

(2014) 03 AP CK 0044

In the Andhra Pradesh High Court

Case No : Writ Petition No. 29185 of 2011

M/s. Shri Maruthi Textiles Ltd.

APPELLANT

Vs

The Board for Industrial and Financial Reconstruction and
Others

RESPONDENT

Date of Decision : 25-03-2014

Acts Referred:

Companies Act, 1956 — Section 529, 529A, 530, 530(1)
Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 11,
11(1), 11(2), 14B, 15
Presidency Towns Insolvency Act, 1909 — Section 49
Provincial Insolvency Act, 1920 — Section 61
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 17, 18, 19

Citation : (2014) 5 ALD 415 : (2014) 4 ALT 105 : (2014) 143 FLR 209 : (2014)
3 LLN 49

Hon'ble Judges : P. Naveen Rao, J

Bench : Single Bench

Advocate : E. Manohar, Senior Counsel appearing for Sri P. Kamalakar, Advocate for the Appellant; Ponnam Ashok Gound, counsel for Respondent No. 1, Sri R.N. Reddy, counsel for Respondents 2 to 5 Government Pleader for Revenue for Respondent No. 5, Sri L.V. Veera Reddy, counsel for Respondent No. 6, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

P. Naveen Rao, J.—The petitioner company was governed by the provisions of Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for brevity hereinafter referred to as "Act, 1952"). The petitioner company did not pay its contribution to the Provident fund Account for a long time. By order dated 28-03-2007 property of petitioner to an extent of 12.31 acres was attached. In exercise of powers vested by Act, 1952, the competent authority determined arrears of contribution, levied interest and damages for the delay in making the contributions. The total amount of dues determined was Rs. 60,21,000/-. Since

petitioner company did not pay the amount quantified, after observing due formalities proclamation of sale order was issued on 14.09.2010 by the Recovery Officer on land to an extent of Ac.4.89 cents in Sy.Nos.162/2 (3.11 acres), 162/1 (Part 1.78 acres) at Chennai Road, Melapattu Group, Natham Revenue Village, Nagari Municipality, Chittoor District out of 12.31 acres attached. Accordingly, open auction was conducted, wherein sixth respondent stood as highest bidder at Rs. 64,50,000/- and the sale was confirmed in his favour. Sale certificate dated 22.11.2010 was issued to the 6th respondent. The sale certificate was registered by the fifth respondent on 05.09.2011. After the registration of sale certificate this writ petition was instituted.

2. Petitioner company went into losses, resulting in initiating proceedings by the Board for Industrial and Financial Reconstruction (BIFR). In case No. 95/95, the Board by Order dated 21.06.2000, opined that the sick industrial company was not likely to make its net worth exceed its accumulated losses within a reasonable time and not likely to become viable in the future and recommended that the company should be wound up in accordance with Section 20(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA").

3. Aggrieved by the orders passed by the BIFR, petitioner company preferred Appeal No. 172/2000. The appellate authority dismissed the appeal on 12.01.2001. The same was challenged in W.P.No.6086/2001, but was dismissed on 19.03.2009 for non-prosecution. So far no orders are passed winding up the petitioner company as per the recommendation of BIFR.

4. Heard learned senior counsel Sri E. Manohar, appearing for Sri P. Kamalakar, counsel for the petitioner and Sri Ponnamm Ashok Gound, counsel for respondent No. 1, Sri R.N. Reddy, counsel for respondents 2 to 4, Government Pleader for Stamps and Registration for respondent No. 5 and Sri L.J. Veera Reddy, counsel for respondent No. 6.

5. Learned senior counsel contended that as per the provision contained in Section 20(4) of the SICA, until winding up proceedings are passed by the High Court, only BIFR is competent to sell the assets of the sick industrial company and if sale is conducted, the sale proceeds can be distributed to the lenders and others in accordance with the provision of Section 529A and other provisions of the Companies Act, 1956 only after obtaining the orders of the High Court. The provisions of SICA shall prevail over any other provision on the same subject. He, therefore, contended that the action of the Employees Provident Fund Organization (EPFO) in conducting sale of the property of the petitioner company, which was already declared as sick industrial company by referring to section 11 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "Act, 1952") is ex facie illegal.

