

(2007) 08 GUJ CK 0020

In the Gujarat High Court

Case No : Special Civil Application No. 19075 of 2007

Atulya Yogendra Mafatlal

APPELLANT

Vs

Regional Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 01-08-2007

Acts Referred:

Companies Act, 1956 — Section 529A, 530
Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 8, 8G
Income Tax Act, 1961 — Section 179
Industrial Disputes Act, 1947 — Section 33
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22(1)

Citation : (2008) 116 FLR 389 : (2008) 1 GLR 301 : (2008) 2 LLJ 80

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Bharat T Rao, for the Appellant; None, for the Respondent

Judgement

H.K. Rathod, J.—Heard learned advocate Mr. B.T. Rao for the petitioner.

2. In pursuance to the direction issued by this Court on 22.6.2007 in SCA No. 15849 of 2007, a representation was made by the petitioner on 5.7.2007 raising certain contentions in respect to provisions of Section 529A and 530 of the Companies Act and other contentions in the said representation. The respondent PF Authority has passed an order on 18.7.2007 after taking into account the representation of the petitioner and rejected the same.

3. Learned advocate Mr.Rao submitted that whatever contentions raised in representation are not dealt with by the respondent PF Authority and the respondent PF Authority has also not considered the parri passu claim along with secured creditors as per the provisions of Section 529A and 530 of the Companies Act. He further submitted that a moment the company is wound up and OL is appointed, then, the present petitioner _ the Director is ceased to be the Director of the Company and OL is in possession of the property of the company. He also submitted that respondent PF Authority cannot recover the PF

dues from the petitioner in a personal capacity. Therefore, he submitted that the decision which has been taken by the respondent PF Authority is contrary to law and bad. Therefore, present petition is filed.

4. I have considered the submissions made by learned advocate Mr. Rao and have also perused the order passed by respondent PF Authority.

5. The total amount is due to be recovered from the petitioner comes to Rs.6,79,41,707/-. The said amount is not paid since more than 6 years. Various steps have been taken in between by the respondent PF Authority to recovery the said amount but, on each and every occasion, the legal proceedings is to be taken which ultimately the respondent PF Authority is not able to recover any amount from the petitioner. The detailed reply is quoted as under:

WHEREAS a sum of Rs.6,79,41,707/- (Rs. Six Crore Seventy Nine Lacs Forty One Thousand Seven Hundred and Seven) is due from the establishment namely M/s. Novinon Ltd. as PF contributions and other allied dues vide a Recovery Certificates issued by authorized officers Vadodara and Mumbai to the authority undersigned for execution of Recovery.

AND WHEREAS facts place before me are:

That Hon"ble High Court of Mumbai on 16/12/05 ordered (Company Petition No. 1176 of 2001) winding up of the establishment, appointed Official Liquidator for taking over the assets of the establishment for disposal.

That the authority undersigned lodged claim before the official liquidator for remittance of PF dues in execution of the recovery certificates but in vain.

That the SASF Mumbai was directed to remit Pf Dues in arrear mentioned in the recovery certificates from the proceeds of the assets of the establishment in its possession but of no avail.

AND WHEREAS the authority undersigned is empowered by Section 8 of the EPF and MP Act, 1952 and Scheduled II of the Income Tax,1961 provision of which provide that u/s 179 of the Income Tax Act, 1961, SWhere any tax due from any private company cannot be recovered then the directors of such company shall be jointly and severally liable for payment of such taxes unless they prove that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on their part in relation to the affairs of the company.

AND WHEREAS Section 8G of the EPF and MP Act,1952 provides for application of certain provisions of Income Tax Act,1961 (43 of 1961) and Income Tax (Certificate proceedings) Rules,1962 as in force from time to time, with necessary modification as if the said provisions and the rules referred to the arrears of the amount mentioned and Section 8 of this act instead of to the Income Tax. Further providing 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.

AND WHEREAS the authority undersigned caused recovery action against the original/erstwhile director of the company namely Shri Atulya Mafatlal under the above referred provision following which the said director approached the Hon"ble High Court of Gujarat, Ahmedabad for relief and obtained order dated by 22.6.2007 of the Hon"ble Court directing the said director to submit detailed reply to the authority undersigned, without personal appearance being not necessary and directing that the authority undersigned to pass order on receipt of the reply from the said director. This order of the Hon"ble High Court was obtained at the back of the authority undersigned as no copy of the petition filed before the Hon"ble Court was ever served upon the authority undersigned.

