(2011) 06 KAR CK 0091

In the Karnataka High Court

Case No : Writ Petition No. 3174 of 2010 (L-PF)

Mr. R. Vijayendra Babu Gowda — APPELLANT

Vs

K. Narayana Regional Provident Fund Commissioner II Employees'' Provident Fund Organisation Sub Regional Office, "Bhavishya Nidhi Bhavan", 2nd Stage, Gayathripuram, Mysore - 570 019 and Assistant Provident Fund Commissioner Recovery Officer, Employees'' Provident Fund Organisation, Sub Regional Office, Bhavishya Nidhi Bhavan", 2nd Stage, Gayathripuram, Mysore-570 019 — RESPONDENT

Date of Decision : 08-06-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 7 A, 8 (B), 8 (G)
Income Tax Rules, 1962 — Rule 73

Citation : (2011) 131 FLR 910 : (2011) 4 KCCR 381 SN

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : Lomesh Kiran. M, for M/s. Indus Law, for the Appellant; G. Mallikarjunappa, for the Respondent

Judgement

1. Petitioner aggrieved by the order Annexure-''F'' of the 2nd Respondent-Assistant PF Commissioner and Recovery Officer directing issue of warrant of arrest and commit the Petitioner to civil prison, has presented this petition.

2. Petition is opposed by filing statement of objections dated: nil of the 2nd Respondent, inter alia contending that M/s. Spectra Lamps Pvt. Ltd., covered under the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (for short ''the Act'') committed default in remitting provident fund contribution, following which an order u/s 7(A) of the Act was passed, determining non-remittance of Rs. 15,34,123/- towards contributions for the period 09/1998 to 02/2006. Failure to comply with the said order, led to issue of recovery certificates bearing Nos. 119, 06, 55 and 30 dated 16.01.2002, 20.05.2002,

10.01.2005 and 08.04.2008, respectively, u/s 8 of the Act. Recovery Officer/ Respondent on receipt of the certificates, initiated proceedings to recover the said sums by arrest of the employer, being one amongst several modes prescribed in Sections 8(B) to 8(G) of the Act, by issuing a show cause notice dated 27.11.2009 whence, the Petitioner appeared before the recovery Officer on 18.01.2010 and filed objection statement contending that he had resigned from the post of director of the said company and one Sri. Hemanth Kumar, the transferee of the Company together with assets and liabilities, with effect from 05.03.2007 was responsible and liable to pay the sums determined in the certificates. The objection being without merit was rejected and justifiably the order impugned was passed.

3. Learned Counsel for the Petitioner contends that though arrest and detention is one of the modes for recovery of the amount, nevertheless. Act also provides for other modes of recovery by way of sale of assets of the Company and that the mode of arrest and detention in civil prison ought to be the last resort and even if deployed, should be in compliance with Rule 73 in part V of Schedule II to the Income Tax Act, 1961. Learned Counsel places reliance upon the decision of a learned single judge of the High Court of Bombay in Kanaiyalal Prabhudas Maru and Ors. v. Regional Provident Fund Commissioner, Maharashtra and Goa and Ors. 2002 1 LLJ 297 Lastly Learned Counsel contends that the assets of the Company M/s. Spectra Lamps Pvt. Ltd., is valued at more than Rs. 4.00 crores and the amounts determined as contribution is recoverable by enforcing the mode of sale of the said assets. No other grounds are urged.

4. Learned Counsel for the Respondents seeks to sustain the order Annexure-''F'' as being well merited, fully justified and not calling for interference. According to the Learned Counsel, Section 8(B) of the Act provides for issue of certificate to the recovery officer while arrest of the employer and detention in civil prison is one among other modes such as ''attachment and sale of the movable and immovable property of the establishment'', or ''appointing a receiver for the management of the movable or immovable properties of the establishment''. Pointing out to Section 8(F) it is contended provides for other modes of recovery by the Central Provident Fund Commissioner or any other officer authorised by the Central Board. Learned Counsel further contends that arrest and detention of the Petitioner in civil prison is pursuant to exercise of jurisdiction under Rule 73 of Part V to schedule II to the Income Tax Act, 1961 since Section 8(G) of the Act specifically provides for its application in the matter of recovery of monies.

5. Having heard the Learned Counsel for the parties and examined the order Annexure-''F'', indisputably Petitioner asserts that having tendered resignation to the post of director of M/s. Spectra Lamps Pvt. Ltd. is not liable to answer the recovery of the unpaid contributions. It is not in dispute that the Company is incorporated under the Companies Act, 1956 and continues in the register maintained by the Registrar of Companies and the registrar of Companies had not issued an acknowledgement for having received Form No. 32 under the

Companies Act over alleged Petitioner''s resignation to the post of director. Undoubtedly, there is no material to establish that the assets of M/s. Spectra Lamps Pvt. Ltd., were conveyed to one Hemanth Kumar on 14.02.2008 under a memorandum of Understanding dated 05.03.2007 and that the purchaser had agreed to discharge the liabilities. It is also not in dispute that Rs. 15,34,123/- is not remitted by M/s. Spectra Lamps Pvt. Ltd., for the period 09/1998 to 02/2006 whence the Petitioner was its director. So also the Petitioner cannot claim ignorance of the recovery certificates dated 16.01.2002, 20.05.2002, 10.01.2005 and 08.04.2008. In the factual matrix, the Petitioner''s contention that he was not liable to pay since all the assets of the company were in the custody of the transferee Hemanth Kumar, was justifiably rejected by the recovery officer.

