

(2008) 08 GUJ CK 0059

In the Gujarat High Court

Case No : Special Civil Application No. 3843 of 2008

Employees Provident Fund Organization

APPELLANT

Vs

Jai Corporation Limited

RESPONDENT

Date of Decision : 21-08-2008

Acts Referred:

Companies Act, 1956 — Section 13(2), 13(7), 2
Constitution of India, 1950 — Article 227
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 14(B), 15(2), 17, 17(5)
Factories Act, 1948 — Section 7(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 10, 13, 13(2), 13(4), 13(7)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2009) 121 FLR 265 : (2009) 1 GLR 123

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : Niraj R. Mehta, for the Appellant; Devang Nanavati, for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Thaker, J.—In this petition, the Employees Provident Fund Organization (hereinafter referred to as the department) has through the Assistant Provident Fund Commissioner, challenged an order dated 26.07.2007 passed by the Presiding Officer, Employees Provident Fund Appellate Tribunal (hereinafter referred to as P.F. Tribunal) in Case No. ATA/400(5)/2006, whereby the P.F. Tribunal has allowed the appeal preferred by the present respondent.

2. The facts involved in and relevant for the purpose of present petition are that the Regional Provident Fund Commissioner had raised demand against M/s. Santogen Spinning Mills Ltd. (hereinafter referred to "erstwhile establishment") for Rs. 1,35,96,274/- inclusive of damages u/s 14B and interest u/s 7Q of the Employees Provident Fund And Miscellaneous Provisions Act, 1952 (hereinafter

referred to as the PF Act). It appears that the erstwhile establishment, was declared a sick undertaking under the provisions of Sick Industrial Companies (special provisions) Act, 1985 (hereinafter referred to as SICA) and subsequently, proceedings under the provisions of The Securitisation And Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act) were initiated by Asset Reconstruction Co. India Ltd. (hereinafter referred to "ARCIL") and said ARCIL had taken over the possession of the secured assets of said erstwhile establishment and subsequently initiated auction proceedings of the assets of said Erstwhile Establishment, so as to recover the alleged unpaid amount.

It was during the said auction proceedings by said ARCIL that the present respondent purchased the assets of the said Erstwhile Establishment. It appears that until then the dues of the Department i.e. the petitioner organization were not fully paid by the said Erstwhile Establishment, therefore, it raised demand against ARCIL after ARCIL took over the possession of the secured assets of the Erstwhile Establishment under the provisions of SARFAESI Act and demanded the amount in question from ARCIL. The said action was challenged by way of a writ petition by ARCIL and in the said petition, an order was passed allowing the department to take action in accordance with law against the Erstwhile Establishment and the present respondent. This Court is informed that the said order also permitted present respondent to make representation to the P.F. Commissioner. In light of the said order, present respondent No. 1 made representation to the petitioner taking up the contention that no claim can be made under the provisions of the Act, against it for the alleged dues of the Erstwhile Establishment and in any case, it was not liable or responsible for dues and/or even for the alleged delay inasmuch as it was only a purchaser of assets from ARCIL through auction proceedings.

3. It appears that the respondent No. 1 apart from making representation, also filed detailed written submission dated 12.4.2006. Subsequently the petitioner department passed an order dated 19.06.2006 asking the present respondent to pay amount of Rs. 81,17,407/- towards the damages and Rs. 22,74,953/- towards interest.

4. Aggrieved by the said order dated 19.6.2006, the respondent preferred an appeal before the P.F. Tribunal and by order dated 26.7.2007, the P.F. Tribunal allowed the appeal of the present respondent and set aside the order dated 19.6.2007 passed by APF Commissioner i.e. the petitioner herein.

5. Before proceeding further, it is relevant and necessary to note that the amount, which is being claimed by the petitioner organization is not towards P.F. Contribution but is towards the damages and interest and is being claimed on account of alleged delay said to have been caused not by present respondent but by the Erstwhile Establishment in paying the P.F. Contribution.

5.1 The respondent No. 1 has asserted, without prejudice to its other

contentions, that it is not liable or responsible to pay either the principal and/or damages and interest, and despite such submissions and contentions, the A.P.F. Commissioner passed the order dated 19.6.2006 holding the respondent No. 1 liable to pay the amount in question and the P.F. Appellate Tribunal passed the order dated 26.7.2007 which is brought under challenge by the petitioner.

6. Heard Mr. N.R. Mehta, learned advocate for the petitioner organization and Mr. Devang Nanavati, learned advocate for the respondent No. 1.

7. Mr. Mehta, learned advocate submitted that the order of P.F. Tribunal is erroneous and contrary to the provisions of the PF Act. Mr. Mehta, learned advocate also submitted that the P.F. Tribunal has committed serious error in allowing the appeal preferred by the present respondent. He submitted that the petitioner-department is justified in demanding the damages and interest from respondent No. 1, which originally became payable by the Erstwhile Establishment in view of the delay caused by it in depositing the contribution. Mr. Mehta learned advocate has, however, not disputed the submission that the amount towards contribution has already been paid and the only demand which is being pressed is regarding damages and interest.

