(2010) 06 MAD CK 0094

In the Madras High Court

Case No : Writ Petition No''s. 11208 of 2005, 19413 of 2009 and 334 of 2010

Protchem Industries India Limited — APPELLANT

Vs

The Regional Provident Fund Commissioner, Employee's Provident Fund Organisation Ministry of Labour, Govt. of India and The Assistant Provident Fund Commissioner, Employee's Provident Fund Organisation, (Ministry of Labour, Govt. of India)
Goenka Infrastructures (P) Ltd. Vs The Recovery Officer, E.S.I. Corporation, The Chairman and Managing Director, IDBI Bank Ltd. and Protchem Industries (India) Ltd.
Foods Fats and Fertilizers Ltd. Vs The Assistant Provident Fund Commissioner, Regional Provident Fund Commissioner, Protchem Industries (India) Ltd. and Induslland Bank — RESPONDENT

Date of Decision : 08-06-2010

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 11, 11(1), 11(2), 11(2), 14
Employees State Insurance Act, 1948 — Section 45C, 45D, 45E, 45F, 45G

Citation : (2010) 4 LLJ 480

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : H. Balaji, in W.P. No. 11208 of 2005 and Bharath Chakravarthy, in W.P. No. 19413/09 for Sai, Bharath and Ilan, in W.P. No. 334 of 2010, for the Appellant; K. Gunasekaran in for R1 and R2 in W.P. Nos. 11208/05 and 334 of 2010 and K.C. Ramalingam for R1 in W.P. No. 19413 of 2009, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—Heard both sides.

2. The first writ petition (W.P. No. 11208/2005) is filed by M/s. Protchem Industries India Limited, challenging the order of the second

respondent dated 02.03.2005 and seeks to set aside the same. The impugned order is passed u/s 7A of the Employees'' Provident Fund and

Miscellaneous Provisions Act, 1952.

3. The writ petition was admitted on 04.04.2005. Pending the writ petition, this Court granted an order of interim stay. Subsequently, when the

matter came up on 02.08.2006, the interim stay was made absolute on condition that the petitioner pays 50% of the amount demanded by the

impugned order dated 02.03.2005 and to furnish a Bank Guarantee for the remaining amount within a period of four weeks from the date of the

said order.

4. Subsequent to the entertainment of the writ petition, it was found that the petitioner company was brought under the control of the Industrial

Development Bank of India (IDBI) and the Authorised Officer of the IDBI Bank sold the assets of the petitioner company in terms of SARFAESI

Act to M/s. Foods, Fats and Fertilizeres Limited on 31.05.2007. It was intimated by the IDBI Bank to Assistant PF Commissioner vide their letter

dated 02.12.2008, wherein it was stated as follows:

Case No. 348/2004- M/s. Protchem Industries (India) Limited

Payment of Outstanding Dues

We are in receipt of your letter CHN/SRO/PONDY/PC/482/COMP/2007 dated November 30, 2007 on the above subject. In this connection,

we advise that the AO of IDBI has sold the assets of M/s. Protchem Industries (India) Limited (PIIL) under SARFAESI Act to M/s. Foods Fats

and Fertilisers Limited on May 31, 2007.

As per the terms of the sale of assets of PIIL through SARFAESI Act ""All payments due to any person whatsoever and payment of all statutory

dues, including but not restricted to property taxes, sales taxes, customs and central excise dues, cess, transfer charges and other dues/levies etc.,

if any, shall be ascertained and borne by the successful bidder"".

We, therefore, request to take up the issue directly with M/s. Foods Fats and Fertilisers Limited having their registered office at 7th Floor,

Fountain Plaza, Pantheon Road, Egmore, Chennai ï¿½ 600 008 being the successful bidder of the assets of PIIL.

5. It was thereafter, the Provident Fund Commissioner proceeded against M/s. Foods Fats and Fertilizers Limited on finding that they are holding

a sale certificate in respect of the assets of the petitioner company (W.P. No.

11208 of 2005) and issued a notice dated 02.07.2008 stating as to

why it should not be treated as an employer of the previous company since they are the successful bidder and took over the company. The said

company sent a reply dated 22.07.2008 stating that their Advocates were examining the various legal aspects. Subsequently, Indus Ind. Bank sent

a letter informing that company that an attachment order u/s 8F of Employees'' Provident Funds and Miscellaneous Provisions Act was in existence

regarding the statutory dues payable by the previous company and the PF contribution by the previous company was to the extent of Rs.

