(2008) 08 CAL CK 0044

In the Calcutta High Court

Case No : Writ Petition 1910 of 2002 and G.A. 3882 of 2005 with W.P. 3068 of 1993

Lakshmi Niwas APPELLANT

Vs

Regional Provident Fund Commissioner and Others RESPONDENT

Date of Decision : 07-08-2008

Acts Referred:

Companies Act, 1956 — Section 633
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A, 17(1), 2, 7A, 7B
Factories Act, 1948 — Section 7(1)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2010) 125 FLR 606

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Ajit Kumar Panja and Jayanta Kumar Mitra, Bhaskar Banerjee and Shyam Sundar Manna, for the Appellant;S.C. Prasad, for the Respondent

Judgement

Aniruddha Bose, J.—Both these writ petitions are being disposed of by this common judgment as the legal issues involved in these two writ petitions are interlinked, and the causes of action of the two writ petitions have their root in a common set of events.

2. The petitioner before me in these two writ petitions has described himself as a "reputed industrialist and a director of several well-known companies." His main grievance, with which he has approached this Court is issuance of certificate proceeding against him for certain defaults made on account of deposit of provident fund dues of the employees of a company by the name of Bowreah Cotton Mills Co. Ltd., ("the Company" in short). The dues are on account of employer?s contribution, employees? share and "R.O.W.", which term, I am informed implies recovery of wages. The petitioner?s association with this company dates back to 1971, when he joined Bowreah Cotton Mills Co. Ltd. in a senior administrative position. Later on he became an additional director of this

company. He was appointed as the managing director of the company on 11th April 1986, a post which he held till 28th August 1990. He claims to have had resigned on that date from the said post, as well as from the post of a director of the Company, as there was overall management change at that point of time, and the company was taken over by another group of industrialists. The company is an exempted establishment in terms of Section 17(1)(a) of the Employees? Provident Funds and Miscellaneous Provisions Act, 1952 (the 1952 Act, in short). In W.P. No. 3068 of 1993, the petitioner challenges the legality of a certificate issued under the provisions of Section 8C of the 1952 Act, in which the writ petitioner has been described as the managing director of the establishment. This writ petition was required to have been heard on the basis of reconstructed records, as it was reported to this Court by the department that the records in original were not readily available. In the certificate which is impugned in this writ petition (which I shall refer to as the first writ petition), the nature of the dues and the corresponding period has been shown as:

3. The writ petitioner approached this Court by filing W.P. No. 1910 of 2002, when he received a notice from the provident fund authorities dated 14th August 2002, requiring him to show cause as to why action should not be initiated against him for malpractice and maladministration of the provident fund trust. In this notice, it was also specified that the establishment had defaulted in depositing an amount of Rs. 2,04,06,359/- to the trust and the account of the trust was not updated after 1990. The petitioner, by a communication dated 21st August 2002 claims to have had denied his obligation and liabilities vis-?-vis the operations of the establishment and the trust. On 19th August 2002, the petitioner was issued another notice to show cause as to why warrant of arrest shall not be issued against him for failure to pay amount of arrear specified in the certificate dated 11th February 1993, and another certificate dated 30th September 1997 (bearing No. 07/EPF/98-99). In this notice, it was proposed to execute the said certificate. The petitioner was directed to appear before the Recovery Officer of the Employees? Provident Fund Organisation; SRO; Howrah on 30th September 2002.

3. In W.P. No. 1910 of 2002, which I shall describe in the later part of this judgment as the second writ petition, the petitioner has applied for quashing of both the certificates dated 11th February 1993 and 30th September 1997, as well as the two notices dated 14th August 2002 and 19th August 2002. An application has been filed in connection with this writ petition being G.A. No. 3882 of 2005 for vacating the interim order, which was passed in this matter on 10th September 2002. Mr. Soumya Majumdar, learned Advocate appeared in this matter on behalf of Bowreah Cotton Mills Company Ltd. Sangrami Sramik Union, who were allowed to intervene in this matter. He has argued in support of the certificate issued and the steps taken by the provident fund authorities in pursuance thereof. In addition, he has raised grievance on behalf of his clients that the provident fund authorities are not taking adequate steps to recover the legitimate dues of the employees by initiating proceeding for recovery of the

dues from the assets of the establishment.

