

(2011) 09 MAD CK 0019

In the Madras High Court

Case No : Writ Petition No. 25901 of 2010 and M.P. No. 1 of 2010

Lakshmi Machine Works Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14(B),
17(B), 20, 7(I), 7(Q)
Industrial Disputes Act, 1947 — Section 25(O), 25(O)(3)
Transfer of Property Act, 1882 — Section 55

Citation : (2011) 131 FLR 899

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : Mr. R. Krishnamurthy, for Mr. R. Bharath Kumar, for the Appellant;
Mr. V. Vibhishanan, CGSC for R1 and R3, for the Respondent

Final Decision : Dismissed

Judgement

The Honourable Mr. Justice K. Chandru

1. The Petitioner is the employer. They have come forward to challenge an order of the second Respondent Employees Provident Fund Appellate

Tribunal made in ATANo. 259(13)2005 dated 23.08.2010 confirming the order of the third Respondent viz., the Assistant Provident Fund

Commissioner, Coimbatore, dated 29.10.2004 and seeks to set aside in respect of the damages claimed against the petitioner.

2. In the writ petition, notice of motion was ordered on 19.11.2010. Pending the notice of motion, an interim injunction was granted for four

weeks. Thereafter, it was not extended. On notice from this Court, the Respondents have filed a counter affidavit dated 16.12.2010.

3. It is stated by the Petitioner that Textual Company Limited (for short TCL) was declared as a sick company and the matter was referred to the

Board for Industrial and Financial Reconstruction (for short BIFR).The BIFR granted approval of rehabilitation scheme with effect from

01.04.2003 and the said TCL ordered to be merged with the Petitioner company. It is at this stage the third Respondent issued a show cause

notice dated 17.05.2004 seeking to levy damages in respect of the delayed payment of Provident Fund dues u/s 14-B of the Employees Provident

Funds and Miscellaneous Provisions Act, 1952 (for short EPF Act). The total claim worked out to Rs. 3,89,675/- . The Petitioner company as it

had already taken over TCL sent a reply dated 23.07.2004, claiming that the TCL had suffered losses to the extent of 94.5 crores. The said

company due to the disconnection of power supply sought permission for layoff the workmen and also filed an application for closure of the

company u/s 25-O of the Industrial Disputes Act, 1947. It was claimed that since no orders were passed by the Government, it was deemed to

have been closed in terms of the provision found u/s 25(O)(3) of the I.D. Act. The machinery division of the company was closed from March

2002 and the matter was taken to BIFR in August 2002 and that TCL was declared as a sick industrial company under the provisions of the

SICA Act. The ICICI Bank was appointed as Operating Agency. The proposal for rehabilitation was submitted by TCL seeking merger of the

said company with the petitioner. The merger proposal was approved by the BIFR vide order dated 22.10.2003 effective from 01.04.2003.

Therefore, the Petitioner which had bailed out the said company requested the Respondents to consider waiver of damages levied on the erstwhile

TCL company. Notwithstanding the same, by a notice dated 02.09.2004, the total dues payable by the TCL was assessed to Rs. 41,78,164/-

4. Though in the enquiry notice, it was indicated the liability was only Rs. 3,89,375/- , subsequently after personal hearing was given to the

Petitioner, the department claimed the liability of the erstwhile company was to the tune of Rs. 41,78,164/- and the same was made known to the

Petitioner. In fact when the notice of personal hearing was issued on 29.10.2004, one of the representative of the Petitioner company by name

A.T. Sethuraman appeared and it was intimated to him that the liability was not as indicated in the original notice. This fact was set out in

paragraphs 6 and 7 of the counter affidavit filed by the Respondents. When the petitioner company did not pay the amount, coercive proceedings

were initiated u/s 8-B of the EPF Act. The Petitioner company once again sent a presentation dated 06.10.2004 seeking the Respondents to

consider the waiver of damages under Para 32-B of the RPF Scheme 1952 as it is the case of amalgamation or merger of sick industrial company.

They had stated that at the time of merger, they were not aware of the extra liability of Rs. 41,78,164/- but they were willing to meet the interest

liability to the extent to which the EPF department has to incur extra expenditure while disposing the PF dues of the employees.

5. By a memo dated 30.11.2004, the Petitioner was directed to pay the interest u/s 7Q of the EPF Act which worked out to Rs. 14,47,588/- .

The Petitioner by a covering letter dated 20.12.2004 paid a sum of Rs. 14,47,099/- as directed by the Respondents towards interest. It was

thereafter when the Petitioner requested for waiver, the Respondents by a communication dated 12.01.2005 informed the Petitioner that such a

waive is not feasible for compliance.

6. At this stage, the Petitioner filed an appeal before the second Respondent Tribunal u/s 7I of the EPF Act. The said appeal was taken on file as

ATA No. 259(13)2005 by the Tribunal on the condition of pre deposit. The Tribunal directed the Petitioner to deposit 50% of the amount levied.