6. Learned senior counsel further contended that principle of estoppel is not attracted in this case. There is no estoppel against statute and in view of the

provision contained in Section 20(4) of SICA, the auction conducted by the respondent organization is ex facie illegal and void. Thus, merely because petitioner did not respond to the notices issued and amounts determined are statutory liability, doctrine of estoppel cannot be invoked to non-suit the petitioner.

7. In support of his contention, learned senior counsel placed reliance on the decision of Supreme Court in the case of NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and Another, .

8. It is the contention of the standing counsel for Provident Fund Organization that the Act, 1952 is a special enactment intended to safeguard the interests of employees working in a company and it is the primary responsibility of the organization to ensure payment of contributions by the employer. In order to ensure proper enforcement of the provisions, sufficient safeguards are provided in the Act and power vested in the organization for enforcement of its orders. In the said manner, section 8(f) of the Act empowers to resort to all modes to recover the amounts due to the organization. Learned standing counsel further contended that on 22.10.2010, petitioner was given one month time to clear the dues and was also informed that sale would not be confirmed, even though auction was conducted, if the petitioner paid the amount due to the organization. Since the petitioner did not respond to the notice dated 22.10.2010, on 22.11.2010 sale was confirmed in favour of the 6th respondent. Petitioner failed to respond to the notices and failed to take steps to pay the amounts due. SICA has no application to the facts of the case.

9. Learned standing counsel placed reliance on the decision of the Division Bench of this Court in the case of Sarvaraya Textiles Limited v. Commissioner, Employees' Provident Fund and others 2002-I-LLJ 611 and decision of Supreme Court in the case of Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner, .

10. Learned counsel Sri. L. J. Veera Reddy contended that the petitioner has not challenged any of the proceedings resulting in registration of the document and challenge is only to the registration of sale certificate. Hence, writ petition is not maintainable. Learned counsel placed reliance on Section 8(f) and Section 11(2) of the Act, 1952 in support of his contention that the ample power is vested in the EPF Organization to recover the arrears of amounts due towards Provident Fund contribution, damages and interest and in valid exercise of said power, the sale was conducted and the 6th respondent was a bona fide purchaser.

11. In support of his contention that sale was validly conducted, learned counsel placed reliance on the decision of Supreme Court in the case of Employees Provident Fund Commissioner Vs. O.L. of Esskay Pharmaceuticals Limited, .

12. The points that arise for determination are:

(A) Whether the sale of properties of petitioner company vitiated in view of

provision in Section 20(4) of SICA?

(B) To what relief?

13. To appreciate rival contentions, it is useful to extract the relevant statutory provisions:

(A) Sections 20(4), 22(1) and 32(1) of SICA read as under:

Section 20. Winding up of sick industrial company

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), the Board may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of section 529A, and other provisions of the Companies Act, 1956.

Section 22. Suspension of legal proceedings, contracts, etc.

(1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956, or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the appellate authority.

Section 32. Effect of the Act on other laws

(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.

(B) Sections 8(f) and 11(1) & (2) of Employee's Provident Funds Miscellaneous Provisions Act, 1952 read as under:

8F. Other modes of recovery

(1) Notwithstanding the issue of a certificate to the Recovery Officer u/s 8B, the Central Provident Fund Commissioner or any other officer authorized by the

Central Board may recover the amount by any one or more of the modes provided in this section.