4. The main case of the petitioner, represented by Mr. Ajit Kumar Panja, and Mr. Jayanta Kumar Mitra, learned Senior Advocates, is founded on three main planks. His case is that after his resignation, he had no connection whatsoever with the company, and he was not administering the Trust. He was not an employer within the meaning of Section 2(e) of the 1952 Act, and as such recovery proceeding could not be initiated against him in terms of Section 8C of the Act. The second ground on which the proceeding against the petitioner has been challenged is that the company being an exempted establishment, proceeding u/s 8C of the Act does not lie against the petitioner. It has also been contended that company had become a "sick industrial company" under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985, and at the material time, the case of the company stood referred to the Board For Industrial and Financial Reconstruction (BIFR). As such, it was contended that the recovery proceeding against the petitioner ought to have been stayed in terms of Section 22 of the 1985 Act.

5. In the second writ petition, the main case of the petitioner is that he was

--- (Period) --- (i) 4/89 to 9/89, 2/90 to 11/90. Employees'' share of Provident Fund Contributions ... ... Rs. 26,50,436.45 --- (ii) 4/89 to 9/89, 2/90 to 11/90. Employers? Share of Provident Fund Contributions ... ... Rs. 52,33,470.45 --- (iii) 4/89 to 9/89 2/90 to 11/90. R.O.W. ... ... Rs. 69,12,921.44 ---

not given any notice prior to the issuance of these certificates as regards the subject-dues. In the notice dated 14th August 2002, various irregularities in the working of the Trust have been alleged and as regards the establishment, as it has already been indicated above, the charge is that the establishment has defaulted in transferring a sum of Rs. 2.04.06,359/- to the Board of Trustees. The petitioner, as the managing director was required to explain these defaults and in this notice, the petitioner?s responsibility was specified in the following manner:

Whereas it is ascertained that you have been the Managing Director of M/s Bowreah Cotton Mills and was responsible for overseeing the working of the Trust. The Trust, in fact, was defunct after 1990 and no efforts were taken by anybody either to run it normally or to revive it sufficiently. Even the instructions issued by this office are not complied with. The in-action on your part to run the Trust smoothly and to transfer the due amount to the Trust has contributed to the present state of affairs of Trust. A large number of employees are visiting this office and also our head office requesting intervention for getting their P.F. amount disbursed. You are, therefore, called upon to explain as to why appropriate action, as specified in the E.P.F. Scheme or other rules and laws of the land, should not be initiated against you for the malpractices and maladministration of the E.P.F. Trust. If full compliance as per our requirement is not received before 30th August 2002, this office will be going ahead with actions as may be found required. This may be treated as a notice under the Act.

6. The petitioner claims to have had replied to this notice on 21st August 2002, which was in the nature of an interim reply, mainly contending that he could not be held responsible for the misdeed of the trustees. In this reply, he also requested for four weeks time to make reply to the show-cause notice. By that time, the notice dated 19th August, 2002 had been issued.

7. The second writ petition was moved on 9th September 2002, on which date an Hon''ble Single Judge of this Court was pleased to pass an interim order restraining the respondents from taking any action against the petitioner pursuant to the said notices. The operation certificates dated 11th February 1993 and 30th September 1997 were also stayed.

8. The application for vacating the interim order, being G.A. No. 3882 of 2005, which is also being taken up for hearing along with the main writ petition, is based mainly on two grounds. It has been pleaded in this application that the earlier writ petition, being W.P. No. 3068 of 1993 has been dismissed and all interim orders passed in that matter was vacated by an order of this Court passed on 28th June 2001. Subsequently, the writ petition was restored by this Court by an order passed on 4th October 2002, but the interim order was not revived. The second ground on which vacation of the interim order has been applied for is that the case before the BIFR was also disposed of on 26th October 1999.