Aggrieved by the rejection of the request for waiver of pre-deposit, the Petitioner filed a writ petition before this Court being No. 13050 of 2005.

The learned Judge of this Court by an order dated 19.04.2005 disposed of the said appeal by directing the Petitioner to deposit Rs. 7.5 lakhs within

a period of four weeks and if such payment was made within the time, the appeal was directed to be disposed of by the Tribunal in accordance

with law.

7. It was thereafter, the tribunal heard the appeal after notice to the parties and by an order dated 23.08.2010 dismissed the appeal. The Tribunal

held that the question of waiver of levy of damages will not arise only on the ground that the Petitioner had faced financial crunch. It was also held

that merely because the company is a sick company, it cannot be a ground for waiver of PF liability. Aggrieved by the rejection of the appeal, the

present writ petition came to be filed as noted already.

8. The contention raised by the Petitioner was that since BIFR had approved the Merger Scheme, the respondents were not justified in levying damages for the period from 3/2000 to 5/2002 against the transferee company when no such liability was disclosed during the approval of the Scheme despite inviting objections from all the statutory authorities. The Petitioner company could not be penalized for the acts done by the erstwhile TCL and they had come into picture only after the merger pursuant to the order of BIFR dated 22.10.2003. Having accepted the TCL as sick industrial unit, it is not open to the Respondents to levy damages. The PF authorities never appeared before the BIFR and on the date of merger, these liabilities were not disclosed in the books of accounts of the TCL. Since already the Petitioner had been penalized with the levy of interest, they ought notto have levied damages. The judgment of this Court in *Kasthuri Mills (P) Ltd. v. Assistant Provident Fund Commissioner* reported in 2007 6 MLJ 1793 will squarely apply to the case on hand.

9. In the counter affidavit filed by the respondents, it was stated that even earlier the petitioner was informed that since there was no dispute regarding default, they are bound to pay the interest. With reference to waiver of damages, they are at liberty to move the Central Board of Trustees. It was contended that the plea that the Petitioner was not aware of the liability of the transferor company was false. Even in the Rehabilitation scheme sanctioned by the BIFR in paragraph 7, BIFR directed as follows:

All legal and other proceedings by or against the transferor company, if any, pending on the appointed date and relating to the said undertaking, its liabilities, obligations, duties and covenants shall be continued and enforced by or against the transferee company as the case may be

10. Further, on the liability of the transferor company under the heading Staff, Workmen and Employees in Para 8(c) of the scheme, it was directed as follows:

It is expressly provided that as far as the Provident Fund, Gratuity Fund, Superannuation Fund, or any other special fund created or existing for the benefit of the staff, workmen and employees of the Transferor company are concerned, upon the scheme becoming effective, the transferee company shall stand substituted for the Transferor company for all purposes

whatsoever related to the administration or operations of such schemes or Funds or in relation to the obligations to make contributions or operation to the said fund in accordance with provisions of such schemes or funds according to the terms provided in the respective Trust Deed. It is the aim and intent that all the rights, duties, powers and obligations of the Transferor Company in relation to such schemes or Funds shall become those of the Transferee company and will be treated as having been continued for the purpose of the aforesaid scheme or funds.

11. Therefore, it was too late on the part of the petitioner company to wriggle out of their statutory obligation in meeting the liability of the transferor company u/s 17B of the EPF Act. The liability in case of transferor establishment is set out in paragraph 17B of the EPF Act is as follows:

17-B Liability in case of transfer of establishment.-

Where an employer in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or the Pension Scheme or the Insurance Scheme as the case may be, in respect of the period up to the date of such transfer: Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

12. It was further stated that the Petitioner company themselves fully aware of the liability to pay damages only sought for waiver of the said damages and when they sought for such a waiver, they were directed to approach the Central Board of Trustees which they did not do. Under the second proviso to Section 14-B of the EPF Act, it is the Central Board which can reduce or waive the damages in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the BIFR subject to such terms and conditions as may be specified in the scheme. It was also stated that even the erstwhile establishment is not entitled for waiver on the basis of the Scheme since the default was committed even before the TCL was declared as a sick company. Since all other payments including dues and the

interest were paid by the petitioner company, they cannot seek only for waiver of damages alone.

13. Mr. R. Krishnamurthy, learned Senior Counsel leading Mr. R. Bharath Kumar, counsel for the Petitioner referred to a decision of the Calcutta

High Court in Poysha Industrial Company Ltd. Vs. Union of India (UOI) and Others, for contending that if the Central Board, under the second

proviso of Section 14B of the EPF Act do not exercise the power, the Court can set aside the claim for levy of damages.