8. Mr. Nanavati for respondent No. 1 submitted that petition does not deserve to be entertained and the order passed by the P.F. Tribunal, is just, equitable, legal and proper. Mr. Nanavati also raised a contention that it is not permissible to the petitioner to challenge the order passed by the highest adjudication authority under the Act, viz. the P.F. Tribunal. Mr. Nanavati in support of his said submission relied upon the order dated 18.12.2005 passed by this Court [Coram Honorable Mr. Justice K.S. Jhaveri] in Special Civil Application No. 15094 of 2005. Mr. Nanavati, submitted that respondent No. 1 merely purchased the assets from ARCIL during the auction held by said ARCIL under authority conferred on it by virtue of provision of SARFAESI Act, and that therefore any liability of the "erstwhile" owner, more particularly the alleged liability of damages and/or interest cannot and should not be fastened upon the respondent No. 1 and the action of the petitioner of imposing the said liability on the petitioner has been rightly set aside by P.F. Tribunal. He further submitted that even otherwise the Order in original passed by petitioner (which was challenged before the P.F. Tribunal) suffer from the vice of breach of natural justice and the same being unsustainable, has been rightly set aside by P.F. Tribunal. Mr. Nanavati submitted that it is not in dispute that the entire amount towards the "contribution" i.e. the principal amount of Provident Fund contribution has already been paid and the respondent No. 1 has under pressure and compulsion also paid, though not payable by it, Rs. 22,74,453/- towards interest and now the petitioner is claiming the alleged balance dues from respondent No. 1 which is not only unreasonable but also arbitrary and unjust. He submitted that Tribunal has rightly set aside the demand and passed the order on merits on the ground that the claim is unjustified and without application of mind and that the order passed by the P.F. Tribunal does not suffer from any error and may not be set aside, as prayed for

by the petitioner.

9. So far as the factual background is concerned, there is dearth of clarity regarding the facts including the chronology of dates and events and also of relevant material and both i.e. the petitioner as well as the respondent plead helplessness in clarifying certain factual aspects connected with to the controversy. The inability or helplessness on the part of respondent No. 1 is understandable since it is only an "auction purchaser" and therefore it may not have knowledge about earlier events or material, but the submission of the petitioner that it is also not in position to clarify factual aspects is a bit difficult to digest.

9.1 It appears that there was a concern named Santogen Spinning Mills Ltd., i.e. Erstwhile owner-employer and said Erstwhile Establishment was a unit of a Company named "Sonu Synthetics Ltd.", and when asked that whether the Erstwhile Establishment was a subsidiary/sister concern of M/s. Sonu Synthetics Ltd. and how and on what basis, it has been described as a "unit of Sonu Synthetics Ltd.", no reply is given either by the petitioner or the respondent.

9.2 The submission of the petitioner is that the said Erstwhile Establishment had caused delay in depositing the Provident Fund contribution and that therefore proceedings were initiated against the said Erstwhile Establishment (in which, at the relevant time present-respondent was not a party) and during the said proceedings, the dues towards damages and interest were assessed at Rs. 1,35,96,274/- u/s 14(B) and Section 7(q) of the Act.

9.3 It is relevant to note that the demand pertains to the period from 1995 to 2004 whereas the respondent No. 1 purchased the assets of the Erstwhile Establishment in December 2005 vide sale Certificate dated 5.12.2005 and that too during auction.

9.4 The petitioner was in process of recovering the said amount from the erstwhile establishment, however, it came to their notice that ARCIL had taken out proceedings against the said Erstwhile Establishment and had, in exercise of powers under the SARFAESI Act, taken possession of the secured assets of the said Erstwhile Establishment. It is also claimed that it came to the department's notice that the said ARCIL, was in process of taking steps to dispose the assets of said Erstwhile Establishment and during that process, the petitioner issued notice to the said ARCIL raising its claim against Erstwhile Establishment in respect of its dues.

10. Aggrieved by the action of present petitioner, ARCIL approached this Court by way of petition being Special Civil Application No. 1258 of 2006 wherein an order dated 13.03.2006 was passed and thereafter in subsequent Civil Application, order dated 13.03.2008 came to be passed and by virtue of the said orders, the department was allowed to take actions in accordance with law against the erstwhile establishment and present respondent No. 1. It is pertinent that present respondent No. 1 came in picture because in the auction proceeding

held by the said ARCIL - the respondent No. 1 was one of the bidders and later on it was declared to be the successful bidder and therefore, the assets of the erstwhile establishment came to be sold to present respondent in the said auction proceedings and now the petitioner department is holding "auction purchaser" (i.e. present respondent) liable for payment of the alleged dues. It appears that the petitioner initiated action against present respondent No. 1. The respondent No. 1 claims that in view of High Court's orders dated 13.03.2006 and 13.03.2008, it had filed written submissions and despite its contention that the demand for the alleged dues and damages and interest was unjustified and arbitrary, the petitioner proceeded to pass an order dated 19.06.2006 whereby he fastened the liability of Erstwhile Establishment on it. Aggrieved by the said order dated 19.06.2006, the respondent No. 1 approached the P.F. Tribunal and the P.F. Tribunal allowed the appeal and has set aside the order of present petitioner.