Section 11. Priority of payment of contributions over other debts

(1) Where any employer is adjudicated in solvent or, being a company, an order for winding up is made, the amount due

(a) from the employer in relation to [an establishment] to which any [Scheme or the insurance Scheme] applies in respect of any contribution payable to the Fund [or, as the case may be, the Insurance Fund], damages recoverable u/s 14B, accumulations required to be transferred under sub-section (2) of section 15 or any charges payable by him under any other provision of this Act or of any provision of the [Scheme or the Insurance Scheme]; or

(b) from the employer in relation to an exempted [establishment] in respect of any contribution to the provident fund or any insurance fund] (in so far as it relates to exempted employees), under the rules of [the provident fund or any insurance fund] [any contribution payable by him towards the [Pension] Fund under sub-section (6) of section 17,] damages recoverable u/s 14B or any charges payable by him to the appropriate Government under any provision of this Act under any of the conditions specified u/s 17, shall where the liability therefor has accrued before the order of adjudication or winding up is made, be deemed to be included] among the debts which u/s 49 of the Presidency Towns Insolvency Act, 1909, or u/s 61 of the Provincial Insolvency Act, 1920, or under [section 530 of the Companies Act, 1956], are to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be. (2) Without prejudice to the provisions of sub-section (1), if any amount is due from an employer, [whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution], the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts.

14. Power is vested in the BIFR u/s 16 to cause enquiry to determine whether any industrial company has become a sick industrial company and incidental thereto. If in such enquiry it is established that a company has become a sick industrial company, in exercise of power vested by Sections 17 to 19, the BIFR can take all possible steps to revive the sick industrial company. If the BIFR fails in its effort to revive the sick industrial company, it is empowered to recommend to wind up the sick industrial company in exercise of power u/s 20(1). However, such company cannot be wound up unless winding up orders are passed. Section 20(4) deals with the interregnum period between the date of recommendation by BIFR to wind up a sick industrial company and the date of order of winding up. As per Section 20(4), the power to sell the assets of sick industrial company vests only in BIFR. However, BIFR has to obtain orders from concerned High

Court before utilizing the sale proceeds.

15. Section 22(1) deals with a situation when enquiry u/s 16 or scheme referred to in Section 17 is under preparation and prior to orders of BIFR recommending for winding up of the sick industrial company were passed. It seeks to freeze the assets and liabilities during the interregnum period.

16. Interpreting the provisions contained in Section 22(1) vis-?-vis the provisions of Act, 1952, this Court in Sarvaraya Textiles held that Section 22(1) has no application to EPF dues and Act, 1952 being a special enactment it shall prevail.

17. In Maharashtra State Cooperative Bank Limited, it is held that even the mortgaged properties can be sold in view of the provision contained in Section 11 of the Act, 1952.

18. In Employees Provident Fund Commissioner, the defaulting company was wound up. The company was in default towards EPF contributions. The EPF organization approached the official liquidator for payment of amount determined u/s 7(A) of EPF Act. Since there was no response, EPF filed company application for issuance of directions to the official liquidator to pay the amount payable by the employer under the EPF Act and the same was dismissed. The appeal filed by the EPF was also dismissed by the Division Bench, against which appeal was filed in Supreme Court. The stand taken was that the defaulting company was in arrears to several other companies/organizations and the amounts payable to the EPF was treated as on par with the other dues.

19. Considering the provisions of Section 11 of EPF Act and Section 529, 529A and 530 of the Companies Act, Supreme Court held that sums due to any employee from a provident fund, pension fund, gratuity fund or any other fund for the welfare of the employees maintained by the company are payable in priority to all other debts.

20. Thus, the dues payable by the petitioner to the EPF acquires first charge compared to any other dues.

21. In the instant case, EPF sold the properties of petitioner company after BIFR recommended for winding up the petitioner company.

22. In NGEF Ltd., after exhaustively considering the provisions of Companies Act and SICA, Supreme Court held as under:

49. It is difficult to accept the submission of the learned counsel appearing on behalf of the respondents that both the Company Court and BIFR exercise concurrent jurisdiction. If such a construction is upheld, there shall be chaos and confusion. A company declared to be sick in terms of the provisions of SICA, continues to be sick unless it is directed to be wound up. Till the company remains a sick company having regard to the provisions of sub-section (4) of Section 20, BIFR alone shall have jurisdiction as regards sale of its assets till an order of winding up is passed by a Company Court.

50. but there cannot be any doubt whatsoever that having regard to the phraseology used in Section 20 of SICA that BIFR is the authority proprio vigore which continues to remain as custodian of the assets of the company till a winding up order is passed by the High Court.