20,39,704.45Ps and the Bank had informed that they had paid a sum of Rs. 14,767.89 and Rs. 10,539.93 in favour of Assistant Provident Fund

Commissioner.

6. As against the said information, M/s. Foods, Fats and Fertilisers Limited filed W.P. No. 334 of 2010 seeking for a direction to forbear the

Assistant Provident Fund Commissioner from proceeding against the petitioner company or its property in respect of the PF dues payable by M/s.

Protchem Industries (India) Ltd.

7. When that writ petition came up for admission, this Court directed the earlier writ petitions to be posted along with W.P. No. 334 of 2010.

8. The contention of the purchaser of the company under the SARFAESI Act viz., M/s. Foods Fats and Fertilisers Limited was that though they

are having a valid sale certificate of the assets of the previous company they could never held to be liable for the payment of dues to the previous

company. If at all the PF Commissioner should proceed against the properties of the said company. The bank cannot be threatened by a distraint

action in this fashion.

9. The learned Counsel also stated that since the properties have already been sold to them and if there were any attachment to the said property

even before the sale, the dues from the sale proceeds can be recovered only by filing a suit. He also submitted that if at all any due recoverable by

the PF Department, it can be done only by filing an application before the Sale Officer. The Officer will determine the amount payable to the

secured creditor and unsecured creditor and it cannot proceed to attach the properties of the petitioner company u/s 8F of the PF Act. For this

purpose he also contended that the SARFAESI Act will prevail over any other enactment because of the non obstante clause contained therein.

Therefore, the PF law cannot be said to be a special law overriding the provisions of the SARFAESI Act.

10. For this proposition, the learned Counsel placed reliance upon the judgment of the Supreme Court in Tata Motors Ltd. v. Pharmaceutical

Products of India Ltd. and Anr. reported in (2008) 7 SCC 619. He further placed reliance upon the judgment of the Supreme Court in AI Co.

Industries Ltd. v. The Official Liquidator and Anr. reported in 2009 (3) CTC 881 for the purpose of contending that the purchaser is under no

legal duty to enquire with regard to liabilities of the company and in respect of such company even if Municipal tax arrears to be paid, in respect of

the property sold in auction it did not constitute charge on such property. Therefore, the company has no liability to pay its past dues. If there was

any statutory duty without creating any encumbrance on the property, the purchasers have no obligation to enter into such liabilities. If once the

property is sold, the assets of the company are required to be distributed to the creditors in the order of preference but such liability do not extend

to the purchaser as if he was a successor in interest.

11. The petitioner also relied upon a judgment of a Division Bench of this Court in Indian Bank v. Commercial Tax Officer reported in 2009 Ind.

LM 2885 for the purpose of contending that a tax due can have a priority of debt over others. But such a creditor can only be an unsecured

creditor and an unsecured creditor cannot have a priority over a secured creditor.

12. In the meanwhile, M/s. Goenka Infrastructures (P) Ltd., represented by its Senior Manager filed W.P. No. 19413 of 2009, seeking to

challenge the order of the E.S.I. Corporation dated 14.09.2009 giving notice of taking physical possession of the property of M/s. Protchem

Industries India Limited, pursuant to the order of attachment of the immovable property dated 07.12.2004. Earlier ESI Corporation had issued a

notice u/s 45-C to 45-I of the ESI Act and the building and related superstructure of the company was attached and therefore, since the property

was already under the constructive possession of the Recovery officer, the said notice was given. The petitioner challenging the said notice stated

that the properties have been sold under the SARFAESI Act to the petitioner on the basis of ''As is where is condition'' and that the SARFAESI

Act is a special law. In the said writ petition, notice of motion was ordered on 18.09.2009 and an order of interim stay was granted.

13. Subsequently, the respondents ESI Corporation had filed a counter affidavit dated 29.01.2010. It was stated that u/s 93 of the ESI Act, any

transfer made, the transferee is jointly and severally liable to pay the amount due to the corporation. The contentions raised in these writ petition

are no longer res integra.

14. The Supreme Court very recently while analysing the scope of the EPF vide its decision in Maharashtra State Maharashtra State Co-operative

Bank Ltd. Vs. The Assistant Provident Fund Commissioner, has held in paragraphs 66 to 69 which is as follows:

66. Section 11 gives statutory priority to the amount due from the employer vis-ï¿½-vis all other debts. Clause (a) of Sub-section (1) of Section 11

is applicable to cases where an employer is adjudicated insolvent or, being a company, an order of its winding up is made. In that situation, the

amount due 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 14-B, accumulations required to be transferred u/s

15(2) or any other charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme.

