
(2011) 07 SHI CK 0003
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 700 of 2008

Alico Rubber Reclamation (Private) Limited	APPELLANT
Vs	
Employees Provident Fund Organisation and another	RESPONDENT

Date of Decision : 08-07-2011

Acts Referred:

Constitution of India, 1950 — Article 37, 38, 43
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 11, 11(2), 17, 17B, 2
Himachal Pradesh Tenancy and Land Reforms Act, 1972 — Section 118
State Financial Corporations Act, 1951 — Section 29
Transfer of Property Act, 1882 — Section 2

Citation : (2011) 131 FLR 45

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Material facts necessary for the adjudication of this petition are that M/s. Anuj Cement (Private) Limited had been running industry over Khasra No. 316/271/74 measuring 8 bighas in estate Bharapur, Tehsil Paonta Sahib, District Sirmour. M/s. Anuj Cement (Private) Limited could not repay the loan amount to respondent No. 2-Financial Corporation. The ownership and possession of the unit was taken over by respondent No. 2 on 16.9.1999 and mutation No. 715 dated 16.9.1999 was also attested. Respondent No. 2 issued a sale notice on 9.8.1999 whereby M/s Anuj Cement (Private) Limited was also put to sale. An advertisement was issued on 19.8.1999. The sister concern of M/s. Anuj Cement (Private) Limited, i.e. M/s. Luxmi Rubber Industries made an offer to purchase the unit as per letter dated 12.10.1999. Thereafter, at the request of sister concern, i.e. M/s. Luxmi Rubber Industries, the unit was sold to the petitioner-company and the possession was delivered after the receipt of sale proceed of Rs. 17.60 lakhs. The company has obtained essentiality certificate on 31.5.2001, permission u/s 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 on 22.12.2001 and the "no objection certificate" from the

State Pollution Control Board on 23.3.2001. A notice Annexure P-8 dated 11.4.2002 was issued for recovery of arrears and interest u/s 17 of the Employees Provident Funds and Miscellaneous Provisions Act; 1952 (hereinafter referred to as "the Act" for brevity sake). Petitioner-company filed reply to the same on 25.4.2002. Thereafter one Kuldeep Singh, Managing Director of M/s. Anuj Cement (Private) Limited was served with a notice by the Recovery Officer on 11.6.2002. The petitioner- company was informed that since it has purchased the establishment from Himachal Pradesh Financial Corporation, Shimla, the liability still falls upon it and the company was directed to deposit the amount of Rs. 4,21,892/-. Petitioner-company filed a detailed reply to the same on 20.6.2002 through its Advocate. Thereafter, petitioner-company received another letter dated 12.10.2007 whereby the Recovery Officer had called upon the petitioner-company to pay sum of Rs. 4,21,892/- towards provident fund dues. The same was replied on 22.10.2007. Petitioner was served with a letter dated 12.11.2007 and thereafter warrant of attachment of the immovable property of the petitioner was issued by the Recovery Officer. The company was prohibited and restrained vide order dated 28.3.2008 by the Recovery Officer from transferring or charging the property mentioned in the letter.

Ms. Jyotsna Rewal Dua has strenuously argued that the petitioner-company has purchased the unit after the same was taken over by respondent No. 2 u/s 29 of the State Financial Corporation Act and his client is not liable to pay a sum of Rs. 4,21,892/- towards provident fund dues. She then contended that section 17-B of the Act will not be attracted in this case for the simple reason that the property has been purchased by the petitioner-company from respondent No. 2 and there is no transfer as such stipulated u/s 17-B from the employer.

2. Mr. Sandeep Sharma, learned Assistant Solicitor General of India and Mr. Ajay Kumar Sood have vehemently argued that the case falls within the ambit of section 17-B and the petitioner-company is liable to pay the provident fund dues and the order of attachment is legal. In addition, Mr. Sandeep Sharma has also argued that once the amount of Rs. 17.60 lakhs has been received by the respondent No. 2 by selling the unit/establishment, it was bound to pay the provident fund dues as per section 11(2) of the Act.