23. In *Raheja Universal Limited Vs. NRC Limited and Others*, , Supreme Court reviewed the entire case law on the subject and held,

From the above judgments of this Court, the unambiguous principle of law that emerges is that the provisions of SICA 1985 shall normally override the other laws except the laws which have been specifically excluded by the legislature u/s 32 of SICA 1985. SICA 1985 has been held to be a special statute vis-à-vis the other laws, most of which have been indicated above. In the present case, we are concerned with the provisions of TPA 1881.

24. EPFO is a statutory authority vested with powers to enforce provisions of Act, 1952 including mode of recovery of dues from erring employer. The EPFO exercised such powers to recover dues from petitioner-company. While doing so, it cannot be said that it was not acting bonafidely and that it was appraised that in view of provision in Section 20(4) of BIFR, it is not competent to sell the properties of petitioner company.

25. SICA is a special enactment dealing with sick industries. Section 20(4) of SICA is a special provision dealing with a situation where BIFR recommended sick industry for winding up, but yet to be wound up. It is but natural that the sick industry would be in default to clear its debts and liabilities. Properties of a sick industry can be sold only by BIFR. This provision is intended to protect the interest of all the lenders to the sick company. The Act, 1952 is also a special enactment dealing with Provident Funds of employees and it is a social welfare legislation. The welfare of the employees of the company is paramount. The EPFO is vested with wide amplitude of powers to enforce contributions from employer and to recover the dues payable by the employer. Section 11 of the Act, 1952 read with Section 530(1) of Companies Act, assign first priority to the amounts due under Act, 1952 from a company which is ordered to be wound up. The Act 1952 and SICA have overriding effect to the respective provisions. It is necessary to reconcile both the provisions. On harmonious reading of Section 20(4) of SICA, Section 11 of the Act, 1952 read with Section 530(1) of Companies Act, it is but imperative to assume that Section 11 of Act, 1952 read with Section 530(1) of Companies Act assign first charge to the dues to EPF but those provisions operate only after the company is wound up. These provisions also do not vest power in EPFO to recover the dues from the assets of a sick company directly. On the contrary. provision in Section 20(4) of SICA is explicit. BIFR alone is competent to sell the properties of a sick company pending winding up proceedings. Thus, EPFO ought to have approached BIFR to recover PF dues from the sick company. Such recovery can be only through the medium of BIFR. In the instant case, procedure envisaged in Section 20(4) of SICA was not followed.

26. The admitted position is EPF has assessed Rs. 60,21,000/- as arrears of amounts of contribution by the petitioner to the PF, the penal interest and damages thereon. Petitioner was given ample opportunity to repay the amounts due, but the petitioner did not respond to the opportunity afforded by the EPF. Even after conducting sale, petitioner was given one month time to clear the dues informing the petitioner that if the amounts are paid, the sale already conducted would be cancelled. Petitioner did not respond and having waited for the time granted to the petitioner, EPF had no other option, but to confirm the sale. Petitioner invoked jurisdiction of this Court only after the sale certificate was registered in favour of the buyer. Petitioner only disputed the quantum of amount of dues payable by him. Sixth respondent is a bona fide purchaser having participated in the open auction. One other important factor mitigating against the petitioner is, as stated by petitioner, even after thirteen years of the recommendation by the BIFR, so far no winding up orders are passed. It is not brought on record as to whether the liabilities of petitioner company towards PF contributions were placed before BIFR. There is nothing on record to show that EPFO was appraised that in view of Section 20(4) of SICA, sale of assets of petitioner-company can be conducted only by BIFR.

27. It is settled principle of law that the jurisdiction vested in this Court under Article 226 of the Constitution of India is a discretionary jurisdiction and High Court acts as court of equity. The relief to be granted in exercise of such power is an equitable one. Mere infraction of statutory provision noticed hereinabove would not result as a matter of course to issue a writ. Accepting the contention of petitioner and setting aside the sale conducted by EPFO would only result in perpetuating the illegality. Non-compliance of mandatory provision of Act, 1952 by petitioner is staring. Opportunities afforded to him by statutory authority were not availed. Petitioner failed to establish as to how violation of Section 20(4) of SICA has invaded judicially enforceable right vested in him. He has no right. In fact, he is the wrong doer. Writ can not be issued at the instance of such person.