11. The above narration of facts shows that there are many gaps in the chronology but neither the petitioner nor the respondent is in position to fill-up those gaps. Be that as it may. The relevant fact is that the petitioner is claiming payment of damages and interest from the respondent No. 1 on the ground that Erstwhile Employer had caused delay in depositing P.F. Contribution and therefore, it had become liable to pay damages u/s 14B and interest u/s 7(q) and now since the respondent No. 1 has purchased the properties of Erstwhile Employer, it is its liability to make the said payment.

12. The questions, therefore, are whether the demand of petitioner, in the first instance, for the damages and interest is justified and maintainable and if yes, whether the department can enforce the said claim (i.e. liability of Erstwhile Employer) against the present respondent No. 1. So as to appreciate the rival submissions, it is necessary to take into account, certain provisions of the P.F. Act and also of the SARFAESI Act.

13. The relevant provisions under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, are Section 2(e), 2(k), 14(b) and 7Q. The same read thus:

Section 2(e): "employer" means

(i) 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, whether 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:

Section 2(k) "occupier of a factory" means the person who has ultimate control over the affairs of the factory, and, where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory;

Section 7Q:- Interest payable by the employer:

The employer shall be liable to pay simple interest at the rate of twelve percent per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment:

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.

[emphasis supplied]

Section 14B Where an employer makes default in the payment of any contribution to the Fund, the [Pension] fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under Sub-section (2) of Section 15 [or Sub-section (5) of Section 17] or in the payment of any charges payable under any other provisions of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified u/s 17, [the Central Provident Fund Commissioner or such other officer as may be authorized by the Central Government, by notification in the Official Gazette, in this behalf] may recover [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:]

[emphasis supplied]

[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard]

[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established u/s 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme]

[emphasis supplied]

14. So far as the SARFAESI Act is concerned, the relevant provisions are to be found under Sections 2(v), 2(z), 2(z-c), 3 and 9, Sections 13(2), 13(4), 13(7), 13(8), 13(9) and Section 15. For ready reference, the same are reproduced hereinbelow:

Section 2(v): "reconstruction company" means a company formed and registered under the Companies Act, 1956 (1 of 1956) for the purpose of asset reconstruction;

Section 2(z): - "securitisation" means acquisition of financial assets by any

securitisation company or reconstruction company from any originator, whether by raising of funds by such securitisation company or reconstruction company from qualified institutional buyers by issue of security receipts representing undivided interest in such financial assets or otherwise:

Section 2(z-c):- "secured asset" means the property on which security interest is created:

Section -3 : Registration of Securitisation companies or reconstruction companies:

(1) No securitisation company or reconstruction company shall commence or carry on the business of securitisation or asset reconstruction without:

(a) obtaining a certificate of registration granted under this section, and,

(b) having the owned fund of not less than two crore rupees or such other amount not exceeding fifteen percent of total financial assets acquired or to be acquired by the securitisation company or reconstruction company, as the Reserve Bank may, by notification, specify:

Provided that the Reserve Bank may, by notification, specify different amount of owned fund for different class or classes of securitisation companies or reconstruction companies:

Provided further that a securitisation company or reconstruction company, existing on the commencement of this Act, shall make an application for registration to the Reserve Bank before the expiry of six months from such commencement and notwithstanding anything contained in this sub-section may continue to carry on the business of securitisation or asset reconstruction until a certificate of registration is granted to it or, as the case may be, rejection of application for registration is communicated to it.

Section 9 : Measures for assets reconstruction:

Without prejudice to the provisions contained in any other law for the time being in force, a securitisation company or reconstruction company may, for the purpose of asset reconstruction having regard to the guidelines framed by the Reserve Bank in this behalf, provide for any one or more of the following measures, namely:

(a) the proper management of the business of the borrower, by change in, or take over of, the management of the business of the borrower;

(b) the sale or lease of a part or whole of the business of the borrower;

(c) rescheduling of payment of debts payable by the borrower;

(d) enforcement of security interest in accordance with the provisions of this Act;

(e) settlement of dues payable by the borrower;

(f) taking possession of secured assets in accordance with the provisions of this Act

[emphasis supplied]

Section 13(2) : Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4).

Section 13(4) : In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt;]

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured debt.

Section 13(7) :- Where any action has been taken against a borrower under the provisions of Sub-section (4), all costs, charges and expenses which in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

Section 13(8) :- If the dues of the secured creditor together with all costs,

charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

Section 13(9) :- In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to Sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Section 15:-Manner and effect of takeover of management:

(1) [When the management of business of a borrower is taken over by a securitisation Company or reconstruction company under Clause (a) of Section 9 or, as the case may be, by a secured creditor under Clause (b) of Section (4) of Section 13] the secured creditor may, by publishing a notice in a newspaper published in English language and in a newspaper published in an Indian language in circulation in the place where the principal office of the borrower is situated, appoint as many persons as it thinks fit

(a) in a case in which the borrower is a company as defined in the Companies Act, 1956 (1 of 1956), to be the directors of that borrower in accordance with the provisions of that Act; or

(b) in any other case, to be the administrator of the business of the borrower.