3. I have heard the learned Counsel for the parties and have perused the pleadings carefully.

4. What emerges from the facts enumerated hereinabove is that initially M/s. Anuj Cement (Private) Limited had been running the business. It could not repay the loan amount to respondent No. 2, which led to taking over the possession of the unit on 16.9.1999 on the basis of which mutation No. 715 was also attested. Thereafter, the unit, i.e. M/s. Anuj Cement (Private) Limited was put to sale. The sister concern of M/s. Anuj Cement (Private) Limited, i.e. M/s. Luxmi Rubber Industries submitted an application for purchase of assets of taking over unit on 12.10.1999. According to the pleadings, the sister concern made a request that the unit may be permitted to be purchased by the petitioner-company. The unit

was purchased by the petitioner after paying a sum of Rs. 17.60 lakhs.

5. The core question involved in this petition is : whether the petitioner is to be treated as transferee u/s 17-B of the Act after it has purchased the unit from respondent No. 2 or it is the previous employer, who has to pay the liability of the outstanding provident fund dues. In the instant case, the property has not been transferred by the employer to the petitioner- company. The unit has been purchased by the petitioner from respondent No. 2 pursuant to sale notice. Section 17-B of the Act will not apply in those cases where the sale is involuntary. In the case in hand, the property of M/s. Anuj Cement (Private) Limited has been taken over while exercising the power u/s 29 of the State Financial Corporation Act. It was coercive act, which has been taken by the Financial Corporation.

6. Now, as far as the transfer of the unit is concerned, it is not by the employer, but it has been transferred by the State Financial Corporation to petitioner-company. As per section 29 of the State Financial Corporation Act, it is open to respondent No. 2-Corporation either to take over the management or possession or both of industrial unit. In the instant case what has been taken over by respondent No. 2-Corporation is the possession and not the management as per averments contained in the reply filed by respondent No. 2, to which no rejoinder has been filed. In case the Corporation had taken over the management, it could safely be concluded that it has got the control with the business and other belongings of the industrial unit. The company, i.e. Anuj Cement (Private) Limited is still existing and is liable through its Promoter/Director to pay provident fund dues and not the petitioner-company. The petitioner-company will not fall within the expression of transferee employed in section 17-B of the Act.

7. The learned Single Judge of Madras High Court in *Shri Angappa Spinning Mills, Madurai and others v. Regional Commissioner, Employees' Provident Fund, Madras*, 1986 Lab. I.C. 458 has held that in case of a sale or transfer of an establishment is by the Court, section 17-B shall not apply. The learned Single Judge has also held that there is no indication that section 17-B contemplated transfers otherwise than by an employer as defined in the Act in relation to an establishment. The Court sale takes place by operation of law and not by any transaction inter vivos. In that case since it is an involuntary sale against the wishes of the person whose property is sold and in these circumstances, it could be called a transfer, as ordinarily understood, which connotes a voluntary transaction entered into between two parties. The learned Single Judge has concluded by making observations that the words "in any other manner whatsoever" occurring in section 17-B would not cover a case of involuntary sale or Court sale.

8. The learned Single Judge of Orissa High Court in *Suburban Ply and Panels (P) Ltd. Vs. Regional Provident Fund Commissioner and Others*, has held that in case the transfer is by the State Financial Corporation after taking over u/s 29 of the State Financial Corporation Act, section 17-B of the Employees Provident Funds

and Miscellaneous Provisions Act, 1952 will not attract. The learned Single Judge has also held that the transfer has not been made by the employer but after seizure of the unit/establishment, the same was transferred by the OSFC to the present petitioner and there is no indication that section 17-B contemplates transfers otherwise than by an employer as defined in the E.P.F. Act in relation to an establishment. The learned Single Judge has followed 1986 Lab. I.C. 458 (supra). The learned Single Judge has held as under:

11. A conjoint reading of the provisions of sections 2, 8 and 17-B of the EPF Act as quoted above gives a clear picture that the liability to pay contribution and other sums due from the employer on transfer of an establishment is specifically provided in section 17-B of the EPF Act. The principle behind it is that the employer, who is liable to pay u/s 6 of the Act the contribution and other sums, cannot by reason of its owning or occupying the establishment on transfer be permitted to avoid such liability and, therefore, provision is made u/s 17-B of the Act that the employer as well as the transferee shall be jointly and severally liable to pay the contribution and other sums up to the date of transfer. This speaks that by reason of the transfer, the liability on the employer would not cease, but would continue to exist and would also be fastened upon the transferee, though limited to the value of the assets obtained by the transferee by such transfer. The transfer by the employer of the establishment contemplated u/s 17-B is an act by the employer. Here is a case where the transfer has not been made by the employer but after seizure of the unit/establishment, the same was transferred by the OSFC to the present petitioner. There is no indication that section 17-B contemplates transfers otherwise than by an employer as defined in the EPF Act in relation to an establishment. By a Court sale or otherwise a transfer takes place by operation of law and not by any transaction inter vivos. In that sense, it is an involuntary sale against the wishes of the person whose property is sold. That can hardly be called a transfer, as ordinarily understood, which connotes a voluntary transaction entered into between two parties. In this connection it has also to be remembered that the provisions of the Transfer of Property Act generally dealing kinds of transfers do not affect transfer by operation of law, or by or in execution of a decree or order of a Court of competent jurisdiction u/s 2(d) of the Transfer of Property Act. (See *Angappa Spinning Mills, Madurai v. Regional Commissioner, Employees Provident Fund, Madras*. 1986 Lab. I.C. 458 (Mad.))

12. In the case at hand, this cannot be construed to be a transfer by the employer as the petitioner took delivery of possession of the establishment of O.P. No. 4 by entering into an agreement with the OSFC for which the provisions of section 17-B of the EPF Act cannot be applied. Accordingly, refusal to allot a new code number and the order passed in Annexure-1 cannot be sustained in the eye of law. This being the position, O.P. Nos. 1 and 2 cannot fasten the liability on the petitioner to pay the contribution and other charges, which have remained unpaid as against O.P. No. 4.

9. Now, the Court will advert to the additional submission made by Mr. Sandeep Sharma, learned Assistant Solicitor General of India with regard to applicability of section 11(2) of the Act. According to Mr. Sandeep Sharma, respondent No. 2 has sold the unit/ establishment for a sum of Rs. 17.60 lakhs pursuant to sale notice dated 12.10.1999 and in these circumstances according to him, as per the object of section 11(2) of the Act, it is the liability of respondent No. 2 to pay the provident fund dues. He has relied upon Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner, Their Lordships of the Hon"ble Supreme Court have held that the priority given to the dues of provident fund etc. in section 11 is not hedged with any limitation or condition. Their Lordships have further held that the priority clause enshrined in section 11 will operate against statutory as well as non-statutory and secured as well as unsecured debts including a mortgage or pledge. Their Lordships have further held that section 11(2) was designedly inserted in the Act for ensuring that the provident fund dues of the workers are not defeated by prior claims of secured or unsecured creditors. Their Lordships have further held that irrespective of the time when a debt is created in respect of the assets of the establishment, the dues payable under the Act would always remain a first charge and shall be paid first out of the assets of the establishment notwithstanding anything contained in any other law for the time being in force. Their Lordships have finally concluded that the statutory first charge created on the assets of the establishment by section 11(2) and the priority given to the payment of any amount due from an employer will operate against all types of debts. Their Lordships have held as under:

30. Since the Act is a social welfare legislation intended to protect the interest of a weaker section of the society, i.e., the workers employed in factories and other establishments, it is imperative for the Courts to give a purposive interpretation to the provisions contained therein keeping in view the Directive Principles of State Policy embodied in Articles 38 and 43 of the Constitution. In this context, we may usefully notice the following observations made by Krishna Iyer, J. in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*,

28. The pragmatics of the situation is that if the stream of contributions were frozen by employers' defaults after due deduction from the wages and diversion for their own purposes, the scheme would be damnified by traumatic starvation of the Fund, public frustration from the failure of the project and psychic demoralisation of the miserable beneficiaries whey they find their wages deducted and the employer get away with it even after default in his own contribution and malversation of the workers' share. "Damages" have a wider socially semantic connotation than pecuniary loss of interest on non-payment when a social welfare scheme suffers mayhem on account of the injury, Law expands concepts to embrace social needs so as to become functionally effectual.

40. The measure was enacted for the support of a weaker sector viz. the working class during the superannuated winter of their life. The financial reservoir for the

distribution of benefits is filled by the employer collecting, by deducting from the workers' wages, completing it with his own equal share and duly making over the gross sums to the Fund. If the employer neglects to remit or diverts the moneys for alien purposes the Fund gets dry and the retirees are denied the meagre support when they most need it. This prospect of destitution demoralises the working class and frustrates the hopes of the community itself. The whole project gets stultified if employers thwart contributory responsibility and this wider fall-out must colour, the concept of "damages" when the Court seeks to define its content in the special setting of the Act. For, judicial interpretation must further the purpose of a statute. In a different context and considering a fundamental treaty, the European Court of Human Rights, in the Sunday Times Case, observed: The Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty.

41. A policy-oriented interpretation, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to assign to "damages" a larger, fulfilling meaning."

31. We shall now consider the question whether the provision contained in section 11(2) of the Act operates against other debts like mortgage, pledge, etc. Answer to this question is clearly discernible from the plain language of section 11. The priority given to the dues of provident fund etc. in section 11 is not hedged with any limitation or condition. Rather, a bare reading of the section makes it clear that the amount due is required to be paid in priority to all other debts. Any doubt on the width and scope of section 11 qua other debts is removed by the use of expression "all other debts" in both the sub-sections. This would mean that the priority clause enshrined in section 11 will operate against statutory as well as non-statutory and secured as well as unsecured debts including a mortgage or pledge. Sub-section (2) was designedly inserted in the Act for ensuring that the provident fund dues of the workers are not defeated by prior claims of secured or unsecured creditors. This is the reason why the legislature took care to declare that irrespective of time when a debt is created in respect of the assets of the establishment, the dues payable under the Act would always remain first charge and shall be paid first out of the assets of the establishment notwithstanding anything contained in any other law for the time being in force. It is, therefore, reasonable to take the view that the statutory first charge created on the assets of the establishment by sub-section (2) of section 11 and priority given to the payment of any amount due from an employer will operate against all types of debts.

10. The Court is of the considered view that since respondent No. 2 has realized a sum of Rs. 17.60 lakhs by selling the assets of M/s. Anuj Cement (Private) Limited. It is also bound to pay provident fund due to the workers. This charge is

to be treated as per section 11(2) first charge and will get preference over all other dues. In case any other interpretation is given to section 11(2), the right of the workers to get their dues will be defeated even though the amount has been realized by selling the assets of the establishment/unit by respondent No. 2.

11. Accordingly, in view of the observations and discussions made hereinabove, the petition is allowed. Annexure P-15 is quashed and set aside. Respondent No. 2 is directed to deposit a sum of Rs. 4,21,892/- with respondent No. 1 for further disbursement of the provident fund to the workmen. It shall be open to respondent No. 2 to recover the outstanding amount after the adjustment of the sale proceed from M/s. Anuj Cement (Private) Limited against which a suit for recovery has already been filed before the learned Debt Recovery Tribunal, Chandigarh. There shall, however, be no order as to costs.