28. In A.P. State Financial Corporation Vs. M/s. Gar Re-rolling Mills and another (1994) 2 SCC 647, Supreme Court held as under;

There is no equity in favour of a defaulting party which may justify interference by the courts in exercise of its equitable extraordinary jurisdiction under Article 226 of the Constitution of India to assist it in not repaying its debts..... Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law.

29. In Ritesh Tewari and Another Vs. State of U.P. and Others, , Supreme Court held as under:

26. The power under Article 226 of the Constitution is discretionary and supervisory in nature. It is not issued merely because it is lawful to do so. The extraordinary power in the writ jurisdiction does not exist to set right mere errors of law which do not occasion any substantial injustice. A writ can be issued only

in case of a grave miscarriage of justice or where there has been a flagrant violation of law. The writ court has not only to protect a person from being subjected to a violation of law but also to advance justice and not to thwart it. The Constitution does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the court. However, being that the power is discretionary; the court has to balance competing interests, keeping in mind that the interests of justice and public interest coalesce generally. A court of equity, when exercising its equitable jurisdiction must act so as to prevent perpetration of a legal fraud and promote good faith and equity. An order in equity is one which is equitable to all the parties concerned. The petition can be entertained only after being fully satisfied about the factual statements and not in a casual and cavalier manner. (vide *Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others*, ; *Chimajirao Kanhojirao Shirke and Another Vs. Oriental Fire and General Insurance Co. Ltd.*, ; *Life Insurance Corporation of India and Others Vs. Smt. Asha Goel and Another*, ; *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another*, ; *Chandra Singh Vs. State of Rajasthan and Another*, and *Punjab Roadways Moga through its General Manager Vs. Punja Sahib Bus and Transport Co. and Others etc. etc.*,).

30. The EPF Act, 1952 is a social welfare legislation and is intended to safeguard the interest of employees. Provident fund contribution is one of the important element in an employee's service and savings accrued through such contributions alone are the backbone for the employee after his retirement. These contributions are part of his salary and emoluments and as a reward to the service rendered by him to the company while he was working. Therefore, the employees are entitled to receive their amounts. It is the paramount duty of employer to promptly credit the PF contributions. Failure to credit the same by employer is a serious matter. Ample powers are vested in the EPFO to enforce the discipline in the employer and to recover the amounts due. Section 11 of Act, 1952, imposes first charge on the assets of the sick industrial company. Section 530(1) of the Companies Act is also to the same effect. Thus even after winding up proceedings are concluded, the dues payable to the EPF are to be cleared first before clearing any other debts. The delay in payment of the amounts due to the employees, more particularly when the company became sick, would be detrimental to the welfare of the employees. As it appears, the company is not working and proposal to wind up the company was made on 21.06.2000. For the last more than 13 years, the employees of the petitioner company are denied of their due amounts. Therefore any further delay in settlement of their dues would cause great hardship and suffering. Furthermore, in the sale conducted by EPFO, a third party paid huge sum as per auction conducted and purchased the property. He is no way concerned with the controversy. He is a bonafide purchaser. If the sale is upset, his interests would also adversely affect.

31. It can not be said that the infraction pointed out is not curable. Thus, in the facts of this case, though it is noticed that the procedure as mandated by Section

20(4) of the SICA is not followed, the sale confirmed in the year 2011 cannot be upset at this stage.

32. Having regard to peculiar facts of this case, while rejecting the prayer of the petitioner, the EPFO is directed to approach BIFR duly intimating the sale of petitioner company assets, seek its ratification for appropriation of the sale proceeds towards PF dues of petitioner company and on receipt of such request, BIFR shall undertake required formalities to ratify the action of EPFO. Entire exercise shall be completed within a period of six (06) weeks from the date of receipt of copy of this order.

33. Accordingly, the writ petition is disposed of. No costs.

Miscellaneous petitions if any pending in this writ petition shall stand closed.