(2010) 03 MAD CK 0101

In the Madras High Court

Case No : Writ Petition (MD) . No. 2426 of 2010 and M.P. No. 1 of 2010

M. Mohammed Ali Jinnah APPELLANT

Vs

The Assistant Provident Fund Commissioner and The Recovery Officer, Employees Provident Fund Organization RESPONDENT

Date of Decision : 01-03-2010

Acts Referred:
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 17B, 7A, 7B

Citation : (2010) 3 LLJ 765

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : B. Saravanan, for the Appellant; G.R. Swaminathan, for the Respondent

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—Heard the learned Counsel appearing for the petitioner and the learned Counsel, who has taken notice on behalf of the

respondents and made his submissions on instructions.

2. The Writ Petition is directed against the impugned summon notice issued by the first respondent dated 01.01.2010 u/s 7A of the Employees

Provident Funds and Miscellaneous Provisions Act, 1952, [hereinafter referred to as ""the Act""], by which the petitioner was directed to appear for

an enquiry and also ordered for attachment, i.e., in respect of the earlier order passed by the organization dated 27.04.2009 by which the arrears

of a sum of Rs. 5,56,139/- towards employers'' contribution was directed to be paid by the petitioner under the Act.

3. The grievance of the petitioner is that he has purchased a Cinema Theatre by name M/s. Eena Theatre from the previous owners by name K.M.

Gula Mohaideen and M.M. Khadar Bava and after his purchase, whatever the amount dues by way of contribution, the same has been duly paid

by him, whereas, his vendors of the petitioner have not paid their contribution to the earlier period. It was in respect of the earlier period of

contribution, the order was passed by the organization on 27.04.2009 directing the petitioner as well as the other vendors of the petitioner to pay

jointly and severally a sum of Rs. 5,56,139/-.

4. It is the case of the petitioner that without giving an opportunity and without issuing any notice to the petitioner, the order impugned came to be

passed and it was an ex-parte order, since the petitioner was not able to appear before the authority due to various reasons. It is the further case

of the petitioner that immediately after the said order was received, within the time limit prescribed under the Act, the petitioner has filed an

application on 23.07.2009 to set aside the ex-parte order and the same is pending. In the meantime, on 18.09.2009, the petitioner has also filed an

application for review against the Order dated 27.04.2009 u/s 7B of the Act and the same is also stated to be pending. While the review

application as well as the application to set aside the ex-parte order are pending, the impugned summon notice came to be issued, which,

according to the learned Counsel for the petitioner, is improper.

5. On the other hand, the learned Counsel appearing for the respondents submits that once the property is purchased by the petitioner from the

previous owner, he is liable to pay contribution. He would also bring to the notice of the Court Section 17-B of the Act, which reads 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 license 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 upto the date of such transfer.

6. The learned Counsel appearing for the respondents has relied on a Judgment of a Full Bench of the Calcutta High Court in Dalgaon Agro

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Industries Ltd. (Now known as Tasati Tea Ltd.) Vs. Union of India (UOI) and Others, , wherein, in paragraph 57, while construing the said

provision, it has been held as follows:

57. Therefore, we answer the questions raised by Mr. Sengupta as follows:

(1) that on transfer, whether voluntary or involuntary under a sanctioned scheme framed by the Court, the statutory liabilities remain unaffected; (2)

Section 17-B creates a fiction making the other person, the transferee jointly and severally liable even in respect of other sum due prior to the

period of transfer; (3) the expression ""contribution"" and ""other sum due"" under any provision of the Act etc., employed in Section 17-B includes

damages for default contemplated u/s 14B being other sum due u/s 17-B of the Provisions of the 1952 Act; (4) the limitation of the liability in the

proviso to Section 17-B to the extent of the assets received by the other person, the transferee on transfer is a limitation with regard to the liability

of the transferee and it does not indicate the exception to the liability of the transferee for pre-transfer dues becoming the joint and several liability

of the transferor and transferee; (5) the liability is that of the establishment irrespective of who the owners from time to time may be; (6) in case of

transfer that the transferee would be liable to the extent of the assets received on transfer by him and by reason thereof he cannot be proceeded

against for the balance if any, against his personal assets when it would be the exclusive liability of the past employer, who can be proceeded

against for recovery of the balance as regards the assets of the transferor; (7) the transferee can very well be asked to explain a pre-transfer default

in relation to the scope of Section 14-B which is confined only to the determination of the default and the period during which the default

continued; (8) Save and except the same nothing requires to be explained [Hindustan Times (Supra)] and as such, the proviso would not be futile

for the transferee who can explain the same from the records of the establishment supposed to be available with him; (9) in case it is not available,

in that event even without the transferee, the employer would not have been able to explain and in such eventuality the principles laid down in the

decision in Organo Chemicals (supra) would apply; (10) the damages imposed u/s 14-B is imposed on the transferor even then it would be a sum

due recoverable from the establishment and can be recovered from the assets of

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the establishment at the hands of the transferee though not against

the assets of the transferee or in other words no recovery could be effected in respect of the pre-transfer liability from any asset other than those of

the establishment received on transfer and the liability of the transferee is limited only to that extent and not beyond.

7. I have considered the above submissions and perused the material documents available on record.

8. A close reading of the above provision would make it manifestly clear that the purchaser of an establishment will be jointly and severally liable to

pay the contribution. Therefore, it is not correct on the part of the learned Counsel for the petitioner to say that the vendors of the petitioner alone

are liable to pay the contribution and the respondents cannot proceed against the petitioner.

9. It is true that by exercising powers conferred under the Act, the petitioner has filed an application seeking to set aside the ex-parte order within

the time stipulated under the Act and also an application for review against the Order dated 27.04.2009. Therefore, when such applications are

pending, it may not be proper on the part of the respondents in issuing the impugned summon notice in a hurried manner.

10. Considering the contentions raised by both parties, I am of the considered view that the respondents should be directed to take up the

application filed by the petitioner seeking to set aside the ex-parte order as well as the Review Application filed against the Order dated

27.04.2009 to decide the matter on merits subject to certain conditions.

11. In such view of the matter, the Writ Petition is allowed in the following terms;-

The impugned summons issued by the respondents are directed to be deferred on condition that the petitioner shall deposit a sum of Rs.

1,00,000/- [Rupees One Lakh) with the respondents within a period of four weeks from the date of receipt of a copy of this order.

On such deposit being made by the petitioner, the first respondent shall pass appropriate orders on the application filed by the petitioner seeking to

set aside the ex-parte order as well as the application filed by the petitioner u/s 7-B of the Act for review against the Order dated 27.04.2009, on

merits and in accordance with law, after affording sufficient opportunity to the petitioner.

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It is made clear that if the petitioner fails to comply with the above conditions, it will be open to the respondents to proceed with the impugned

summon notice.

No costs. Consequently, connected Miscellaneous Petition is closed.

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