
(2014) 02 CAL CK 0044

In the Calcutta High Court

Case No : W.P. Nos. 10564 and 18755 (W) of 2012

Bhaskar Tea and Industries Limited

APPELLANT

Vs

Employees" Regional Provident Fund Organization

RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Companies Act, 1956 — Section 34
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17B,
2(c), 2A, 8F(3)(x)
Factories Act, 1948 — Section 2, 7
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 21, 25

Citation : (2014) 2 CHN 706 : (2014) 3 WBLR 924

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Samit Talukdar, Suman Dutta, Soumyajit Dasgupta, Sutapa Sanyal and P.K. Tulsyan, Advocate for the Appellant; Shiv Chandra Prasad, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Soumen Sen, J.—Since both the writ petitions involved common question of law and fact, the said writ petitions stand disposed of by this common judgement. The writ petitioners in this writ application have assailed the notice of demand dated May 22, 2012, the prohibitory order dated May 25, 2012, the prohibitory order and order of attachment dated May 31, 2012 and notice for issuance of warrant of arrest dated May 31, 2012 issued by the respondent authorities for realization of provident fund dues of Alipurduar Enterprises Limited.

2. Mr. Samit Talukdar, learned counsel appearing on behalf of the petitioners submits that under the provisions of the Employees" Provident Funds and Miscellaneous Provisions Act, 1952 a notice of demand against Alipurduar Enterprises Limited cannot be executed and/or enforced against the petitioners notwithstanding the fact that the petitioner No. 1 is the holding company of Alipurduar Enterprises Limited.

3. The moot question arises in this writ petition is whether the provident fund authorities could realize the dues of Alipurduar Enterprises Limited from the petitioners.

4. The Alipurduar Enterprises Limited is a wholly owned subsidiary of the petitioner No. 1. On March 3, 2010 an agreement was entered into between Bhaskar Tea and Industries Limited and Sarada Pleasure and Adventure Limited regarding sell of Bundapani Tea Garden. The agreement refers Bhaskar Tea and Industries Limited as seller and Sarada Pleasure and Adventure Limited as purchaser. Alipurduar Enterprises Limited was mentioned as the confirming party.

5. The recitals read that Bhaskar Tea and Industries Limited is the holding company of the confirming party. The entire issued and subsidiary capital of the confirming party is held by the seller in the proportion set out in the Schedule "B" to the said agreement.

6. Sarada Pleasure and Adventure Limited had agreed to acquire the said Tea Garden with effect from January 1, 2010 as a going concern with all the workers and staff employed at the said Tea Garden by purchasing or acquiring in its entirety the whole of the issued and subscribed capital of the confirming party held by the seller for consideration and on the terms and mutually agreed terms and conditions stated hereafter.

7. The effect of the said agreement is that for all intents and purposes the interest that Bhaskar Tea and Industries Limited had in Alipurduar Enterprises Limited stands transferred and vested in Sarada Pleasure and Adventure Limited although Mr. Talukdar would make an attempt to water down such transfer by contending that it merely relates to the sell of the shares.

8. The parties of the aforesaid agreement were aware of various statutory liabilities and accordingly the agreement in so far as it relates to provident fund dues records the following:

"Provident Fund.

Payment and discharge of old provident fund dues outstanding as per Order dated 09.01.2008, passed by the High Court at Calcutta in W.P. No. 24376 (W) of 2008 (copy of the order is enclosed), amounting to Rs. 44,04,000/- and current provident fund dues, till 31st December, 2009, amounting to Rs. 86,79,000/-, aggregating in all to Rs. 1,70,83,000/- (Rupees one crores seventy lacs eighty three thousand only) [approximately] shall be paid by the Purchaser upon condition that the said amount of Rs. 1,70,83,000/- shall be deducted from the Gross sale consideration payable by the Purchaser to the Seller, which the Seller has agreed to accept unequivocally."

9. The fact remains that Alipurduar Enterprises Limited did not pay the provident fund dues for the period from January 1, 2008 to September 2010. By virtue of the agreement dated March 3, 2010 on and from January 1, 2010 the Sarada Pleasure and Adventure Limited would be the owner of the said garden and in

terms of section 17B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 would be required to pay the provident fund dues. The liability in case of such transfer is jointly fastened upon the transferor as well as the transferee that is to say the liability is joint and several. Alipurduar Enterprises Limited knew that there is a subsisting claim of the provident fund authorities. Bhaskar Tea and Industries Limited as a holding company is hang due notice of such liability. It was known to Alipurduar Enterprises Limited and Bhaskar Tea and Industries Limited that this tea garden is the only tangible asset from where such money could be recovered. The said sale was made with a view to deprive the provident fund authorities from realizing the amount from Alipurduar Enterprises Limited. Moreover the agreement records liability of Bhaskar Tea and Industries Limited and Sarada Pleasure and Adventure Limited to pay the provident fund dues.

10. Mr. Talukdar has referred to the decision reported in Industrial Development Corporation Orissa Limited and Another Vs. Regional Provident Fund Commissioner-II and Another, to argue that the holding company and the subsidiary company are distinct entities and for the liability of the subsidiary company the holding company cannot be saddled with any liability.