6. The question for decision making is:

Whether in the facts and circumstances, the 2nd Respondent was justified in issuing the warrant of arrest and detention of the Petitioner in civil prison, by the order impugned?

7. Power to arrest a person is a drastic power vested with the recovery Officer under the Act by recourse to Rule 73 of schedule II to the Income Tax Act, 1961 as enabled by Section 8(G) of the Act. It is needless to state that the power of arrest is required to be strictly in accordance with law as it affects personal liberty enshrined under Article 21 of the Constitution as held by the Apex Court in Jolly George Varghese and Another Vs. The Bank of Cochin, . There can be no dispute that Sections 8(B) to 8(G) provide for methods of recovery of the contribution determined u/s 74 of the Act. Section 8(B) empowers the recovery officer, on the issue of a certificate to deploy one or more of the modes prescribed under Rule 73 of Part V to Schedule II to the Income Tax Act, 1961 (for short ''Rules'') which reads thus:

73. (1) No order for the arrest and detention in civil prison of a defaulter shall be made unless the Tax Recovery Officer has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause whey he should not be committed to the civil prison, and unless the Tax Recovery Officer, for reasons recorded in writing, is satisfied-

a. that the defaulter, with the object or effect of obstructing the execution of the certificate, has, after (the drawing up of the certificate by the Tax Recovery Officer) dishonestly transferred, concealed, or removed any part of his property, or

b. that the defaulter has, or has had since (the drawing up of the certificate by the Tax Recovery Officer) the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

(2) Notwithstanding anything contained in Sub-rule (1), a warrant for the arrest of the defaulter may be issued by the Tax Recovery Officer if the Tax Recovery Officer is satisfied, by affidavit or otherwise, that with the object or effect of

delaying the execution of the certificate, the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Tax Recovery Officer.

(3) Where appearance is not made in obedience to a notice issued and served under Sub-rule (1), the Tax Recovery Officer may issue a warrant for the arrest of the defaulter.

8. A bare reading of the aforesaid Rule makes it abundantly clear that the exercise of power of arrest must strictly comply with the mandate by issue and service of a notice on the defaulter to appear before the Tax recovery Officer and show cause as to why he should not be committed to civil prison. The Recovery officer may order the arrest and detention in civil prison, the defaulter, by recording reasons and on being satisfied:

(a) the defaulter with the object of obstructing the execution of the certificate dishonestly transferred, concealed or removed or any part of his property or

(b) the defaulter has or has had since drawing up of the certificate, means to pay the arrears or some substantial part thereof and refuses or neglects to pay the same. The non abstante clause in Sub-Rule 2 mandates the Recovery Officer to be satisfied by affidavit or otherwise, that with the object of delaying the execution of the certificate the defaulter is likely to abscond or leave the local limits of the jurisdiction of the recovery officer then and then alone by recording reasons in writing an order of arrest and detention in civil prison of the defaulter is permissible.

9. Having regard to the factual matrix and an examination of Annexure-F order impugned, it is needless to state that the order suffers from an error apparent on the face of the record for non compliance with Rule 73. The order does not animate reasons over satisfaction of the recovery officer as required by Clause (a) and (b) of Sub-Rule 1 of Rule 73 of Rules. Recording of reasons over satisfaction of the recovery officer is a condition precedent to exercise the power of arrest. More over the Recovery Officer''s satisfaction by affidavit or otherwise with the object or effect of delaying the execution of the certificate the Petitioner is likely to abscond or leave the local limits of the jurisdiction of the officer is not forthcoming from the order. Thus there is non compliance of Sub Rule (2) of Rule 73 of the Rules.

10. In my considered opinion absence of reasons in Annexure-F vitiates the exercise of power of arrest, calling for interference in exercise of extraordinary writ jurisdiction under Article 226 and 227 of the Constitution of India.

11. The question supra is answered in the negative. In other words, the 2nd Respondent was not justified in directing issue of warrant of arrest and detention of the Petitioner in civil prison. Identical is the view of the HighCourt of Bombay in Kanaiyalal Prabhudas Maru''s case supra.

12. Although Learned Counsel for the Petitioner submits that since the proceeding is to be remanded for consideration of the contention that the

Respondent could recover the amounts under the certificates by attachment and sale of assets of the Company, so also the Respondent be directed to consider the contention that the Petitioner not being a director and the assets sold to Hemanth Kumar, the same be recovered from the said person, I am afraid the second part of the contention is unacceptable. I say so because Petitioner having admittedly failed to place relevant material constituting substantial evidence of the fact of resignation from directorship and the sale of the assets of the Company, following which it is held that the explanation offered by the Petitioner was justifiably rejected by the Respondent, Petitioner cannot be permitted to have a second bite at the cherry.

13. Learned Counsel for the parties submits that 25% of Rs. 15,34,123/- is in deposit and this is not so since the order dated 2.11.2010 in W.A. 463/2010 discloses that the amount deposited is directed to be transmitted to the Respondents as per account number furnished, subject to the result in the writ petition.

In the result, writ petition is allowed in part. The order dated 18.01.2010 Annexure-''F" of the 2nd Respondent is quashed and the proceeding remitted for consideration afresh in the light of the observations supra and to pass orders strictly in accordance with law.