9. The main submissions of Mr. Panja and Mr. Mitra, learned Senior Advocates appearing for the petitioner has been that the petitioner could not be held responsible for the default of the Trust, as his client had no connection with the management of the Trust. As regards the outstanding dues of the employer to the Trust, the first contention of the petitioner is that he is neither the employer, or the manager of the company. His further submission is that under the proviso to Section 8B of the 1952 Act, it was incumbent upon the provident fund authorities to effect recovery by applying the mode of attachment and sale of the property of the establishment. Only if such mode failed to yield the amount due, proceeding could be initiated for recovery by arrest and detention of the employer. The provisions of Section 8B of the Act is reproduced below:

8B. Issue of certificate to the Recovery Officer.-(1) Where any amount is in arrear u/s 8, the authorised officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the establishment or, as the case may be, the employer by one or more of the modes mentioned below:

(a) attachment and sale of the movable or immovable property of the establishment or, as the case may be, the employer;

(b) arrest of the employer and his detention in prison;

1. (c) appointing a receiver for the management of the movable or immovable properties of the establishment or, as the case may be, the employer:

2. Provided that the attachment and sale of any property under this Section shall first be effected against the properties of the establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

(2) The authorised officer may issue a certificate under Sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

10. Mr. Panja specifically relied on the proviso to Section 8B(1) of the Act, in support of his submission that it was incumbent upon the authorities to exhaust the option of attachment and sale of immovable property before initiating the proceeding for arrest.

11. Learned Advocates for the petitioner also emphasised on the fact that the company concerned was an exempted establishment, and no proceeding for recovery could be initiated for recovery of the dues for the Directors or erstwhile Directors of the Company in such a case. Three authorities have been relied upon by Mr. Panja in support of his contentions, being:

(i) Employees'' State Insurance Corporation Chandigarh Vs. Gurdial Singh and Others,

(ii) The Hooghly Mills Co. Ltd. v. The Regional Provident Fund Commissioner and Anr. (2006) (2) CLJ (Cal) 80,

(iii) Sri Varadarajaswami Transports (Pvt.) Ltd. Vs. Regional Provident Fund Commissioner, Madras and Another, .

12. The case of the Provident Fund Authorities has been argued by Mr. Prasad, whose main submission is that since the charge against the establishment is non-payment of dues to the Trust Fund, the employer is cannot be absolved of his responsibility. The respondents? main case on the point of the liability of the petitioner is that while discharging the duties of the managing director of the company, he was in charge of the affairs of the company. This rendered him liable for the dues of the company. His alternative case is that whether the petitioner comes within the ambit of the definition of employer or not is

essentially a factual issue, and this Court in exercise of the constitutional writ jurisdiction ought not to enter into this aspect of the controversy. The decision relied upon by him in support of this submission is a judgment of a Special Bench of this Court in the case of Dalgaon Agro Industries Ltd. (Now known as Tasati Tea Ltd.) Vs. Union of India (UOI) and Others, .

13. On the argument advanced on behalf of the petitioner that during subsistence of the proceeding before the BIFR, recovery ought to be stayed, the learned Advocate for the Provident Fund Authorities has submitted that no such immunity can be enjoyed by the petitioner, as the 1952 Act is a special statute. A decision of the Hon''ble Supreme Court in the case of Rabindra Chamria and others Vs. The Registrar of Companies, West Bengal and others, has been relied upon by him on this point. He has also relied on an unreported decision of an Hon''ble Single Judge of this Court in the case of Sri Sayan Ghosh and Anr. v. Regional Provident Fund Commissioner, West Bengal and Ors. judgment delivered on 19th June 1998 in W.P. No. 1095 of 1985 for the proposition that proceeding for arrest as a mode of recovery of Provident Fund dues is permissible even without exhausting other modes. On the obligation of Directors of a Company for the provident fund dues of the latter he has cited two authorities, being an unreported judgment of this Court in W.P. No. 1642(W) of 2000 delivered by an Hon''ble Single Judge on 21st December 2000, and another decision of this Court in the case of Albert Judah Judah Vs. Rampada Gupta and Another, .