11. The order of the learned Single Judge was ultimately affirmed by the Apex Court in Regional Provident Fund Commnr. and Others Vs. ABS Spinning Orissa Ltd. and Another, Mr. Talukdar relying upon the said decision submitted that the Hon'ble Apex Court has affirmed the decision of the learned Single Judge. It was held in Regional Provident Fund Commissioner (supra) that a subsidiary company has an independent existence as against the holding company.

12. The undisputed position as it emerges from the agreement disclosed in this proceeding that on and from March 1, 2010 the liability in so far as the provident fund dues of the establishment is concerned has devolved jointly and severally upon the Bhaskar Tea and Industries Limited and Sarada Pleasure and Adventure Limited.

13. For the earlier period, that is to say between August 1, 2008 to January 1, 2010 it has to be seen if Bhaskar Tea and Industries Limited would be responsible for payment of such provident fund dues of its subsidiary Alipurduar Enterprises Limited. The annual returns disclosed in this proceeding show that the only asset of Alipurduar Enterprises Limited is the tea garden. The Alipurduar Enterprises Limited is virtually controlled by Bhaskar Tea and Industries Limited. This fact cannot be denied although, Mr. Talukdar has stated that the names of Directors for the two companies are different. If that be so then for the sale of the said tea garden Bhaskar Tea and Industries Limited could not have been the seller and Alipurduar Enterprises Limited as confirming party. It could have been then a direct sale between Alipurduar Enterprises Limited and Sarada Pleasure and Adventure Limited. In Industrial Development Corporation (supra) the learned Single Judge on construction of sections 21 and 25 of the SICA Act and section 34 of the Companies Act held that ABS Spinning Mills,

Orissa Limited is a body corporate, capable of exercising all functions of an incorporated company having perpetual and common seal with such liability on the part of its members to contribute to the assets of the company in the event of its winding up in accordance with the provisions of the Act. In view of such clear provisions of law, there can be no manner of doubt that petitioner No. 2 company is an independent company having its independent identity, assets and liabilities. In such view of the matter, the liability of petitioner No. 2 so far as it relates to the payment of provident fund dues of its workers are on it and under law it cannot be saddled or imposed on petitioner No. 1 which is its holding company except as provided under the Companies Act. Then comes the question as to whether, in view of the provision of sections 2(c), 2A and 8F(3)(x) of the Employees' Provident Funds and Miscellaneous Provisions Act, the liability of petitioner No. 2 can be recovered from the petitioner No. 1 company. Clause (e) of section 2 defines employer to mean, in relation to an establishment which is a factory; the owner 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 manager of the factory under clause (f) of sub section (1) of section 7 of the Factories Act, 1948, the person so named; 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.

14. Thus, on a consideration of such fact it was held that the petitioner No. 1, as a holding company would not come within the scope or ambit of employer as contended by the learned counsel for the Employees' Provident Fund Commissioner.

15. In the instant case on a factual examination of the matter it appears that the Alipurduar Enterprises Limited has in fact an alter ego of Bhaskar Tea and Industries Limited and it is a settled law that in the matter of realization of statutory dues the authorities can always lift the corporate veil to find out the real persons who are responsible for payment of such statutory dues. The corporate veil undisputedly can be pierced when the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workmen or against public interest *Kapila Hingorani Vs. State of Bihar*, The doctrine of lifting the veil can be applied where companies are in relationship of holding and subsidiary; particularly in revenue matter when the question of controlling interest is in issue and broadly speaking where fraud is intended to be prevented. It is the substance rather than the form which is important. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is a beneficial piece of legislation so as to ensure that the employees get their due share on superannuation. In this regard, it would be useful to refer to the observations of the Hon'ble Supreme Court in *Delhi Development Authority Vs. Skipper Construction Company (P) Ltd.* and another, corresponding to *Delhi Development Authority Vs. Skipper Construction Company (P) Ltd.* and another, .

The Hon''ble Supreme Court at 381 of the Company Cases held--

"28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned."

16. Any mechanism either to evade the provision of the said Act or to circumvent the said provisions of the Act by such a mechanism cannot be accepted.

17. The other striking features of this matter is that cogent upon when the hiving off of the Tea Garden of Alipurduar Enterprises Limited the said Company would be virtually a paper company and any interpretation which would absolve either Bhaskar Tea and Industries Limited or Sarada Pleasure and Adventure Limited to pay the provident fund dues would run counter to the very object and purpose of the said Act. A fraudulent transfer to circumvent the provision of the Act cannot be supported.

18. For the aforesaid reasons, the instant writ petitions stand dismissed.

19. There will be, however, no order as to costs.

20. After this judgement is pronounced, Mr. Talukdar, learned counsel appearing for the petitioners prays for stay of operation of the order.

21. Accordingly, the warrant of arrest shall not be executed for a period of two weeks from date. Urgent photostat certified copy of this order be supplied to the parties, if applied for, on usual undertaking.