AND WHEREAS a long period of 7 years has elapsed since the establishment went in to default in 2000, but the recovery certificates remain un-executed throughout due to one reason or the other attributed by the directors themselves, thus the aim and objective of the social legislation seems to have been lost in the mean time resulting into the non-availability of social security benefits to the workers to which they are entitled for having put in their long and hard labour when they were employed in the establishment long back. Under the circumstances the authority undersigned having been entrusted with the responsibility of the enforcement of the provision of the Act cannot remain a mere spectator any more and the aim and objective of the act cannot allowed to be lost or left unenforced too long.

Now, therefore, applying mind on the above facts and circumstances of the case in exercise of the powers conferred upon him by Section 8 of EPF & MP Act,1952, Schedule II of Income Tax Act,1961 and Income Tax (Certificate proceedings) Rules, 1962 the authority undersigned directs Shri Atulya Mafatlal to liquidate forthwith the PF Dues in arrears, declare details of his un-encumbered and encumbered assets, movable and immovable properties at the disposal of the authority undersigned.

I, further order that in the event the said director fails to comply this order within 15 days from the date of issue of this order the authority undersigned shall invoke coercive provision for recovery of the said dues.

This order is without prejudice to any other action that may lie or may be contemplated under any section of the EPF & MP Act,1952, IIInd schedule Income Tax Act,1961 and Income (Certificate Proceedings) Rules,1962 and any section of PIC,1960 (45 of 1960) as the case may be.

5.1 Recently the Full Bench of Madras High Court has in case of Gowri Spinning Mills (P) Ltd. rep. By its Managing Director, Dharmapuri v. Assistant Provident Fund Commissioner, Salem and Anr. Reported in (2006) 4 MLJ 1261. Relevant observations made in para.14, 15 and 32 are quoted as under:

14. Both the statues are special statutes. Whereas the object of enactment of the SICA was to provide for the revival and rehabilitation of sick industrial companies, the object of the EPF Act, as indicated hereinbefore, was a measure

to provide social security to the employees. The contribution of the employees as well as the employer towards provident fund is not a tax due. It is also not an amount recoverable under a contract. The moneys, which have been deducted from the wages of the employees as well as the amounts, which the employer is required to pay as its contribution, belong to the employees, and constitute their rightful and just entitlement for the eventual payment of provident fund benefits.

15. In our opinion, the provision of Section 22(1) of the SICA has no application to the provident fund dues and the provisions of the EPF act would not come within the purview thereof. The provident fund and other dues payable under the EPF Act are part of the legitimate statutory settlement of the workers. The employer is obligated to pay the contribution of the employees as well as his contribution of the Fund, which is set up under the Act, and the Scheme framed thereunder. The employees' contribution together with the employer's contribution is required to be paid into the Fund by the employer with the stipulated period. These amounts whether by way of contribution of the employee or the contribution of the employer, are moneys which belong to the employee. An account which is required to be maintained in the name of each member of the provident fund, contains contribution of the employee, the employer as well as the interest which has been credited. Provident fund is the foundation of an important measure of social security provided to employees of those establishments to whom the Act applies. In the aforesaid situation, an employer cannot refuse to comply with the statutory mandate to pay the contribution made by the employees as also his share, which was by way of social security scheme. Although the object of the SICA is laudable, but, in our view, the same should not deprive the hard earnings of the employees. It does not and cannot stay the recovery proceedings for recovery of money to which employees are entitled by way of social security scheme. The money does not belong to the company, it belongs to the employees. These moneys can be withdrawn by the employees in certain eventualities even prior to the attainment of age of superannuation. The Scheme makes provision for withdrawal from the Fund and for the grant of advances from the Fund in special cases.

32. A Division Bench of the Karnataka High Court in case of Indian Plywood Manufacturing Company Ltd. v. Commissioner of Labour and Ors. 2000(2) LLN 677 (Kar.) following the decision of the Allahabad High Court in the case of Modi Industries Ltd. v. Addl. Labour Commissioner, Ghaziabad (supra), held that the impugned notice and recovery certificate u/s 33(c) of the Industrial Disputes Act cannot be regarded as governed by Section 22(1) of the SICA. Similar is the view of the Uttaranchal High Court in Uptron India Ltd. Vs. Presiding Officer, Labour Court and Another, and that of the Madhya Pradesh High Court in Kedia Distilleries v. General Secretary, Chhatisgarh Chemical Mill Majdoor Sangh 2001 LIC 1815 (MP).

