

(2000) 01 CAL CK 0049

In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction W.P. No. 1642 (W) of 2000 A.S.T. No. 162 of 2000

Binod Kumar Biyala

APPELLANT

Vs

The Regional Provident Fund Organisation, West Bengal

RESPONDENT

Date of Decision : 21-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 43, 17, 51
Constitution of India, 1950 — Article 14, 21, 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 14C, 2E, 7A, 8(B)

Citation : (2000) 2 CALLT 443 : (2001) 88 FLR 216 : (2001) 1 LLJ 305

Hon'ble Judges : Basudeva Panigrahi, J

Bench : Single Bench

Advocate : Mr. Hirak Mitra, Mr. Sadhan Roychawdhury and Mr. Supriya Chattopadhyay, for the Appellant; Mr. P. Mullick, Mr. Vinay Mishra and Mr. A.K. Gupta, for the Respondent

Judgement

B. Panigrahi, J.—This writ petition has challenged the validity, legality and the propriety of the arrest effected by the Respondent No. 2, the Recovery Officer. In a proceeding Initiated u/s 8C of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter be said as the said Act).

2. The petitioner has, inter alia, claimed to have been appointed as paid Director in M/s. Loomtex Engineering (P) Ltd.. sometimes in the month of July, 1997 registered under the Companies Act, 1956 having Its registered office at 16, Bona fide Lane, 3rd floor, Calcutta-1. The Loomtex Company had taken the Caledonia Jute Mills, on licence, of Chittagong pursuant to the order of this Court dated 21st November, 1997. It has been claimed by the petitioner that he had never any control over the affairs of the Loomtex Company and was merely a name lender to act as a Director of the said Company. Undisputedly the M/s. Loomtex Engineering (P) Ltd. has committed default in payment of provident fund dues. But the petitioner having no ultimate control over the affairs of the

said Company, therefore, the Provident Fund authorities could not/cannot proceed to recover the provident fund dues from the petitioner pursuant to a proceeding for recovery of the provident fund dues to the tune of Rs. 1,36,45,860/-. The Recovery Officer passed an order of attachment on movables lying in the godown of the said Company on 14.1.1999 and kept the attached movables under the Jimma of the Chief Security Officer, Mr. Trivedi. A sale/proclamation notice was issued by the Recovery Officer to show cause as to why the finished goods lying Inside the godown which was attached before should not be put to sale. In the meanwhile from the report of the said Recovery Officer it has appeared that at present only worth of Rs. 60,000/-finished products are lying inside the godown and the rest of the materials have been stolen from the campus.

3. In the meanwhile the Recovery Officer, the Respondent No. 2, directed the petitioner to be arrested for the recovery of the provident fund dues to the tune of Rs. 1,36,45,860/- u/s 8B of the said Act. After the petitioner was taken into custody, this application has been filed for appropriate direction to the Respondent No. 2, for the release of the writ petitioner.

4. Since time was short, Mr. Mullick, learned Advocate appearing for the respondents, has however submitted that Instead of filing Affidavit-in-opposition, he would produce the relevant documents on the basis of which the case may be disposed of.

5. In the warrant of arrest it has been shown that the petitioner and also the Loomtex Company are liable to pay the amount of Rs. 1,56,01,102/- and the same has not yet been recovered. Therefore, in exercise of power u/s 8B of the said Act, the warrant of arrest was issued and accordingly the petitioner was taken into custody.

6. Mr. Mitter, learned Advocate appearing for the petitioner, has advanced a serious contention by stating that the petitioner being not in charge of the Company is not liable to make good of the amount payable to the respondents. In support of his contention, he has stated that one of the Directors, Satish Kumar Samanka, had written a letter to the petitioner as well as Titagarh Jute Mill that since the petitioner was taken as a Director, being the friend of Santilal Surana, he was not given any power under any resolution to take decisions on behalf of the Company. Reliance has been placed on another notice issued by one of the Directors, Satish Kumar Samsuhka, where it has been stated that the power of the petitioner was restricted. Therefore Mr. Mitter wanted to contend that since it would appear from the above documents that he was not a person In charge of the Company, therefore to make himself liable to pay the provident fund dues.

7. Mr. Mullick, learned Advocate, on the other hand has submitted that the petitioner was a Director at the time whom this dues became payable. He has also laid great stress upon Form No. 5A which had been submitted by the

Company and filed a xerox copy of such form, in the said form it was Indicated that the petitioner was one of the persons in management of the Company. He has also issued a letter to the Respondent No. 1 on January 27, 1998 admitting such liabilities of the Company and had given an undertaking to clear up the huge liabilities towards the provident fund dues.

8. The petitioner seems to have deposed before the Respondent No. 1 admitting his dues payable to the authority in a proceeding u/s 7A of the Act.

