arrear u/s 8, the authorised officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the establishment or, as the case may be, the employer by one or more of the mode mentioned below:

(a) attachment and sale of the movable or immovable property, of the establishment or, as the case may be, the employer;

(b) arrest of the employer and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the establishment or, as the case may be, the employer:

Provided that the attachment and sale of any property under this Section shall first be effected against the properties, of the establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

(2) The authorised officer may issue a certificate under Sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

5. We have already indicated the process of recovery starts with certain preliminaries and the issue of certificate to the recovery officer as defined under in 2(kb) is the first and foremost requirement. The certificate u/s 8 has to be issued by the authorised officer viz., Central Provident Fund Commissioner, Additional Provident Fund Commissioner, Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner or such other officer as may be authorised by the Central Government as defined in Section 2(aa) and sent to the Recovery Officer proceeds to recover the amount due from the establishment or the employer, either by attachment and sale of the movable or immovable property of the employer or of the establishment or arrest of the employer and his detention in prison or by appointing a receiver for the management of the movable or immovable properties of the establishment. The conditions for resorting to either of the modes above mentioned are that attachment and sale of property shall first be effected against the properties of the establishment and then against the property of the employer for recovery whether of the whole or any part of the arrears, if the attachment and sale of the property of the establishment is insufficient for recovery of the entire amount in arrears. Further, where the attachment and sale of the property of the establishment be found sufficient for recovery of whole of the amount in arrears, the properties of the employer shall not be proceeded with.

6. Section 8G deals with the application of certain provisions of Income Tax Act which is extracted hereunder for easy reference:

8G. Application of certain provisions of Income Tax Act. -

The provisions of the Second and Third Schedules to the Income Tax Act, 1961 (43 of 1961) and the Income Tax (Certificate Proceedings) Rules, 1962, as in force from time to time, shall apply with necessary modifications as if the said provisions and the rules referred to the arrears of the amount mentioned in Section 8 of this Act instead of to the Income Tax:

Provided that any reference in the said provisions and the rules to the ''assessee'' shall be construed as a reference to an employer as defined in this Act.

Section 8G specifically says that the provisions of the Second and Third Schedule to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962, as in force from time to time, shall apply necessary modifications as if the said provisions and the rules referred to the arrears of the amount mentioned in Section 8 of this Act instead of to the Income Tax. So, Section 8, 8B and 8G have to be read together. If so read, the provisions of the Second and Third Schedule to the Income Tax Act, 1961 and the Income Tax (Certified Proceedings) Rules, 1962 will have to be applied.

7. Part V of the Second Schedule to the Income Tax Act, 1961 deals with the arrest and detention of the defaulter. Rule 73(1) of the Second Schedule in Part V reads as follows:

73. Notice to show cause: (1) No order for the arrest and detention in civil prison of a defaulter shall be made unless the Tax Recovery Officer has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and show cause why he should not be committed to the civil prison, and unless the tax Recovery Officer, for reasons recorded in writing is satisfied;

(a) that the defaulter, with the object or effect of obstructing the execution of the certificate, has after the drawing up of the Certificate by the Tax Recovery Officer, dishonestly transferred, concealed, or removed any part of his property, or

(b) that the defaulter has or has had since the drawing up of the certificate by Tax Recovery Officer the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

8. Sections 8, 8B and 8G if read together would show that a defaulter can be arrested only on the following conditions: (i) The defaulter with the object or effect of obstructing the execution of the certificate, has after the drawing up of the certificate by the Tax Recovery Officer, dishonestly transferred, concealed, or removed any part of his property or (ii) the defaulter has or has had since the drawing up of the certificate by Tax Recovery Officer the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

9. We are of the view so long as there is no finding on Exhibit P-5 order that the above mentioned situations had ever occurred the issuance of warrant of arrest cannot be sustained. Respondent in our view has not followed the statutory procedures before issuing warrant of arrest against the petitioner. Another mode of recovery is also prescribed in Section 8F of the Act which has employed a non obstance clause which says that not withstanding the issue of a certificate to the Recovery Officer u/s 8B, the Central Provident Fund Commissioner or any other officer authorised by the Central Board may recover the amount by any one or more of the modes provided in that Section. The modes provided for under that Section can be resorted to despite the issue of a certificate of recovery u/s 8G has only supplemented the provisions of Section 8F(5) by making the relevant provisions of the Second and the Third Schedules to the Income Tax Act, 1961, as also the Income Tax (Certificate Proceedings) Rules, 1962 as in force from

time to time, applicable, with necessary modifications, to the mode of recovery contemplated u/s 8F(5). Section 8G is therefore in legal phraseology, a legislation by reference.

10. We are of the view, Section 8G would be applicable to proceedings which are initiated by reference u/s 8 also since Section 8F specifically refers to Section 8B. True Sub-section (5) of Section 8F specifically refers Third Schedule to the Income Tax Act, 1961 though there is no specific reference as such in Section 8B. All the same we are of the view, the proceedings initiated against a person for arrest and detention on the mere issuance of certificate by the authorised officer to recovery officer may not be a correct procedure in law when the person against whom other modes of recovery u/s 8F are possible. In our view, before arrest and detention of a person the provision of Part V of the Second Schedule of Income Tax Act 1961 has also to be followed. Under such circumstances we are inclined (sic) to set aside Exhibit P-4 holding that the recovery proceedings can be initiated by arrest and detention of the petitioner only after following the provisions contained in Second and Third Schedule to Income Tax Act 1961 and the Income Tax (Certificate Proceeding) Rules 1962. W.A. 2091/2006 is allowed, and we set aside the interim order passed by the learned single Judge. W.P.(C) 27541/2006 is allowed and Exhibit P-4 would stand quashed. We make it clear that this order would not stand in the way of respondents initiating recovery proceedings in accordance with law.