15. Before proceeding further, it is appropriate and necessary to consider the objection of respondent No. 1 against the petition on the ground of its maintainability.

16. As per the provision under the P.F. Act, the P.F. Tribunal is the ultimate adjudicating authority exercising appellate jurisdiction over the Regional Provident Commissioner and the orders passed by Regional Provident Commissioner and/or the Assistant Provident Fund Commissioner under the Act. Considering the fact that the P.F. Tribunal is the ultimate appellate authority under the Act, this Court, in the above referred order dated 14.02.2005 in Special Civil Application No. 1509 of 2005, held that Commissioner or the E.P.F. Organization should not challenge the order of P.F. Tribunal by way of Writ Petition. In light of the said order, the respondent has raised objection against maintainability of the petition. On behalf of the respondent, it is submitted that an appeal against the said judgment has been admitted and is pending, however there is no stay against the judgment. In view of the said fact, this Court is of the view that pending the decision in appeal, this matter may be decided, without going into the aforesaid issue with the clarification that the decision in the appeal would apply to and govern the said objection, and this matter can be

considered on the issues arising from P.F. Tribunal's order and from the impugned demand against the respondent.

17. With the aforesaid clarification, the order dated 26.07.2007, which is impugned in present petition, is taken up for consideration. The P.F. Tribunal has held, inter alia, that:

The Assistant Provident Fund Commissioner, Vapi while deciding to levy damages u/s 14B has not appreciated the submission of appellant in its correct perspective. In the impugned order, there is no finding of fact whether the appellant had deliberately withheld P.F. Dues with mala fide intention to avoid its legal responsibility towards its workers. The another vital drawback in the impugned order is that it pertains to M/s. Santogen Spinning Mills Ltd., which was purchased by the appellant on 5.12.2005 from ARCIL and the impugned order pertains to the earlier period i.e. March 1995 to July 2004. The Assistant Provident Fund Commissioner, VAPI had also failed to consider the fact that for belated remittance of PF dues liability to pay damages does not arise automatically, but the same will have to be decided by P.F. Authority by applying mind to the merits of the case and not by storing arithmetical calculation.

[emphasis supplied]

For arriving at the findings of fact in said Para - 12 of the order, the P.F. Tribunal has taken note of the reply affidavit filed by Commissioner (Present Petitioner) wherein the claims and assertions by the present respondent were not disputed and the P.F. Tribunal also took notice of the fact that the Commissioner, while passing the order, did not take into consideration the submissions of the appellant (i.e. Present respondent).

The P.F. Tribunal has, in the order, made acidulous remark that "It is apparent from the face of the impugned order that the oral submissions made by the General Manager of the appellant Company followed by written submissions have not been appreciated in right perspective." The P.F. Tribunal has, to support and justify its observations, findings and decision, relied upon the observation of the Honorable Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, The observations of Honourable Apex Court in said judgment, on which, the P.F. Tribunal has based its findings and order are:

An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a manner of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the

provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. ...

[emphasis supplied]

18. In its order, the E.P.F. Appellate Tribunal has also referred to and relied upon the judgment of Honourable Kerala High Court - in the case of Ernakulam Dist. Co-operative Bank v. Regional Provident Fund Commissioner 2000 (I) [LIJ] 268 and 1977 1 LIJ 379(Ker) and the P.F. Tribunal has reproduced, in its order following Para from the aforesaid judgment:

Section 14B clearly indicates that an employer is liable to pay damages if he has made default in payment of the contribution. Merely, because of the amount had been paid earlier to the order u/s 14B, it cannot be contended that there was no default in payment on the due date if the amount was paid only subsequent to the due date. Any delay in paying the amount u/s 6 causes loss to the beneficiaries of the scheme : such as loss of interest and the like. This is the loss that is sought to be recovered from the defaulter for the purpose of indemnifying the beneficiaries of the scheme namely, the employees to the extent of the loss suffered. The defaulter u/s 14B, is therefore, liable to pay damages which represent the loss, but not anything more, as such recovery would amount to penalty and that is not permitted under the Section.