6. Learned advocate Mr. Rao relied upon the provision of Section 529A /530 of the Companies Act and claim of secured creditors and claim of the workman at

pari passu. This is not the case arising from the Companies Act. The provisions of Companies Act is a separate legislation; having separate machinery to recover the amount from the employer. This being a beneficial enactment having its own machinery to enforce the recovery and priority to recover / privilege to recover the PF being a benevolent legislation is more than the provision of Section 529A /530 of the Companies Act. It is necessary to note that if such type of defence is to be taken by each and every employer and he is no more existing Director and assets are with the OL, then, PF amount cannot be recovered from any employer. Therefore, this entire aspect has been rightly taken into account by the respondent PF authority in light of the provisions of Income Tax Act, 1961 and Income Tax (Certificate Proceedings) Rules,1962 to have power to recover the said amount from the petitioner in his personal capacity. Therefore, observations made by the respondent PF authority is very relevant as if that authority has failed in discharging its duties as long period of 7 years elapsed since the establishment went into default in 2000 but the recovery certificates remain un-executed throughout due to one reason or the other attributed by the directors themselves, thus the aim and objective of the social legislation seems to have been lost in the mean time resulting into the non-availability of social security benefits to the workers to which they are entitled for having put in their long and hard labour when they were employed in the establishment long back. Under the circumstances the authority undersigned having been entrusted with the responsibility of the enforcement of the provision of the Act cannot remain a mere spectator any more and the aim and objective of the act cannot allowed to be lost or left unenforced too long. According to him, agony which has been mentioned and/or reflected from the PF authority suggest that last 7 years for recovering the amount of more than Rs.6 crores from the petitioner, what efforts have been made by the respondent authority, even though the remain failed. Therefore, such type of litigation must have to come to an end. Accordingly, in my opinion, the respondent authority has rightly examined the issue which has been raised by petitioner in his representation. For that, detailed reasons are given. The respondent authority has not committed any error in rejecting the representation of the petitioner. Therefore, when there is no error committed by the respondent authority, the question of interference by this Court under Article 226 of the Constitution of India does not arise. There is no substance in the present petition. Present petition is accordingly dismissed.

7. After giving dictation, learned advocate Mr.Rao submitted that there is no default on the part of Director as a personal capacity but there was a default of establishment. Prior to the liquidation, the director was very much there and responsible. So whatever the default of the establishment it includes the default of director. Therefore, according to my opinion, the respondent authority has rightly dealt with such issue in its order. Learned advocate Mr.Rao is not able to point out any provision of PF Act which prohibits or not permits recovery from the Director from his personal capacity and properties to the PF authority.

8. In respect to contention raised by learned advocate Mr.Rao that none of the

contentions raised in the representation is considered by the respondent PF authority. I have considered these contentions thoroughly while examining the order in question passed by respondent authority and also satisfied with the answer given by the respondent authority. Learned advocate Mr.Rao is not able to demonstrate that how the reply or decision rendered by PF authority is wrong or contrary to law. When all efforts of PF authority to recover the amount are failed, as a last resort, effective steps which are recognized under the PF Act are taken to recover the amounts from Director in his personal capacity. This mode of recovery is recognized by statutory provision under the PF Act. If that is not recognized then in case the company is wound up then PF authority has to remain in queue with secured creditors, which ultimately frustrate the very object of the PF Act. It is very easy for the management to get order of winding up of a company even by collusion with creditors for avoiding payment of PF dues. Therefore, strict and stringent provisions are provided in the PF Act which are referred by the PF authority in its decision, which can permit to PF authority to recover the said PF dues from Director in his personal capacity. Thus, question of considering provision of 529A/530 of Companies Act similar to provisions of SICA Act does not arise, as decided by Full Bench of Madras High Court as referred above. According to my opinion, such kind of litigation should not be encouraged by High Court when there is no dispute about claim or due of amounts under the PF Act. The petitioner has not disputed liability of total amount of Rs.6,79,41,707/-. The only contention is that it can be recovered from the properties of the establishment and not from the property of the Director. That has been properly, legally and rightly answered by PF authority, while keeping in mind the purpose and object of PF Act.

Registry is directed to send copy of this order to respondent PF authority forthwith.