(2004) 09 BOM CK 0114

In the Bombay High Court

Case No : Writ Petition No. 3059 of 2001

ATV Projects India Ltd. APPELLANT

Vs

Office of The Regional Provident Fund Commissioner RESPONDENT

Date of Decision : 01-09-2004

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 8B, 8G

Citation : (2005) 2 BomCR 242 : (2005) 105 FLR 992 : (2005) 1 LLJ 1046 : (2005) 1 MhLj 791

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : D.A. Athavale, for the Appellant; H.V. Mehta, for the Respondent

Final Decision : Dismissed

Judgement

R.M.S. Khandeparkar, J.—Heard the learned Advocates for the parties. Perused the records.

2. The petitioners challenge the show cause notice dated 16-10-2001 issued by the Recovery Officer of the Employees Provident Fund Organisation u/s 8B of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952, hereinafter referred to as "the said Act". The challenge is mainly on the ground that the authorities under the said Act, unless they comply with the W. P. No. 3059 of 2001 decided on 1-9-2004. (O.O.C.J., Bombay) provisions of law as stipulated u/s 8G of the said Act, cannot proceed to arrest the petitioners for non-payment of the amount in terms of the recovery certificate stated to have been issued under the said Act.

3. The facts not in dispute and relevant for the decision are that on account of failure on the part of the petitioners to discharge their provident fund liability, a recovery certificate came to be issued against the petitioners and for the purpose of recovery of the amount in terms of the said recovery certificate, the impugned show cause notice came to be issued. In terms of the said show cause notice the

petitioners are required to appear before the authority to show cause as to why they should not be arrested and committed to civil prison in execution of the recovery certificate for an amount of Rs. 92,97,912/- along with interest.

4. The Section 8B of the said Act deals with the subject of issuance of certificate to the Recovery Officer, and the sub-section (1) thereof provides that where any amount is in arrears towards money by the employer in terms of Section 8 of the said Act, 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 is required to proceed to recover the amount specified therein from the establishment or, as the case may be, the employer, by adopting one or more modes specified in the said sub-section. The modes specified in the said sub-section include the mode of execution by way of arrest of the employer and his detention in civil prison, along with other modes, like attachment and sale of the movable or immovable property of the establishment or the employer, as also by appointing a Receiver for management of the properties of the establishment or the employer. The proviso to sub-section (1) of Section 8B provides that the attachment and sale of any property under the said 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.

5. Section 8G of the said Act deals with the subject of application of certain provisions of the Income Tax Act, 1961 to all the proceedings under the said Act. It provides that the provisions of the Second and Third Schedules to the Income Tax Act, 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 refer to the arrears of the amount mentioned in Section 8 of the said Act instead of to the Income Tax, provided that any reference in the said provisions and the rules to the "assesses" shall be construed as a reference to an employer as defined in the said Act.

6. The Rule 73 of Part V of Schedule-II of the Income Tax Act, 1961 pertains to the subject of show cause notice to be issued by the Tax Recovery Officer for the purpose of recovery of the amount from the defaulters. The sub- rule (1) thereof reads thus:-

"Notice to show cause.

73(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 to 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 the 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."

7. Plain reading of the above Rule 73 discloses that subsequent to issuance of the show cause notice and after the addressee of the notice is being heard, the Tax Recovery Officer is not supposed to proceed to order the arrest and detention of the defaulter in a civil prison unless and until the Tax Recovery Officer, for the reasons to be recorded in writing, is satisfied that the defaulter, with the object or effect of obstructing the execution of the certificate regarding recovery, after drawing up of the certificate, has dishonestly transferred, concealed, or removed any part of his property, or that the defaulter has, or has had since the drawing up of the recovery certificate, in spite of having the means to pay the arrears or some substantial part thereof, refuses or neglects or has refused or has neglected to pay the same. In other words, before effecting the arrest of the defaulter, the Tax Recovery Officer must be satisfied about the dishonesty on the part of the defaulter in the matter of transferring interest or concealing or removing of any part of his property to defeat the execution of the recovery certificate or that the defaulter should refuse or neglect to comply with the tax certificate in spite of the fact that he has means to pay the arrears or at least the substantial part thereof. Obviously, pursuant to issuance of notice u/s 8B of the said Act and considering the applicability of the provision of Rule 73 of Part V of Schedule-II of the Income Tax Act, 1961 to the proceedings thereunder, the Recovery Officer under the said Act has to hear the party receiving such show cause notice u/s 8B and ascertain on the basis of the reply and the materials placed before it by the recipient of the show cause notice regarding absence of any act on the part of the said addressee which could disclose dishonest transfer, concealment or removal of any of his property with the intention to defeat the execution of the recovery certificate or absence of bona fide and genuine inability to pay the arrears or substantial part thereof in terms of the recovery certificate.

8. Considering the above provisions of law, it is, therefore, clear that it is too premature to entertain the grievance of the petitioners in relation to the show cause notice dated 16-10-2001. It is apparent that the concerned Recovery Officer is yet to apply his mind to the facts of the case. He is yet to hear the petitioners and the petitioners will have ample opportunity to put forth their say in the case before the concerned officer who is also in a position to assess the factual situation and to arrive at the proper finding on the materials to be placed by the petitioners in response to the show cause notice, bearing in mind the provisions of law contained in Rule 73, quoted above, and thereupon to invite a proper order from the Recovery Officer in relation to the show cause notice issued by the Tax Recovery Officer requiring the petitioners to show cause against their arrest and detention in civil prison.

9. Hence there is no case for interference at this stage by this Court in the proceedings before the Recovery Officer. Suffice to observe that in case any order to be passed by the Recovery Officer after hearing the petitioners and on compliance of the provisions of Rule 73 quoted above, happens to be adverse to the interest of the petitioners, then the same shall not be enforced for a period of four weeks from the date of communication of the said order to the petitioners.

10. In the result, therefore, the petition is hereby dismissed. However, it is made clear that any order to be passed, happens to be adverse to the interest of the petitioners, the same shall not be given effect to for a period of four weeks from the date of communication of the said order to the petitioners. The rule stands discharged with above observations with no order as to costs.