[emphasis supplied]

19. It can be seen from perusal of the order, particularly Paras - 5, 7 and 12 of the order, by the P.F. Tribunal, that it has held that the order passed by the petitioner (i.e. A.P.F. Commissioner) stands vitiated due to non-consideration of the respondent's written submissions dated 12.04.2006 and that the alleged dues demanded from the respondent are of period prior to the auction purchase of the assets by Present respondent and that the APF Commissioner did not apply mind and did not address the issue as to whether the contribution was deliberately not paid by Erstwhile Establishment and whether there was malafide intention. Above all the aforesaid features which vitiate A.P.F. Commissioner's order, the justification as regards the decision to recover the amount in question from the respondent No. 1 is also absent. The A.P.F. Commissioner who is the concerned adjudicating authority has not recorded any reason in support of or to justify his decision and action of demanding the amount in question from the respondent No. 1. Actually this issue is not addressed at all, and there is total non-application of mind by the petitioner A.P.F. Commissioner. The tribunal also examined other aspects of the A.P.F. Commissioner's order on merits and after examining the order on merits, the learned tribunal found, in light of the judgments of Honourable Apex Court in case of Hindustan Steel Ltd. v. State of Orissa (Supra) & the Honourable Kerala High Court in the case of Erna Kulam Dist. Co-operative Bank v. R.P.F.C. (Supra) that the order passed by petitioner was unsustainable.

20. Now when the learned tribunal reached such a conclusion then as a corrolary

the tribunal should quash such an order. Hence the PF Tribunal quashed the said order of A.P.F. Commissioner. With all these vitiating factors inherent in the A.P.F. Commissioner's order, the learned Tribunal could not have rejected the appeal and it has rightly allowed the appeal by quashing the order. Mr. Mehta for petitioner, despite his best efforts, could not show anything either in support of petitioner's action or against the order by the P.F. Tribunal and has not been able to contradict or dislodge or successfully assail the observations of the P.F. Tribunal in Paras 5 to 8 of the order and/or findings recorded to Para - 12 of the order.

21. In view of the factual background, which is not disputed by the petitioner, and in light of the authorities relied on by the P.F. Tribunal, the order by the P.F. Tribunal cannot be termed as incorrect or perverse or against settled legal position. Having considered the facts of present case, this Court could not find any error in the order by the P.F. Tribunal. This Court does not find any merit in the petitioner's submissions against the findings of the P.F. Tribunal.

Before turning to the issue regarding the impugned demand for damages and interest, what is required to be mentioned at this stage is that there is nothing on record to show that the said conclusion is, in any manner, incorrect or erroneous. Hence, the order of the tribunal does not deserve to be interfered with, so far as the said finding is concerned and there is also no error of law or of jurisdiction in the impugned decision and order of the P.F. Tribunal.

22. Mr. Nanavati, while opposing the petition on ground of maintainability and while supporting the order by the learned P.F. Tribunal, opposed the demand and submitted that if at all there was any delay caused in depositing the contribution then it was by the erstwhile establishment and not by respondent No. 1 and it pertained to period much prior to the time of purchasing the assets of the erstwhile establishment and therefore also the demand against respondent No. 1 for alleged fault of erstwhile establishment, is unjustified and unsustainable.

23. So as to counter the said submission of respondent No. 1 and to justify the demand, Mr. Mehta for petitioner, made a submission which was not raised by the department before A.P.F. Commissioner nor before the P.F. Tribunal and is raised for the first time in the petition. Mr. Mehta submitted that in light of the provision u/s 17B of the Act, the action of the department and the order of A.P.F. Commissioner are not unreasonable or they are not unjustified. He submitted that the said provision empowers the department to demand, in the event of transfer of establishment, the dues from the vendor and/or the purchaser.

24. On this count, before proceeding further, it is necessary to mention that this ground is not urged by the petitioner department at any earlier stage i.e. either during the original proceeding in which the A.P.F. Commissioner passed the order dated 19.06.2006 or before the P.F. Tribunal and is raised now for the first time in the petition under Article 227 of the Constitution of India. Mr. Nanavati objected on the ground that the contention which has not been urged even at the

appellate stage ought not be allowed to be raised in this proceeding under Article 227. Mr. Nanavati is justified in taking this objection in view of department's failure in urging it at any earlier stage. Normally a party to a petition under Article 227 would not be allowed to raise a contention which is not urged at the trial stage and more so when it is not raised even at the appeal stage. However, in present case, considering the facts of this case as well as having regard to the fact that the submission is based on the provision of the statute and its scope and applicability i.e. Is purely a contention of law, this Court deems it fit to permit the same and also deems it proper and necessary to deal with the same.

25. So as to appreciate the aforesaid submission, it is necessary to examine the provision u/s 17B which reads thus:

Where an employer in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or license or in any other manner whatsoever, the employer and the person to whom the establishment is 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 assets obtained by him by such transfer.

26. As per the submission, if any establishment is transferred then both i.e. the transferor and the transferee are jointly and severally liable and responsible to pay the dues.

27. At first blush, plain reading of said Section may suggest the meaning such as the one canvassed by the petitioner, however a closer look brings out the different and real meaning and scope. No doubt that the said provision comes in play when there is transfer of an establishment, but it is pertinent to note that under this provision, the words "transfers that establishment in whole or in part" are qualified and pre-fixed by the words "where an employer." Thus, the obligation of joint and several liability cast by this provision will come in play when an "establishment is transferred by employer of that establishment," by sale, gift, lease or licence or in other manner.