14. The question as to whether provisions of recovery contemplated in Section 8B to 8F of the Act can apply to an exempted establishment or not, so far as the present writ petitions are concerned would arise only if it is established that the petitioner comes within the ambit of the expression "employer" within the meaning of Section 2(e) of the Act. Learned Advocates for the petitioner has emphasised that the petitioner is not the employer. In the event the petitioner does not come within the definition of employer within the meaning of Section 2(e) of the Act, then it would not be necessary to examine as to whether the proceeding against the petitioner could be maintainable, as the company was an exempted establishment. The provisions of Section 2(e) of the 1952 Act is reproduced below:

(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, where 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;

The petitioner?s case on this point is that he was neither the owner, nor the occupier. It is submitted that in the present case, the establishment being a factory, the "employer" thereof would be the manager, and no case has been made out that the petitioner has been the manager of the factory.

15. On this issue, the provident fund authorities have contended that whether a person is an employer or not is a factual issue, which cannot be adjudicated upon by the Writ Court.

1. 16. Under the scheme of the 1952 Act, dues of an employer under the provision of the Act, the scheme, or the pension scheme or insurance scheme are required to be quantified first in terms of Section 7A of the Act. Persons aggrieved by such quantification may apply for review of the order quantifying the dues or prefer an appeal against such order under the provisions of Section 7B and 7I of the Act respectively. Prior to the exercise of quantification of dues, the normal practise appears to be issuance of notice upon the employer or the establishment, as the case may be. In the present case, the claim of the petitioner is that at the material time he was not the "employer". No order u/s 7A of the Act has been produced before me in course of this proceeding. There is no other material to suggest that before the issuance of the certificate, any notice was issued upon the petitioner. Thus, before getting an opportunity of denying his liability, the petitioner has been exposed to an attachment proceeding. After issuance of a notice u/s 8C of the Act, there is no scope of contesting the liability specified in the notice, and the person against whom such notice issued becomes a certificate debtor. The procedure for quantifying dues of an employer under the provisions of Section 7A of the Act, where an employer is given an opportunity of hearing incorporates the in-built provision for compliance with the principle of natural justice of providing prior

2. opportunity of hearing. But because of the peculiar circumstances of the present case, the petitioner, it appears, was deprived of such opportunity.

16. The writ petitioner has raised the point that he is not an employer in the present case, and the respondents? contention is that the Writ Court ought not to adjudicate such question, as this is a factual issue. But who would decide this question? Under the Act, at the present stage of the proceeding, there is no possibility of adjudication of this question before any statutory fora. In the absence of adjudication of this question, in my opinion it would be premature to enter into the question as to whether an employer of an exempted establishment can be subjected to a recovery proceeding on the allegation of failure on the part of the employer of such establishment to transfer any sum of money to the trust fund.

17. Argument was advanced that during pendency of proceeding before the BIFR, under the provisions of Section 22 of the 1985 Act, till the proceeding was adjudicated upon, the petitioner could not be proceeded against for recovery of provident fund dues of the establishment. In the affidavit-in-opposition a point

has been taken that the amended provision in the 1952 Act was subsequent to the enactment of the 1985 Act and this being a special act, this statute ought to prevail. In the vacating application a specific case has been made out that the BIFR case concerning Bowreah Cotton Mills Ltd. has been disposed of. This averment, i.e. disposal of the case by the BIFR has not been specifically denied.

18. In addition, Mr. Prasad has relied on a decision of the Hon''ble Supreme Court of Bombay in the case of Palliwolf v. Regional Provident Fund Commissioner in Writ Petition No. 1688 of 2000 in which it was held that the provisions 22 of the 1985 Act would not immunise an establishment from a proceeding of recovery of dues from the establishment or its directors if they are liable. The case of Rabindra Chamaria (supra) is also on a similar point. However, in this decision, protection of a company under the 1985 Act was not in issue. The decision in that case was delivered on the applicability of Section 633 of the Companies Act, 1956 in relation to proceeding initiated u/s 14A of the 1952 Act. But the question as to whether recovery proceeding lies against a sick industrial company has largely become academic now, as the company no more enjoys the protective cover of the 1985 Act, whatever be the scope of such protection. The establishment and the employer are liable now to meet the provident fund dues under ordinary circumstances.