14. He further referred to the judgment of a Division Bench of the Karnataka High Court in Regional Provident Fund Commissioner Mangalore v.

Karnataka Forest Plantations Corporation Ltd. Bangalore reported in 2000 (2) L.L.N. 250 to contend that while transferee - employer is only

liable to pay contribution for the period preceding the transfer, Section 17B cannot be interpreted to mean that the transferee employer was also

liable to pay penalty for the default period by the previous employer for the period anterior to transfer.

15. The learned Senior Counsel thereafter referred to the judgment of the Supreme Court in K. Streelite Electric Corporation v. Regional

Provident Fund Commissioner, Haryana reported in (2001) 2 MLJ 164(SC) and stated that if any irrational procedure is adopted in the matter of

levy of damages, the Court can also interfere with the same and for this purpose reliance was placed upon the following passage found in

paragraph 5, which is as follows:

...Even if we hold that the Central Government instructions issued u/s 20 of the Act are not binding on the Respondent, still in assessing the

damages it will be necessary for us to take note of the manner in which the amounts of damages have been levied and appropriately consider as to

what would be the correct rate of damages to be imposed u/s 14-B of the Act...

16. A reference was also made to the judgment of the Full Bench of this Court in Gowri Spinning Mills (P) Ltd. represented by the Managing

Director Thokkampatti v. Assistant Provident Fund Commissioner Sub-Regional Office Salem reported in 2006 (5) CTC 1 and placed reliance

upon paragraph 36, which is as follows:

36. On behalf of some of the intervenors, an alternative submission was advanced that even assuming that the provisions of Section 22(1) of the

SICA are inapplicable to the contribution of the employees or employer, the provisions for levy of interest on delayed payments and the

administrative charges as well as recovery of damages u/s 14-B is covered by Section 22(1) of the SICA. The submission is devoid of any

substance. The levy of interest for delayed payments well as the administrative charges are very much part of provident fund under the scheme

framed under the EPF Act. As fares damages u/s 14-B is concerned, it would be open for a sick industrial company to request the authorities

under the EPF Act, to postpone the determination of damages till the reference is finally decided by the BIFR and or the Appellate Authority, as

the case may be. In case such a request is made, the concerned authority shall pass appropriate orders in the light of the proviso of Section 14-B

of the EPF Act. We may hasten to add that the issue of damages is not involved in any of the matters which have been placed before us.

17. Therefore, it was contended that the respondents are bound to examine the request made by the petitioner. But in that very same case, in

paragraph 22, the Full Bench observed as follows:

22....However, under the proviso appended thereto, the Central Board has been empowered to reduce the quantum of damages that may be

required to be paid by a company in relation to an undertaking which is a sick industrial undertaking and in respect of which the scheme for

rehabilitation has been sanctioned by the BIFR, subject to such terms and conditions as may be specified under the scheme. Parliament thus as a

matter of legislative policy has enacted that the employer be granted a waiver of damages payable u/s 14-B where the undertaking of the employer

is a sick industrial undertaking and the scheme for its rehabilitation has been sanctioned. There again, it must be noticed that the eligibility to grant

waiver u/s 14-B is subject to those conditions which have been prescribed therein. Parliament having thus amended the EPF Act had taken within

its purview the position of a sick industrial undertaking, the extent of the immunity which have been conferred upon such undertaking with reference

to provident fund dues under the Act, must be confined to what has been legitimized by Parliament. The extent of the immunity or exemption

cannot be extended beyond what was allowed in terms of the amendment to the EPF Act.

18. In the present case, the BIFR Scheme do not envisage any waiver of past liability. On the other hand, the liability was fixed on the Petitioner

and the respondents have also considered the fact that the default took place before the company was declared as sick and not after the company

was made as a sick company and declared by the BIFR.

19. The learned Senior Counsel also referred to the judgment of this Court in ABCOY represented by its Managing Partner Ms. Radhika Raman

v. Regional Provident fund Commissioner Tirunelveli reported in (2007) 6 MLJ 1793 for contending that the judgment in Kasthuri Mills Case was

followed and the financial crisis was not taken into account. It was observed that levy of damages is penal in nature an they ought to have

considered the Petitioner"s grievance.

20. Finally, the learned Senior Counsel referred to the judgment of this Court in Terrace Estate, Unit of United Plantation Ltd. v. The Assistant

Provident Fund Commissioner reported in 2011 (2) C.L.T. 185 for contending that while levying damages, mens read of the defaulting party must

be considered and since it is not considered, there cannot be any levy of damages.