9. Mr. Mitter has submitted that the expression "for making a person" liable to pay the provident dues, the person must be a responsible person in management at the time when the certificate is sought to be executed. Since, admittedly, the petitioner is not in management, therefore, the Respondent No. 1 could not have sought the recovery of the dues from him. The Respondent No.2 has no other option but to proceed against the persons where they have shown their liability to pay the provident fund dues. Section 8B to 8E related to civil process for recovery of the amount due payable under the 1952 Act. Sections 14 to 14C deal with punishment which may be imposed in connection with the offence by an employer under the Act. A distinction has to be maintained between the offence alleged to have been committed by the Company and also the mode of recovery of the dues under the Act. Section 14A relates to an offence by the Company whereas section 8 deals with the mode of recovery of the dues.

10. u/s 7A of the Act, a proceeding was initiated where the petitioner had unequivocally admitted his liability to pay the money. While such dues was sought to be recovered u/s 8B, he has no other defence than to pay the money sought to be recovered.

11. The wide Import of the employer u/s 2E shall have to be taken into consideration. It embraces all types of persons those who are in control of the affairs of the establishment including the Manager, the Managing Director of a Company. In this case in Form No. 5A, the petitioner had candidly admitted that he was one of the Directors who had control over the affairs of the Company. Mr. Mitter has submitted that the respondents should prove that the petitioner is in present management of the Company when they sought to recover the dues. Such argument cuts no ice because u/s 8B no such provision has been made that he should be In present management. It Is to be found that if he was liable at the time when default was committed, then he cannot be absolved from his liability to pay the money. Mr. Mullick, learned Advocate appearing for the respondents, has strongly contended that the other Directors are not presently available who have escaped themselves from arrest and also simultaneously are not taking any steps to pay the money which has been swindled by the petitioner as well as the other Directors. Therefore, no such leniency can be shown to them.

12. Reliance has been placed on an unreported Judgment in W.P. 1095 of 1998 in the case of Sayan Ghosh & Another v. Regional Provident Fund Commissioner where the provisions of Interpretation of section 8B was made. Hon"ble Mrs.

Ruma Pal, J. hold as follows :

"There is no bar u/s 8B to the Revenue Officer recovering the amount due by attachment and sale of any movable and Immovable property of the establishment (in this case the firm) as well as by the arrest of the employer (in this case the partners including the petitioners) and their detention in prison. This detention is not a detention pursuant to the finding of guilt u/s 17 but a mode of recovery similar to section 51 of the Civil Procedure Code. It cannot be said therefore that the show cause notice was invalidly or Incompetently issued.

At this stage it is not possible for this Court to determine whether the petitioners have in fact clear the Provident Fund dues. This is also not the function of this Court. It Is a matter which can be taken up by way of deference before the appropriate authority."

13. Mr. Mitter, learned Advocate appearing for the petitioner, has contended that the Recovery Officer in this case has acted very negligently by not putting in the seized property in the proper custody. It is true that the movables attached by respondent No. 2 could not be placed under a custodian as required under the provisions of Order 21 Rule 43 CPC, but the question arises whether the provisions of Order 21 Rule 43 can be exercisable by a Certificate Officer acting u/s 8B, of the said Act. There has been no enabling provision to invoke Order 21 Rule 43 CPC. Furthermore, the Certificate Officer while acting as such u/s 8B cannot be said to be a Civil Court so that he can exercise such powers. In this case, I find that there were theft incidents of the seized articles as a reason whereof the Recovery Officer lodged a report at the police station, but nothing tangible came out from such Investigation. At any rate, at present only worth of Rs. 60,000/- movables are lying inside the godown as against a sum of Rs. 1,56,01,102/-. Therefore, in such situation the Recovery Officer was bound to resort to one or more of the modes in securing the money payable to the respondent No. 1 as empowered u/s 8B of the Act.

14. Under para 6A of the Scheme the Employer is to furnish particulars of the ownership of the factory In Form No. 5-A. It has already been discussed that the petitioner had described himself as one of the Directors of the company who had the ultimate control over the affairs of the factory or the establishment. He also had sent the Intimation to the Regional Provident Fund Commissioner by registered post. In Col. No. 11 of the Form No. 5-A which specified the particulars of the persons In charge of and responsible for the conduct of the establishment. Therein it was noted that the licensee, namely, the petitioner being one of the Directors was in charge of the company. It is true, in a criminal action mens rea is one of the important element to fashion the guilt against the accused but in a civil action such Ingredient is not required to be proved. The provisions of the Act is a welfare legislation enacted for the benefit of the employees engaged in the factory or the establishment. The Provident Fund amount payable by the petitioner and other Directors being the share of the employee as well as the employer. The liability of the petitioner has been

discussed at length above.

15. Mr. Mitter, the learned advocate appearing for the petitioner has submitted that since the petitioner not being In present management, is not liable to pay. I fail to appreciate the logic behind such argument. A Director or a managing Director of company after committing default in paying the Provident Fund dues, transfer the company in favour of another, that by itself cannot however, absolve their responsibility. In this respect reliance has been placed on a Judgment reported in AIR 1993 SC 1566 in the case of Srikant Dutta Narshimhayaya v. Enforcement Officer. It is no doubt true that the said case arose from a prosecution u/s 14 of the Act but the point of law discussed in the above Judgment has aptly been applicable to this case.

Accordingly, I do not find any merit in the writ petition and the same is dismissed without any order as to cost.

16. Petition dismissed