19. Under these circumstances, I am satisfied that the petitioner ought to have been given an opportunity of hearing before issuance of the certificates against him. Such certificates have been issued treating him as an employer, and his contention is that he is not an employer. Accordingly, I direct the respondent authorities to determine the question as to whether the petitioner is an employer or not, upon giving him an opportunity of hearing. Adjudication on this point shall be made within a period of six weeks from date. The certificates impugned in W.P. 3068 1993 as well as in W.P. 1910 of 2002 shall not be given effect to during this period. Thereafter, in the event the authorities conclude, upon considering the materials available and the submissions of the petitioner that he is an employer, then these certificates shall revive, and it would be open to the authorities to proceed in accordance with law in pursuance of these certificates. If the finding of the provident fund authorities is that the petitioner is not an employer, then these certificates shall remain permanently stayed. In course of such hearing, the petitioner shall also be entitled to raise the issue as to whether the employer of an exempted establishment can be subjected to recovery proceeding under the 1952 Act, in the event it is established that the petitioner is an employer. Since the question as to whether provisions of Section 8C of the Act can be applied to an exempted establishment or not is not being adjudicated in this writ petition, I do not consider it necessary to consider the different authorities cited by the learned Advocates appearing for the respective parties on this point.

20. So far as the prayers made in W.P. 1910 of 2002 for quashing of the show-cause notices impugned therein are concerned, these notices have their root in

the certificates issued against the petitioner. Their survival would depend on the determination of the question as to whether the petitioner is an employer or not. Thus, no effect to the show cause notices shall be given until there is determination of this question. If the finding of the authorities is that the petitioner is an employer, then the time to file reply to the impugned show cause notices shall stand extended by a period of two weeks from the date the decision of the provident fund authorities determining the petitioner?s status as an employer is communicated to the petitioner, and thereafter the authorities shall be at liberty to take a decision in accordance with law, upon giving the petitioner an opportunity of hearing. If the finding of the authorities is that the petitioner is not an employer, and cannot be subjected to the recovery proceeding, then the notices to show cause which are under challenge in W.P. 1910 of 2002 shall also stand quashed.

21. Till the status of the petitioner as an employer is determined and if it is found that he can be subjected to the recovery proceeding, the certificates impugned in these two writ petitions shall not be given effect to, but the petitioner shall not be entitled to transfer, alienate or create third party rights in respect of any of his immovable property or other assets except in the usual course of business, without obtaining permission in writing from the Regional Provident Fund Commissioner, Howrah. If such permission is sought for, then the provident fund authorities shall grant such permission upon being satisfied that the petitioner retains, after such transfer, assets to discharge the demand raised against him under the impugned certificates. In my opinion, preservation of such assets is necessary as the dues, as alleged, is of substantial sum and involve the interest of a large number of workmen and their families. Moreover, significant part of the dues appear to have accrued during the time the petitioner was the managing director of the company.

22. I shall now address the issue raised by Mr. Majumdar, who appearing for the employees union, alleged inexplicable inertia on the part of the provident fund authorities in proceeding against the establishment directly. The first writ petition is pending for a period of approximately fifteen years, but the authorities seem to have taken no step at all for recovery of the amount involved by proceeding against the establishment directly. I am of the opinion that the authorities should explore the possibility of realisation or recovery of the dues from the assets of the establishment directly, simultaneous with the proceeding against the petitioner.

23. With these directions, both these writ petitions as well as the connected application shall stand disposed of. The interim orders passed in these two writ petitions shall also stand dissolved.

24. There shall, however, be no order as to costs.

25. Urgent certified Photostat copy of this order be supplied to the parties, if applied for, on compliance of usual formalities.

Later:

Let a Photostat signed copy of the operative part of the order be made available to the parties on usual undertaking.