Clause (b) is applicable to cases where the amount is due from the employer in relation to exempted establishment in respect of any contribution to

the provident fund or any insurance fund insofar it relates to exempted employees under the rules of provident fund or any insurance fund, any

contribution payable by him towards the Pension Fund u/s 17(6), damages recoverable u/s 14-B or any charges payable by him to the appropriate

Government under the Act or under any of the conditions specified in Section 17. This Sub-section then lays down that such amount shall 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. Sub-section (2) lays

down that any amount due from the employer whether in respect of the employeesï¿½ contribution deducted from the wages of the employee or

the employerï¿½s contribution shall be deemed to be the first charge on the assets of the establishment, and shall be paid in priority to all other debts.

67. The expression ""any amount due from an employer"" appearing in Sub-section (2) of Section 11 has to be interpreted keeping in view the

object of the Act and other provisions contained therein including Sub-Section (1) of Section 11 and Sections 7-A, 7-Q, 14-B and 15(2) which

provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is

delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the

same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7-Q. Likewise, default

on the employerï¿½s part to pay any contribution to the Fund can visit him with the consequence of levy of damages.

68. As mentioned earlier, Sub-section (2) was inserted in Section 11 by Amendment Act 40 of 1973 with a view to ensure that payment of

provident fund dues of the workers are not defeated by the prior claims of the secured and/or of the unsecured creditors. While enacting Sub-

section (2), the legislature was conscious of the fact that in terms of existing Section 11 priority has been given to the amount due from an employer

in relation to an establishment to which any scheme or fund is applicable including damages recoverable u/s 14-B and accumulations required to be

transferred u/s 15(2). The legislature was also aware that in case of delay the employer is statutorily responsible to pay interest in terms of Section

17. Therefore, there is no plausible reason to give a restricted meaning to the expression ï¿½any amount due from the employerï¿½ and confine it

to the amount determined u/s 7-A or the contribution payable u/s 8.

69. If interest payable by the employer u/s 7-Q and damages leviable u/s 14 (sic Section 14-B) are excluded from the ambit of expression ï¿½any

amount due from an employerï¿½, every employer will conveniently refrain from paying contribution to the Fund and other dues and resist the

efforts of the authorities concerned to recover the dues as arrears of land revenue by contending that the movable or immovable property of the

establishment is subject to other debts. Any such interpretation would frustrate the object of introducing the deeming provision and non obstante

clause in Section 11(2). Therefore, it is not possible to agree with the learned

Senior Counsel for the appellant Bank that the amount of interest

payable u/s 7-Q and damages leviable u/s 14-B do not form part of the amount due from an employer for the purpose of Section 11(2) of the Act.

15. Therefore, this Court is not inclined to entertain the writ petitions solely on the ground that one petitioner is a purchaser under the SARFAESI

Act and therefore, they are not liable to pay any amount either to the PF or ESI Corporation. Further, the contention that SARFAESI Act is a

special law and therefore, it overrides the other prior enactment cannot be countenanced in the light of the judgment of the Supreme Court referred

to above.

16. The writ petition in W.P. No. 11208 of 2005 will stand dismissed as it is only a notice u/s 7A of the EPF Act. If at all the writ petitioner

company was aggrieved by that order, they should have moved the Appellate Tribunal constituted u/s 7I of the EPF Act.

17. Similarly in W.P. No. 19413 of 2009, the petitioner if at all aggrieved, he has to raise a dispute before the ESI Court u/s 75 and not rush to

this Court on an intimation of taking possession of the property which was already under attachment. Hence, W.P. No. 19413 of 2009 stands

dismissed.

18. In so far as W.P.334 of 2010 is concerned, the decision relied on by the petitioner has no application to the case on hand. On the contrary,

the PF Department is entitled to invoke the distraint mechanism u/s 8F of the PF Act. The PF Act is also a special law in respect of recovery of

dues under the Act and it is not subordinate to SARFAESI Act under which the petitioner had purchased the property in the light of the decision

indicated above. Hence, W.P. No. 334 of 2010 will stand dismissed.

19. In the result, all the three writ petitions will stand dismissed. NO costs. Consequently, connected miscellaneous petitions are closed.