21. In the present case, the contentions raised by the Petitioner cannot be countenanced for more than one reason. The contention that the

Petitioner was not aware of the liability as it did not reflect in the books of accounts cannot be accepted because the Petitioner had paid dues

towards PF and had also offered to pay the interest and also paid the said amount for the delay. Hence, it would not be open to them to state that

these liabilities was not reflected in the books of accounts. Even if it is not reflected in the books of accounts, any liability of the transferor company

is fastened on the petitioner even under the Scheme framed by the BIFR and therefore, they cannot feign ignorance and they are liable to pay the

amount. The Petitioner did not approach the Central Board of Trustees but they had only filed an appeal before the Tribunal u/s 7I of the EPF Act.

It has already been held that the power u/s 7I is wider than the power under second proviso to 14B of the EPF Act. Even there the Appellate

tribunal will have to exercise its appellate power only within the four corners of law. When the default had been committed before the transferor

company became sick, the Petitioner cannot plead the sickness of that company

and the subsequent scheme of merger made by the BIFR.

22. In essence that since the BIFR itself had not thought of dealing with the grant of concession, the Tribunal could not have invoked its appellate

power either to waive or reduce the damages. The further fact that the Petitioner has paid the interest in which there can be no negotiation is an

additional factor about their knowledge about the default in payment. When once the liability arose even before the scheme of merger, then its a

liability attached to the transferor company and the petitioner having taken over the company on a merger cannot seek for a selective waiver. The

judgment of the Karnataka High Court may not be correct in stating that the liability of the transferor with reference to damages cannot be levied

on the transferee. In this case, the liability is that of an employer and the change of ownership will not diminish the liability arose out of the default

by the employer. The Petitioner had the benefit of filing an appeal before the appellate tribunal and the appellate tribunal by giving correct reasons

rejected the appeal. Therefore, in exercise of power under Article 226 of the constitution, the order passed by the Tribunal cannot be interfered

with. The judgment of the Supreme court in K. Streetlight's case (cited supra) referred to above has no application to the facts on hand. In the

present case, the damages are fixed on the basis of guidelines found under the K. Streetlight's case and there was no exception with reference to

the damages. A general plea of sickness cannot be urged for the purpose of seeking waiver of damages. Damages and interest are part of the legal

requirements which can be charged by the Respondent authorities.

23. The Supreme Court in AI Champdany Industries Limited Vs. The Official Liquidator and Another, dealt with the scope of a buyer from the

Official Liquidator in not knowing the prior dues on the property and referred to pay the past liabilities. In that case, it held that if there is a prior

charge or a statutory claim, then the encumbrance on the property cannot be disowned. In that context, it is necessary to refer the following

passages found in Paragraphs 19 to 21 of the judgment:

19. In Ahmedabad Municipal Corpn.¹ itself it was held: (SCC p. 761, para 4)

4....According to the submission it is not necessary for the saving provision to expressly provide for the enforceability of the charge against the

property in the hands of a transferee for consideration without notice of the

charge. This submission is unacceptable because, as already observed what is enacted in the second half of Section 100 of the Transfer of Property Act is the general prohibition that no charge shall be enforced against any property in the hands of a transferee for consideration without notice of the charge and the exception to this general rule must be expressly provided by law. The real core of the saving provision of law must be not mere enforceability of the charge against the property charged but enforceability of the charge against the said property in the hands of a transferee for consideration without notice of the charge. Section 141 of the Bombay Municipal Act is clearly not such a provision. The second contention fails and is repelled.

20. It was furthermore held: (Ahmedabad Municipal Corpn. case¹, SCC p. 762, para 5)

5....Reliance was next placed on a Full Bench decision of the Allahabad High Court in Nawal Kishore v. Municipal Board Agra². According to

this decision the question of constructive notice is a question of fact which falls to be determined on the evidence and circumstances of each case.

But that Court felt that there was a principle on which question of constructive notice could rest, that principle being that all intending purchasers of

the property in municipal areas where the property is subject to a municipal tax which has been made a charge on the property by statute have

constructive knowledge of the tax and of the possibility of some arrears being due with the result that it becomes their duty before acquiring the

property to make enquiries as to the amount of tax which is due or which may be due and if they fail to make this enquiry such failure amounts to a

willful abstention or gross negligence within the meaning of Section 3 of the Transfer of Property Act and notice must be imputed to them.

21. Clause (g) of Sub-section (1) of Section 55 of the Transfer of Property Act whereupon reliance has been placed by Mr Sen reads as under:

55. Rights and liabilities of buyer and seller." In the absence of contract to the contrary, the buyer and the seller of immovable property respectively

are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1) The seller is bound

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest to all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

In terms of the aforementioned provisions, therefore, the seller is bound to pay all the public charges due in respect of the property up to the date of sale, when a property is sold in auction.

24. In view of the above circumstances, there is no case made out. The contention that they were not aware of the liability before they take over is not an issue where this Court can be concerned with as the well known Latin maxim was caveat emptor (buyer beware) will squarely apply to the situation. Hence, there is no case made out. Accordingly, the writ petition stands dismissed. However, there will be no order as to costs.