

(2009) 12 CAL CK 0015

In the Calcutta High Court

Case No : Writ Petition No. 7263 (W) of 2008 With C.A.N. No's. 9473 of 2008 and 8299 of 2009

Balaji Paper and Newsprint Pvt. Ltd. and Another APPELLANT

Vs

Regional Provident Fund Commissioner and Another RESPONDENT

Date of Decision : 21-12-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17B

Citation : (2010) 124 FLR 933

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Arunava Ghosh and Purna Chandra and Paul Chowdhury, for the Appellant; Anil Kumar Gupta, for the Respondent

Final Decision : Allowed

Judgement

Jayanta Kumar Biswas, J.—The petitioners in this Article 226 petition dated April 18, 2008 are seeking a mandamus quashing the letters dated November 30, 2007, February 28, 2008 and April 1, 2008, Annexures P16, P18 and P19 at pp. 131, 137 and 138 respectively, issued by the Assistant Provident Fund Commissioner, C.C.-II, West Bengal, and commanding the provident fund authorities not to take any penal action for non-compliance with the directions given by the letters and to allot a new code number.

2. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (the Act 19 of 1952) was applicable to the establishment of one Neptune Paper Mills Ltd. By an order dated August 4, 1987, made in C.P. No. 443 of 1986, Neptune was wound up. In terms of an order dated September 16, 1987 the official liquidator of Court took possession of Neptune's assets. At the Court sale held on January 9, 2004 one Shree Balaji Paper Sales Pvt. Ltd. emerged as the successful bidder. The sale was confirmed in its favour. After obtaining necessary licences in its new name: Balaji Paper and Newsprint Pvt. Ltd., it started business

activities in February, 2005. Around two years thereafter it submitted an application dated March, 14, 2007 for coverage under provisions of the Act 19 of 1952.

3. By a letter dated March 20, 2007 the Assistant Provident Fund Commissioner (in short the APFC) C.C.-II, West Bengal called upon Balaji to submit the papers mentioned in the letter. He returned the cheque for Rs. 2.03 lakh submitted by Balaji with its application dated March 14, 2007. In response Balaji wrote a letter dated March 23, 2007 tendering the cheque once again and requesting for an appropriate code number. The APFC wrote a letter dated March 29, 2007 returning the cheque once again. With a letter dated April 4, 2007 Balaji tendered the cheque for the third time. The APFC wrote a letter dated July 6, 2007 returning the cheque for the third time. The official liquidator executed the requisite conveyance dated October 16, 2007.

4. Under these circumstances, the APFC wrote the letter dated November 30, 2007 asking Balaji to comply with the provisions of the Act 19, 1952, using Neptune's code number, with effect from February 1, 2005. By a letter dated December 26, 2007 Balaji requested for a new code number. Repeating the request, it wrote a letter dated February 19, 2008. In response, the APFC wrote the letter dated February 28, 2008 directing Balaji to deposit provident fund and other allied dues using Neptune's code number. He pointed out Balaji's liability u/s 17-B of the Act 19 of 1952.

5. Under the above-noted circumstances, the APFC wrote the letter dated April 1, 2008, the contents whereof are as follows:.

Please refer to your letter dt. 19-02-08 on the subject cited above.

In this context, it is reiterated that allotment of code No. WB/17349 to your estt. is correct and justified as per provisions u/s 17-B of E.P.F. and M.P. Act, 1952 since the instant management is jointly and severally liable.

Hence, you are once again directed to comply with the provisions under the E.P.F. and M.P. Act, 1952 under the said code No. (i.e. WB/17349) and to submit all statutory monthly and yearly returns (viz. Form 5/10, Form-12-A (R), Form 3-A(R), Form-6-A (R) etc.) alongwith payments in due time to avoid legal action as contemplated under the Act, 1952.

It is also intimated that on receipt of Form No. 5, the concerned Accounts section will allot individual A/c No. in R/o. all members/employees accordingly.

