
(2001) 10 MP CK 0003
In the Madhya Pradesh High Court
Case No : Writ Petition No. 822 of 2001 (I)

M/s Ferro Concrete Construction (India) Ltd.	APPELLANT
Vs	
Regional Provident Fund Commissioner, M.P. and Others	RESPONDENT

Date of Decision : 03-10-2001

Acts Referred:

Income Tax Act, 1961 — Section 226(3)

Citation : (2002) 1 MPJR 221

Hon'ble Judges : A.M. Sapre, J

Bench : Single Bench

Advocate : Anand Pathak, for the Appellant; S.C. Bagadia with Mr. D.K. Chhabra, for the Respondent

Final Decision : Allowed

Judgement

A.M. Sapre, J.

By filing this writ, the petitioner has challenged the order Dated 23.11.2000 (Annexure P/4) and other consequential orders such as order dated 1.12.2000 (Annexure P/5) and order dated 11.04.2001 [Annexure P/9(c)]. All these orders which are impugned in this writ are passed by Recovery Officer u/s 8(F)(3) of Employees Provident Funds and Miscellaneous Provisions Act, 1952. In order to appreciate the issue involved in the writ, few facts need mention.

Respondent No. 3 is a limited company engaged in manufacture of Cloth business. It is a factory as defined u/s 2(g) of Employees Provident Funds And Miscellaneous Act, 1952 (for brevity hereinafter referred to as "The Act") and hence, subjected to payment of contribution payable In respect of a Member (employee) under a Scheme framed under the Act as per the provisions of the Act at all relevant time.

It appears that respondent No. 3 failed to contribute the contribution payable under the Act and thus, became a defaulter for different period such as 3/84 to 5/90, 2/91 to 2/94, 2/93 to 11/94, 12/94 to 1/95, totalling an amount of Rs.

2,63,933/-. Despite notice of demand sent to respondent No. 3 from time to time by the recovery officer under the Act, the respondent No. 3 did not pay the dues and continued to remain a defaulter.

It further appears that Recovery Officer came to know that respondent No. 3 has to recover some money from the petitioner. In other words, the Recovery Officer came in possession of certain information by which, he could gather that petitioner has to pay some amount to the respondent No. 3. It is on this basis, the Recovery Officer invoking his powers u/s 8-F of the Act issued an order dated 23.11.2000 (Annexure P/4) against the petitioner. In this order, described as Prohibitory order, it was mentioned that petitioner who is required to pay rent to the respondent No. 3 and which is now due from December, 2000 onwards, the same shall not be paid to any person except to recovery officer. This was followed by one letter dated 1.12.2000 (Annexure P/5) from the Recovery Officer to petitioner saying that respondent No. 3 has informed to Recovery Officer by their letter dated 22.11.2000 that monthly rent of Rs. 30,000/- is receivable by the respondent No. 3 from the petitioner of one accommodation and hence, on the strength of the said letter, the petitioner was asked to remit the entire monthly rent to Recovery Officer for realization of dues on the respondent No. 3 amounting to Rs. 2,63,933/-, Rs. 62,039/- and Rs. 8,277/- together with 5% cost till they are fully adjusted. This was then followed by summons dated 30.03.2001 (Annexure P/7) from the office of Recovery Officer to the petitioner asking them to attend the office of Recovery Officer on 11.4.2001. The petitioner was requested to file any documents in support of their case. The petitioner on receipt, by their letter dated 11.04.2001 (Annexure P/8) sought certain clarification such as the details of claim, its nature, Its basis etc. to enable them to file some reply if necessary and defend the proceedings. It appears that Recovery Officer did not reply to petitioner's aforesaid letter but took up the case on 11.4.2001 and observed that since petitioner has not appeared before him pursuant to summons issued, and hence, the impugned order is being passed. It was then held that the representative of respondent No. 3 has appeared and has stated that petitioner has to pay Rs. 30,000/-monthly rent to respondent No. 3 and in its support has filed one award. It is on this basis the Recovery Officer directed the petitioner to pay a sum of Rs. 90,000/- towards the demand in question raised on the respondent No. 3. It is against these orders the petitioner has filed this writ.

