

(2004) 12 BOM CK 0079

In the Bombay High Court

Case No : Writ Petition No. 3115 of 2004

Garware Marine Industries Limited, Mr. Ashesh Chandarana
and Mr. Ashok Garware

APPELLANT

Vs

Union of India (UOI) and Recovery Officer

RESPONDENT

Date of Decision : 08-12-2004

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 7(A),
7Q, 8(B), 8(C)
Factories Act, 1948 — Section 2, 7(1)

Citation : (2005) 2 LLJ 1070

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : J.P. Cama and Deepak Poonamiya, instructed by, RMG Law Associates, for the Appellant; S.V. Bharucha, for Respondent Nos. 2 and 3 and Sonal Humane, instructed by , S.S. Pakale, for the Respondent

Judgement

F.I. Rebello, J.—Rule. By consent heard forthwith.

Petitioner No. 1 is a company incorporated under the Indian Companies Act. Petitioner No. 2 is the company Secretary. Petitioner No. 3 is the non executive Chairman of the first petitioner company. The Petitioner by the present petition have sought relief from this court to strike down the demand notice both dated 6.10.2004 and Notice/Order order dated 20.11.2002. The relief is also sought to strike down the show cause notice for arrest dated 6.10.2004.

2. The Respondents by their order dated 20.11.2003 in exercise of the powers conferred on Respondent No. 2 u/s 7(A) of the Employees Provident Fund and Misc. Provisions Act, EPF & MP Act, 1952 determined the dues of petitioner No. 1 on account of provident fund and employees pension fund and insurance fund contribution and administrative charges towards the provident fund and insurance fund for the period from 3/202 to 9/03 in accordance with the provisions of the Employees Provident Fund and Misc. Provisions Act, 1952 and

EPF Scheme 1952 and Employees Pension Scheme, 1995 in the sum of Rs.5,98,602/-. The company was called upon to pay the said amount within 15 days of receipt of the order. It appears that despite the said demand, the amounts were not paid pursuant to which the third respondent was pleased to issue certificate dated 4.8.2004 and forwarded the same to the authorised officer for the recovery of the amount of Rs.7,95,886/-the details of which were set out therein.

By notice of demand dated 4.6.2004 the Petitioner No. 1 was called upon to pay the amount and interest in accordance with Section 7Q of the Act and also cost, charges and expenses and on failure to pay the amount, the amount would be realised in accordance with the provisions of Section 8(B) and 8(C) of the EPF & MP Act, 1952. By another notice of the same day, Petitioner No. 1 was called upon to pay the sum of Rs.21,30,812/-in similar terms as set out in the earlier notice. Petitioner No. 2 addressed a letter to the recovery officer dated 22.6.2004 setting out therein that they will produce relevant receipts, quadruplicate challans for the period March, 2000 to February, 2003 for verification. It was further set out that in terms of their records, PF contribution has been paid fully and therefore, recovery officer was requested to withdraw the notice of demand and to work out the fresh interest for delayed payment. Further material was forwarded by letter of 22.7.2004 to Respondent No. 2 by Petitioner NO. 2 on behalf of Petitioner No. 1. The legal notice thereafter came to be served on 10.9.2004. It is not necessary to advert to various facts set out therein.

3. The third respondent caused show cause notice to be issued to Petitioner No. 3 that it proposes to execute certificate for the amounts as set out in the show cause notice by his arrest and imprisonment. He was called upon to appear before Respondent No. 3 on 18.10.2004 as to why he should not be arrested and detained in civil prison. A letter came to be addressed to Respondent No. 2 by Petitioner No. 2 on behalf of Petitioner No. dated 15.10.2004. Apprehending that the Petitioner No. 3 may be arrested, the petitioner have filed this petition not only for quashing the show cause notice but also in respect of other demands.

4. At the hearing of this petition, on behalf of the Petitioner, their learned counsel points out that in so far as arrest warrant is concerned, show cause notice could not have been issued to Petitioner No. 3 as he was not employer within the meaning of Section 2(e)(i) of EPF & MP Act, 1952. The learned counsel points out that the occupier of the factory by Resolution of Board of Directors is one Shamsunder Atre who for the purpose of Factories Act by resolution of the Board of Directors of Petitioner No. 1 dated 11.10.2003 has been named as the occupier with effect from 1.7.2002. Reliance is also placed on the judgment in the case of Transport Corporation of India v. RMG 1991 M.L.J. 1055.