28. It is clear that legislature has intended to keep "enforced sale" or "auction sale/purchase" or a "sale by operation of law" or "involuntary sale" out of the purview of this provision otherwise there was no purpose of using, at the outset of the section, the words "where an employer". The said opening words are attached to and qualify the word "transfers" so as to mean "where an employer transfers.". The Section takes in its fold voluntary transfer by an employer. Otherwise the Section would have been framed differently.

If the legislature did not intend to restrict the applicability or coverage of this provision to only those transfers which are made voluntarily by employer and if

the intention was to take in its fold even the transfers imposed by operation of law then the said words "where an employer." would not have been used. The use of the said words at the outset of the Section is clear pointer about the intention of legislature. Any other interpretation would render the said words "where an employer." nugatory.

29. Thus, this provision would come in play and can be invoked by the department when the transfer is effected by the employer. Hence, in present case the department must show, to take shelter under the said provision, that the transfer of Erstwhile Establishment was effected by its "employer."

30. In present case there is no dispute about the fact that prior to the auction, the "employer" was Santogen Spinning Mills and there is also no dispute about the fact that said Santogen Spinning Mills and/or its employer has not "transferred in any manner whatsoever" the erstwhile establishment or any of its assets to present respondent No. 1. Thus present case would not come within the purview of said Section.

31. From the order dated 19.06.2006 by Assistant Provident Fund Commissioner, it becomes clear that the authority has not taken recourse of said section and it was not relied upon before the tribunal to justify the order and it is only as an afterthought that this contention is raised for first time during the hearing (inasmuch as, it is not found in the petition also) of present petition.

32. Further, even if it is assumed that the authority had invoked the said Section then also, it becomes clear from the order that the authority has not even applied his mind to the scope and purview of the said Section. However, without dwelling on the said technicality, if the applicability of said Section is considered, then also, it comes out, as can be seen from above discussion, that the said Section also does not salvage the petitioner's action of demanding the alleged dues towards damages and interest from respondent No. 1.

33. One of the most important aspects of the matter is that the Erstwhile Establishment is claimed to be "a unit of M/s. Sonu Synthetic Ltd." even as per the department. Despite such being the position, the alleged dues are not claimed and/or recovered from the said parent Company and an "auction purchaser" is being pressed to pay the alleged dues. For this reason also, this Court considers the petitioner's action arbitrary.

34. Besides this, the petitioner could not show any provision, except Section 17B (which, as discussed above, would not be applicable in facts of this case) conferring authority to demand and recover alleged dues from an "auction purchaser."

It is pertinent that Section 14B starts with the words "where an employer makes default." and it is further provided therein that "the central P.F. Commissioner or such other Officer as may be authorized may recover from the employer by way of penalty." Thus, the said Section speaks of default by an

employer and provides for recovery of damages from employer and similarly Section 7Q also provides for recovery of interest from employer.

35. Mr. Mehta, realizing the situation and facing the predicament, advanced an alternative submission that the ARCIL sold and thereby transferred, the erstwhile establishment to respondent No. 1 and ARCIL being the employer within the meaning of Section 2(e), the action is justified and authorised.

36. It appears that what Mr. Mehta wants to submit on behalf of petitioner is that since ARCIL took over the possession of the assets of the erstwhile establishment under the authority conferred by SARFAESI Act, it became the "occupier" and consequently it would be "employer" within the meaning of Section 2(e) which defines the said term and that therefore the sale, and thereby the transfer, of the assets of Erstwhile Establishment by ARCIL would be a sale-transfer by "employer" and thus provision of Section 17B would be applicable in present case also. This submission may now be examined.

37. Before proceeding further, it is apposite to note at this stage that if such submission were to be accepted then it would, in first place, amount to accepting a position which would allow the defaulter - like the erstwhile establishment in present case - go away without discharging the liability. Secondly, in present case, it would require ARCIL to pay or discharge the liability at least equal to the value of assets received by it. Thirdly, it would obliterate the real object behind the said provision.

38. It is obvious that the object behind the said provision u/s 17B is to ensure that the defaulter may not escape its liability merely by transferring assets and also to check fraudulent transfers to dummy transferee.

39. It is to curb any sharp practice that, the provision by way of Section 17-B is introduced so that the ruse of using the device of transfer is not employed by defaulter employer to escape the liability. The section opens with the words "where an employer.", which make five aspects abundantly clear, viz. (1) it is aimed at and takes in its sweep transfer by employer and (2) it is not aimed at or it would not affect involuntary or enforced sale or sale by operation of law (3) it embraces voluntary transfer by employer (4) and it also does not touch transfer by any person other than employer and (5) the said Employer (i.e. who transfers its establishment) should be an employer who is in default as contemplated by Section 14B and/or 7Q.

Thus, the petitioner's submission to pull even auction sale-purchase within the influence zone of Section 17B, is misconceived and such construction is not permissible in view of the language of the section.