6. The short question is whether the provisions of section 17-B of the Act 19 of 1952 are applicable to the case. The provisions of section 17-B are as follows:

17-B. Liability in case of transfer of establishment.--Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally

be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, in respect of the period up to the date of such transfer:

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

7. Mr. Ghosh, Counsel for the petitioners, has argued that since Balaji purchased Neptune's assets through a Court sale and the official liquidator executed the conveyance under Court order made in the winding up proceedings, the APFC was wrong in directing it to act in terms of section 17-B of the Act 19 of 1952. Relying on Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner, , and Dalgaon Agro Industries Ltd. (Now known as Tasati Tea Ltd.) Vs. Union of India (UOI) and Others,) Mr Gupta, Counsel for the respondents, has argued that since Balaji purchased Neptune's all assets sold by Court, it is a case squarely covered by the provisions of section 17-B of the Act 19 of 1952.

8. The provisions of the Companies Act, 1956, sections 447, 456 and 528 provide as follows. An order for winding up of a company shall operate in favour of all the creditors. (section 447). All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order of the winding up of the company, (section 456). In every winding up all debts payable and all claims against the company shall be admissible to proof against the company, (section 528).

9. The provisions of the Transfer of Property Act, 1882, sections 54 and 57, provide as follows. Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.(section 54). Where immovable property subject to any encumbrances, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court of the amount sufficient to meet the encumbrance and any interest due thereupon, and thereupon the Court may, if thinks fit, and after notice to the encumbrance, declare the property to be freed from the encumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court, (section 57).

10. The word "employer" used in section 17-B of the Act 19 of 1952 has been defined by its section 2(e), which is as follows:

(e) "employer" means--

(i) in relation to an establishment which is a factory, the owners or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under Clause (f) of sub-section (1) of section

7 of the Factories Act, 1948 (63 of 1948), the person so named; and (ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent;

11. In this case, Neptune's assets were sold by the Court after order was made for its winding up, and Balaji participating at the Court sale, emerged as the highest bidder. It is, therefore, evident that it was not a case of transfer of the whole or part of Neptune's establishment by sale, gift, lease or licence by the employer to Balaji. Before the Court sale took place, by operation of law Neptune's assets in question had stood vested in the official liquidator who executed the conveyance concerned under Court order. The Court selling Neptune's assets was not doing it qua the employer in relation to Neptune's establishment covered by the provisions of the Act 19 of 1952. It did not become the employer simply because by operation of law Neptune's assets came into its custody from the date of the order of winding up. Nor did the official liquidator executing the conveyance under Court order do the job as an employer in relation to the establishment. and it is idle to suggest that the Court sold Neptune's assets as its agent. I am, therefore, unable to see how to the transaction the provisions of section 17-B of the Act 19 of 1952 can be applied.

12. All creditors including the provident fund organisation are bound by the winding up order, and they are to get their dues according to provisions of the Companies Act, 1956. Hence there can be no question of application of the provisions of section 17-B to the transaction through which Balaji purchased Neptune's assets. The APFC was wrong in asking Balaji to act according to the provisions of section 17-B of the Act 19 of 1952. Balaji cannot be held liable for any dues payable for any past period.

13. There can, however, be no doubt that for the purpose of applicability of the provisions of the Act 19 of 1952 the establishment is to be considered continuing one. The two authorities, Mr Gupta has relied on, are on the question of infancy benefit. They are of no assistance at all for deciding the question involved in this case. Since Balaji's establishment is to be treated as the continuation of the old covered establishment, there is no question of allotting it a new code number for complying with the provisions of the Act 19 of 1952. A code number allotted only for administrative purposes and not creating or extinguishing any right or obligation, cannot be claimed as a matter of right.

14. For these reasons, I allow the petition partly and order as follows. The impugned directions, except the one asking Balaji to comply with the provisions of the Act 19 of 1952 under the old code number from February 1, 2005, are hereby quashed. CAN No. 9473 of 2008 (for vacation of interim order), not in the file and CAN No. 8299 of 2009 (for early hearing) shall be deemed to be disposed of. The department is directed to trace out CAN No. 9473 of 2008 and file it in the file. No costs. Certified xerox according to law.