On the other hand, on behalf of the Respondents, their learned counsel submits that the Petitioner No. 1 had submitted names of the owners in form 5A in terms of Para 36A of the Employees Provident Fund Scheme 1952 and Para 16 of the

Employees Pension Scheme 1971. as also employees Insurance Scheme. In Column 7 names of the owners have been given which includes Petitioner No. 3. It is therefore, submitted that the Petitioner themselves having given name of the owners, it is not open now to the Petitioners to contend that Mr. Atre is occupier and therefore, Petitioner No. 3 is not liable to be arrested. In so far as demands made and dues are concerned, it is pointed out that the Petitioner No. 1 has alternative efficacious remedy available by way of appeal and in these circumstances, this court should not exercise its extra ordinary jurisdiction.

5. Having heard learned counsel, in my opinion, in so far as challenge to the orders of assessment and demand dated 4.6.2004, it will not be possible for this court to interfere therewith considering that the Petitioner No. 1 has alternative and efficacious remedy available by way of appeal. All that can be said is that for a period of six weeks from today, in order to enable event petitioner No. file an appeal, Respondent not to take any steps to recover the said amount pursuant to demand made by them on petitioner No. 1.

6. That leaves us with the second contention namely as to whether the show cause notice issued to Petitioner No. 3 is within jurisdiction. It is only a show cause notice. However, as the Petitioner's apprehend arrest if their reply is rejected, and as even otherwise, the argument as advanced is that the show cause notice issued to Petitioner No. 3 is without jurisdiction, that the challenge is being considered.

The EFP and MP Act, 1952 has defined employer u/s 2(e) to mean as under :

"(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, where a person has been named as a manager of the factory under clause (f) of sub section (I) of section 7 of the Factories Act, 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."

"Occupier" has been defined u/s 2(k) to mean as under :

"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."

Under Section 8(B) where any amount is in arrears u/s 8, the authorised officer may issue certificate and based on the said certificate shall proceed to recover the amount specified therein in the manner set out therein which includes by way of arrest of the employer and his detention in prison.

Under the rules framed, the Petitioner No. has to forward details of ownership to

be sent to the Regional Commissioner which includes the name of the owners as also the name of the Manager/occupiers of the factory. It appears that last time that information was conveyed by Petitioner No. 1 to Respondent was on 3rd December, 1992.

A perusal of the first part of Section 2(e)(i) would show that the employer can be either owner or occupier. The second part however, sets out when the person has been named as Manager of the factory, under Sub Section (1) of Section 7 of the Factories Act, 1948 the person so named under the provisions of the Factories Act is the occupier. The occupier u/s 2(g) of the Factories Act has been defined to mean a person who is having control over the affairs of the factory. The Provisions of the Factories Act and the EPF Act therefore, will have to be read together for the purpose of knowing who is occupier. An employer therefore, can either be owner or occupier. In cases where penal consequences are sought to be fastened on a person, there cannot be uncertainty. To my mind therefore, if the definition is read in its proper perspective, the legislative intent would become clear and thus read the expression "and whether the person has been named as Manager of the factory" would mean that in all such cases where the occupier has been named under the provisions of Clause (f) of Sub Clause (1) of Section 7 of the Factory Act, the occupier ordinarily would be employer for the purpose of EPF and MP Act, 1952. It is only in the event there is no occupier can the Respondent proceed against the owner. A harmonious construction is required so that both the employer and the Respondent on whom the liability is fastened are certain as to who is liable or against whom they can proceed. If the construction sought to be placed earlier is accepted, in my opinion, considering the penal nature of the provisions u/s 8(B) that would be a harmonious construction. Therefore, whenever occupier is named for the factory under the provisions of the Factories Act, and is or was the occupier for the period for which the demand is made and is available, I the person so named is the employer within the meaning of Section 2(e) of the EPF and MP Act and he alone can be prosecuted under the provisions of Section 8(B)(b) of the Act. It is no doubt true that the learned counsel for the petitioner has drawn my attention to the judgment in Transport Corporation of India (supra). It is not necessary to consider the ratio of that judgement considering that the issue which is directly arising in this matter was not directly in issue in that matter.

7. Having said so, it will be clear that show cause notice issued to Petitioner No. 3 as to why he should not be arrested is clearly without jurisdiction. Once that be the case, the petition in so far as Petitioner No. 3 is concerned, will have to be made absolute in terms of Prayer Clause (c).

Petition stands disposed of accordingly. No order as to costs. . It is made clear that after the period given to the petitioners to file appeal and if the appellate authority grants no stay, it will be open to the respondents to proceed according to law.