The respondents have defended the impugned orders.

Heard Shri Anand Pathak, 1/c for petitioner, Shri Sanjay Sharma, 1/c for resp. No. 1 & 2 and Shri SC Bagadia, 1/ sr. counsel with Shri D.K. Chhabra for respondent No. 3.

Having heard the learned counsel for the parties and having perused the record of the case, I am inclined to allow the writ and quash the impugned proceedings and remand the case for its decision in accordance with law.

The controversy involved in this writ centres round to Section 8F(1)(3) of the Act which reads as under -

8-F(1) -Notwithstanding the issue of a certificate to the Recovery Officer u/s 8-B, the Central Provident Fund Commissioner or any other officer authorised by the Central Board may recover the amount by any one or more of the modes provided in this section.

(3)(i) The Central Provident Fund Commissioner or any other officer authorised by the Central Board in this behalf may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the employer or, as the case may be, the establishment or any person who holds or may subsequently hold money for or on account of the employer or as the case may be, the establishment, to pay to the Central Provident Fund Commissioner either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due from the employer in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the employer jointly with any other person and for the purposes of this sub-section, the shares of the joint-holders in such account shall be presumed, until the contrary is proved, to be equal.

(iii) A copy of the notice shall be forwarded to the employer at his last address known to the Central Provident Fund Commissioner or, as the case may be, the officer so authorised and in the case of a joint account to all the joint-holders at their last addresses known to the Central Provident Fund Commissioner or the officer so authorised.

(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, bank or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made notwithstanding any rule, practice or requirement to the contrary.

(v) Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.

(vi) Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the employer or that he does not hold any money for or on account of the employer, then, nothing contained in this sub-section shall be deemed to require

such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Central Provident Fund Commissioner or the officer so authorised to the extent of his own liability to the employer on the date of the notice, or to the extent of the employer's liability for any sum due under this Act, whichever is less.

(vii) The Central Provident Fund Commissioner or the officer so authorised may, at any time or from time to time, amend or revoke any notice issued under this sub-section or extend the time for making any payment in pursuance of such notice.

(viii) The Central Provident Fund Commissioner or the officer so authorised shall grant a receipt for any amount paid in compliance with a notice issued under this sub-section, and the person so paying shall be fully discharged from his liability to the employer to the extent of the amount so paid.

(ix) Any person discharging any liability to the employer after the receipt of a notice under this sub-section shall be personally liable to the Central Provident Fund Commissioner or the officer so authorised to the extent of his own liability to the employer so discharged or to the extent of the employer's liability for any sum due under this Act, whichever is less.

(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Central Provident Fund Commissioner or the officer so authorised he shall be deemed to be an employer in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear due from him, in the manner provided in sections 8-B to 8-E and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers u/s 8-B.

This Section was introduced in the Act in the year 1988 by amending Act of 33/88 alongwith other Sections such as Section 8-A, 8-B, 8-C, 8-D, 8-E and 8-G. Section 8-F empowers the Recovery Officer to recover the dues payable by the employer under the Act by other modes. It may be relevant to mention that Section 8-F(3) which consists of ten sub-sections (i) to (x) is a counter part of Section 226(3) of Income Tax Act, In other words, one can easily conclude after careful reading of these two Sections i.e. Section 8(F)(3) of the Act and Section 226(3) of the Income Tax Act that both are identically worded and are enacted for one object. It is as if, Section 226(3) of Income Tax Act which also consists of ten sub sections (f) to (x) is bodily lifted and inserted in the Act as Section 8(F)(3) (i) to (x). In view of this legal position emerging from reading of these two sections, interpretation of Section 226(3) of Income Tax Act made by Supreme Court explaining its scope and ambit will equally apply to cases falling in Section 8(F)(3) of the Act. In other words, any interpretation made by Supreme Court of Section 226(3) *ibid* will equally govern the cases falling in Section 8(F)(3) and it

will have its equal application.