40. Now, so far as the other submission is concerned, it has to be mentioned that the said submission ignores the provision of SARFAESI Act and misreads the Section 2(e) and misconstrues or conveniently reads Section 2(k) also.

It is pertinent that ARCIL is a "reconstruction Company" as defined u/s 2(v) of

the SARFAESI Act, and thus it is a "special purpose vehicle" which is incorporated for specified purpose viz "purpose of asset reconstruction" as specified in Section 2(v) which is clear from the words "formed... for the purpose of asset reconstruction." The term "asset reconstruction" is also defined u/s 2(b) of the SARFAESI Act. In view of Section 5 of SARFAESI Act, the said ARCIL becomes "lender" on acquisition of rights or interest in financial assets. The said ARCIL has to take measures only as per Section 9 of SARFAESI Act which include providing proper management by taking over management or sale or lease of business or re-scheduling the schedule of payment and such other measures, for the purpose of reconstruction of assets. Thus, the measures mentioned in Section 9 can be taken by reconstruction Company (in present case ARCIL) only for the said specified purpose of reconstruction of assets and not for any other purpose. Hence, the power of reconstruction company and the object of its actions are circumscribed. Likewise u/s 10 also, it can take steps "for the purpose of recovering dues. ..." Besides, Section 13 also circumscribes the decisions and actions and manner of "take over of management" and Sub-section 4 of Section 15 provides that if the management was taken over then the reconstruction Company "shall on realization of debt restore the management of the borrower to him." The other provisions of the SARFAESI Act go to suggest, on conjoint reading, that such "reconstruction Company" could take over only "Secured Assets" of the defaulter and that too for specific purpose and can act only in prescribed manner and can exercise only prescribed authority. Thus the said ARCIL can not be considered or can not be said to be "occupier of the factory" as defined and contemplated u/s 2(k) of the Act.

41. The submission of the petitioner regarding Section 17-B acknowledges that transfer of establishment has to be by "employer" as defined u/s 2(e) of the Act. The petitioner therefore submits that since ARCIL had taken over assets of Erstwhile Establishment, it is to be considered "employer" u/s 2(e) which defines the term "employer" and provides, in first place, that in respect of a factory, it's "owner" is the employer. It is clear that ARCIL is not the "owner" of erstwhile establishment, hence, the submission would fail on this ground.

The petitioner therefore shifted the gear to claim that ARCIL would be the "occupier of the factory" upon taking over the possession of the Assets of Erstwhile Establishment. However, such submission overlooks that ARCIL can take-over only "secured assets" and that too only for specific purpose and could act only in permitted and prescribed manner and in view of various limitations prescribed qua the discretion, actions, decisions and power of a reconstruction company (e.g. by virtue of Sections 9, 10, 13 and 15 etc.) ARCIL would not qualify to be "occupier of factory" since as per Section 2(k), which provides that "the person who has ultimate control over the affairs of the factory" is the occupier of factory or where the affairs are entrusted to managing agent the agent shall be the "occupier of the factory". In view of the provisions of SARFAESI Act, ARCIL (or any reconstruction Company acting under and as per SARFAESI Act) would not fall under either category and when only "affairs are

entrusted", the entrustment of affairs would not include the entrustment of the title of the factory/establishment or it would not include the right or authority to sale or transfer the title/ownership of the factory/establishment.

42. Hence, the said ARCIL cannot be said to be "employer" for the purpose of Section 17B and the auction sale effected by ARCIL is not "transfer by an employer" as envisaged by the said section. Further, as discussed earlier, Section 17B does not take in its sweep auction sale and/or enforced sale and/or sale by operation of law and/or involuntary sale. Hence, recourse to Section 17B does not help the petitioner and is not of any avail in the facts of present case. The demand and action of petitioner against respondent No. 1, therefore, fails on this count.

43. Now, even if it is assumed that protection of Section 17B of 1952 Act could be available to the petitioner's action of demanding the dues of erstwhile establishment from respondent then also the action of the petitioner is not justified and in view of this Court, it is unsustainable. The Act provides for both, damages and interest, but the same should not be imposed and/or recovered arbitrarily and without considering relevant aspects.

44. The assessing and original adjudicating authority should also take into account host of factors, including the reason for delay and as to whether there was any mala fide intention in delay in depositing the contribution and whether there are any mitigating circumstances or not, before imposing damages and while deciding the quantum of damages.

45. In this regard the Honourable Apex Court has, while considering similar provisions under Employees' State Insurance Act, 1948 very recently held in the case between Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, that:

A penal provision should be construed strictly. Only, because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an endeavor should be made to construe such penal provisions as discretionary, unless the statute is held to be mandatory in character.

In *Prestolite (India) Ltd. v. Regional Director* this Court rejected a contention raised by the Regional Director of Employee's Insurance that under the Employee's State Insurance General Regulations guidelines have been indicated showing as to how damages for delayed payment are to be imposed and since such guidelines have been followed, no exception should be taken thereto made to the impugned adjudication, stating : (SCC - 693) para - 5)

Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the uppermost limit of the table. In the instant case, it appears to us that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment were not to be accepted. There is no indication as to why the imposition of damages at the rate specified in the order was required to be made. Simply because the appellant did not appear in person and produce materials to support the objections, the employee's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits."

Existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.

46. Thus, the decision regarding damages should not be taken casually and the same should not be imposed mechanically and/or arbitrarily. The petitioner A.P.F. Commissioner has not, as rightly observed by the P.F. Tribunal, applied his mind as regards reasons for delay in depositing the contribution by the Erstwhile Establishment which was before BIFR as a sick undertaking and there was a strong possibility of compelling or mitigating circumstances existing at that time and the same ought to have been considered while deciding to impose damages and interest and/or while quantifying the amount. In present case even this aspect has not been duly addressed by the A.P.F. Commissioner.

The foregoing discussion and a glance at the order - in - original dated 19.06.2006 shows that in present case none of the relevant aspects have been properly considered by A.P.F. Commissioner and the levy on the respondent is unjust and also unauthorised. The P.F. Tribunal is right and justified in setting aside the said order of A.P.F. Commissioner. The learned P.F. Tribunal's order which is impugned in present case does not suffer from any infirmity and the challenge, even if it is assumed that A.P.F. Commissioner can challenge the order of P.F. Tribunal, is misconceived and the impugned order does not warrant any interference.

47. At this stage it deserves to be mentioned that what is under challenge before this Court in this petition under Article 227 of the Constitution of India is the order dated 26.07.2007 passed by the P.F. Tribunal. Thus, this Court is required to examine only that order and that too within well recognised limitations of jurisdiction of this Court under Article 227 of the Constitution of India. Further, the said order can be examined only in the light of and in the background of the contentions raised before and examined by the P.F. Tribunal and any other material or contention which was not before the P.F. Tribunal can obviously not be considered. This Court, however, considered the submission made on the premise of Section 17B, though not raised before the P.F. Tribunal, only because

the contention is based on point of law. The order of the P.F. Tribunal cannot be faulted on any ground which was not urged before the Tribunal, unless the ground is such which would go to the jurisdiction of the P.F. Tribunal and, if accepted, make it Coram non judice. The order of the P.F. Tribunal reveals that the document allegedly executed between ARCIL and present respondent was not referred to or relied upon by the petitioner before P.F. Tribunal and yet the petitioner tried to refer to the said document to justify its action and demand. It is pertinent that the said document and its reference does not find place even in the order of the A.P.F. Commissioner. Thus, it was not the subject matter before the P.F. Tribunal also and the respondent was not given any opportunity to deal with the same either before the A.P.F. Commissioner or before the P.F. Tribunal. On such grounds Mr. Nanavati has vehemently opposed the petitioner's attempt to rely upon the said document at this stage. This Court finds considerable force in the objection of Mr. Nanavati, more so because the said document or any contention on the basis of said document does not find any place or reference in the orders by A.P.F. Commissioner or of the P.F. Tribunal. Further, a copy of the so-called document between ARCIL and respondent which is said to have been executed between the two and which is placed on the record of this petition does not appear to be a complete copy/version. The contention is not purely of law but it would be, at the most, a mixed issue of fact and law. It however, in light of the submission made by Mr. Mehta on the basis of said document, needs to be mentioned that the said document is between ARCIL and the respondent and it may probably indemnify the ARCIL against any claim, but it would not help the petitioner to bring the respondent within the purview of Section 17B or to invoke Section 17B. As per the petitioner, the said document gives right and authority to it de-hors the Act to recover the amount from the respondent and/or gives it right and authority under the Act also to claim and recover the amount. Assuming that the petitioner is right in its said contention, then also the same cannot be made a ground to assail the order of P.F. Tribunal more so because the respondent has not been afforded opportunity to lead evidence to explain the said document and/or plead its non-applicability in the facts of the case since it was not raised at any earlier stage and the P.F. Tribunal's order can not be faulted by this Court on ground based on said document. It is clarified that this Court has not pronounced on the right of the petitioner, if at all there is any, on the basis of the said document and all that is considered and observed is that the petitioner, at this stage, cannot be allowed to assail the order of the P.F. Tribunal on the ground which was not urged before the P.F. Tribunal, more so when it was also not the premise of the claim before or order by the A.P.F. Commissioner also and when neither the A.P.F. Commissioner's order nor the P.F. Tribunal's order contain its reference. The aforesaid observations and discussion is only with a view to put on record that the contention was urged during the hearing and upon having considered the same, this Court is not inclined to find fault in the P.F. Tribunal's order on this count. Since, as mentioned earlier, the said contention was not raised before the P.F. Tribunal and it also does not appear to have been considered by A.P.F. Commissioner of the time of original order i.e. his order does

not proceed or is not based on said document.

48. In the facts and circumstances of the present case, and on over all consideration of the matter, the challenge against the impugned order dated 26.07.2007 passed by the P.F. Tribunal fails.

49. Consequently the petition fails and the same is rejected. However no cost.