As observed supra, the object of these two sections namely Section 8(F)(3) of the Act and Section 226(3) of the Income Tax Act being common, both Sections are enacted to empower the authorities to recover the arrears of contribution/tax payable by the employer/assessee from any person other than the defaulter on fulfilment of certain conditions mentioned in the Section. In other words, if the authorities come to know that some person has to pay certain sum to the defaulter i.e. (employer/assessee) by virtue of some contract or if any sum is found due or may become due, then in such eventuality, the authorities after following the procedure so prescribed in the section directly recover the said money from the concerning person and may equally restrain him from paying the said money to defaulter. Any recovery so made under these sections is adjusted towards the arrears outstanding against the defaulter. These Sections also provides for certain adverse consequences against the person in case if he makes a false statement relating to payment of any money to defaulter.

The scope and ambit of Section 226(3) of the Act came up for consideration before their Lordships of Supreme Court in the case of Biharilal Ramcharan vs. ITO reported in 1984 (131) ITR. 129, 136 (SC). Their Lordships explaining the true scope of Section 226(3) ibid had ruled as a guiding principle to the recovery authorities while exercising their powers under said Section.

In substance, the ratio of the Supreme Court decision rendered in the case of Biharilal supra, is that it is mandatory on the part of the Recovery Officer before passing any order under these two sections to hold an inquiry after giving due opportunity to the person concern, allow him to state on oath whether he has to pay any amount to the defaulter and if so under what head, against which transaction or whether he holds any money on account of defaulter and if so how much, whether any money Is due or not and If so, its extent? It is only after the person concern files and makes a statement on oath on any of the facts referred supra, then depending upon the statement so made, the Recovery Officer will proceed to pass an order in other words, holding of an inquiry into the requirement of section 8(F)(3)(vi) is mandatory and any deviation from the compliance will result in vitiating the order.

The aforesaid principle equally applies to cases falling in Section 8(F)(3) of the Act and hence, Recovery Officer while exercising the powers u/s 8(F)(3), has to follow the aforesaid principle enunciated by the Supreme Court in the case of Biharilal.

Coming to the facts of case, I find that Recovery Officer (respondent No. 2) while initiating and eventually passing the order dated 11.04.2001 (Annexure P/9) did not even care to read Section 8(F)(3)(vi) what to say recorded a finding as contemplated therein. Indeed, while proceeding to pass an impugned order, he committed an error of law in proceeding exparte against the petitioner. The recovery officer neither properly apprised the petitioner of the facts on which he

was proposing to proceed against the petitioner, nor he allowed the petitioner to comply the requirement of Section 8(F)(3)(vi) *ibid*. In substance, the whole proceedings are in total disregard to the provisions of Section 8(F)(3) *ibid* and hence, liable to be quashed.

When there is no compliance of the mandatory procedure contained in the Act, when there is no factual foundation to proceed, when the authority do not extend adequate opportunity to the person concern to defend the proceedings in terms of requirement of Act, then such proceedings are not liable to be sustained and deserves to be quashed. They are accordingly quashed.

In view of the aforesaid discussion, the petition succeeds and is allowed. Impugned proceedings i.e. order dated 23.11.2000 (Annexure P/4), order dated 1.12.2000 (Annexure P/5), summons dated 30.03.2001 (Annexure P/7) and order dated 11.04.2001 (Annexure P/9) are quashed by writ of certiorari. In case, if the respondent No. 2 wishes to proceed against the petitioner u/s 8(F)(3) of the Act, then in such an event, he has to proceed and follow the procedure prescribed under said Section and explained by the Supreme Court in the case of *Biharilal, supra* and then keeping in view of the guidelines pass orders.