(2010) 06 KL CK 0009

In the High Court Of Kerala

Case No : Writ Petition (C) No. 30751 of 2009

Radhamani APPELLANT

Vs

The Enforcement Officer and Others RESPONDENT

Date of Decision : 18-06-2010

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17B, 7A, 8, 8A, 8B

Citation : (2011) 1 KLJ 9

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : E.K. Nandakumar, Jayasankar A.K., John Mathai K., Benny P. Thomas, P. Gopinath Menon and V.J. Anand, for the Appellant; Pirappancode V.S. Sudhir, SC, EPF, ORGN, K. Babu Rajan, Sreekanth S. Nair and Sajeev Babu, for the Respondent

Judgement

K.T. Sankaran, J.—The Petitioner purchased a factory and its premises, namely, Sree Muruga Cashew Factory, from Respondents 2 and 3 as per Ext.P1 sale deed dated 29.5.2009. It is averred by the Petitioner that at the time of purchase, she made enquiries with the office of the Employees Provident Fund Organization and she got information that there were no arrears or dues payable by the employer under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 and the scheme framed there under. The Petitioner received chalan receipts for the period from April 2008 to March 2009 (Exts.P2 to P13) evidencing payment of employer''s contribution for the said period. After the purchase of the factory and property, the Petitioner was remitting the contributions to the Employees'' Provident Fund.

2. While so, on 12.10.2009, the first Respondent, the Enforcement Officer, Employees Provident Fund Organization, Sub Regional Office, Kollam, sealed the go down of the Factory wherein raw cashew nuts worth Rupees One Lakh were stored, after attaching forty bags of cashew nuts as per Ext.P18 mahazar dated 12.10.2009.

3. The Petitioner has filed this Writ Petition for the following reliefs:

(i) declare; that the seizure of goods belonging to the Petitioner as evidenced by Ext.P18 mahazar is illegal and unsustainable;

(ii) issue a writ of mandamus or any other appropriate writ, order or direction, directing the first Respondent to release the goods seized vide Ext.P18;

(iii) issue a writ of mandamus or any other appropriate writ, order or direction, directing the first Respondent to proceed against the properties belonging to the 2nd and 3rd Respondents before proceeding against the Petitioner for recovery of dues; and (iv) grant such other reliefs as this Hon''ble Court may deem fit and proper in the circumstances of this case.

4. In the statement filed by the first Respondent, it is stated that the employer committed default in respect of payment of contribution to the Employees Provident Fund and allied dues for the period from July 2006 to April 2008. After due compliance with the provisions contained in the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as ''the Act''), notice was sent to the defaulter and proceedings u/s 7A were initiated. The defaulter did not pay the dues even after the time limit provided for in the proceedings dated 15.10.2008 u/s 7A of the Act. The amount due from the defaulter was fixed at Rs. 3,21,771.75, as per the order dated 10.11.2008. The Assessment Officer issued a certificate u/s 8B of the Act to the Recovery Officer to collect the amount in the manner specified u/s 8B to 8G of the Act. The Recovery Officer, in execution of the warrant, attached fifty bags of raw cashew nuts. It is also contended that as per Section 17B of the Act, the transferee of the establishment is also liable. According to the first Respondent, the attachment was legal and proper and the Petitioner is not entitled to the reliefs prayed for in the Writ Petition.

5. The second Respondent filed a counter affidavit, in which, he stated that for the period from July 2006 to April 2008, he was not in control and management of the factory and he was not holding the license. The factory was licensed in the name of one Y. Thomas of Chengamanadu during that period and he was running the factory. The license was duly transferred in the name of Y. Thomas and the factory continued to function till April 2008 under valid license. The second Respondent contended that he is not liable to pay the arrears of Provident Fund for the period from July, 2006 to April, 2008.

6. For the purpose of deciding this Writ Petition, it is not necessary to consider the question whether Respondents 2 and 3 were liable to pay the amount or whether Y. Thomas was running the factory during the relevant period and therefore he was liable.

7. When the Writ Petition came up for admission on 29.10.2009, a learned single Judge of this Court passed the following order:

Admit. Learned Standing Counsel takes notice for the 1st Respondent. Issue notice by speed post to Respondents 2 and 3.

There would be an interim order directing the 1st Respondent to release the seized goods of the Petitioner on condition that the Petitioner furnishes bank guarantee for Rs. 1 lakh.

8. Section 17B of the Act reads as follows:

17B. 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 up to the date of such transfer:

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

9. The liability of the transferor and the transferee is joint and several. The transferee also would be liable in respect of the contribution or other sums due from the employer for the period up to the date of transfer. However, the liability of the transferee is limited to the value of the assets obtained by him by the transfer. In view of the specific provision u/s 17B of the Act, the Petitioner, who is the transferee, cannot be heard to contend that she is not liable to pay the contribution or other sums due from the employer; before the date of the transfer in her favor. The transferee is also not entitled to contend that the dues before the date of transfer should be recovered from the transferor or that the transferee could be proceeded against only on failure to recover the amount from the transferor. There is no liability on the part of the Employees'' Provident Fund Authorities to proceed against the transferor first, nor there is a right vested in the transferee to insist for such a course being adopted.

10. The order determining the amount due from the employer is to be made u/s 7A of the Act. Section 8 provides for the mode of recovery of the amount due from employers. The amount in arrear may be recovered in the manner specified in Sections 8B to 8G of the Act. Section 8B of the Act provides that where any amount is in arrear u/s 8, the authorized officer may issue, to the Recovery Officer, a certificate specifying the amount of arrears and the Recovery Officer shall proceed to recover the amount from the establishment or, as the case may be, the employer by one or more of the following methods:

(a) attachment and sale of the movable or immovable property of the establishment or, as the case may be, the employer;

(b) arrest of the employer and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the establishment or the employer.

The proviso to Sub-section (1) of Section 8B reads as follows:

Provided that the attachment and sale of any property under this section shall first be effected against the properties of the establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

11. A reading of the proviso to Section 8B(1) along with Section 17B makes the position clear on the following aspects:

(1) The liability of the transferor and the transferee is joint and several;

(2) The liability of the transferor is only up to the date of transfer;

(3) The transferee would be liable to pay even the arrears which fell due before the date of transfer;

(4) The liability of the transferee is limited to the extent of the value of the assets obtained by such transfer;

(5) The attachment and sale by the Recovery Officer shall first be effected against the properties of the establishment;

(6) If the attachment and sale of the properties of the establishment is insufficient for recovering the amount due, the Recovery Officer may proceed against the property of the employer.

12. For the foregoing reasons, the challenge against the attachment of the cashew nuts is not maintainable. The Petitioner is not entitled to any relief prayed for in that regard.

13. It is worthwhile to note that at the time of making the attachment, the Recovery Officer had sealed the go down of the establishment. I do not think the procedure adopted by the Recovery Officer is legal and proper. Attachment of movable shall be by actual seizure. The movables so seized could be moved to a safe place by the Recovery Officer or if the Recovery Officer thought that the movables could not be so easily moved or it was not feasible to keep the articles at the place from where they were attached, the Recovery Officer could release the goods on kychit to an appropriate person. If the articles attached could be kept in a portion of the go down under lock and key, such a procedure also could be adopted by the Recovery Officer. However, locking and keeping of the factory or go down under seal of the Recovery Officer was highhanded. Simply because the employer or his transferee is liable to pay any arrear to the Employees'' Provident Fund, that does not mean that the employer or his transferee should be prohibited from running the establishment. That is not what is meant by Section 8A or 8B of the Act. The purpose of attachment is to bring the movables

for sale and to recover the dues to the extent possible. That should not result in the employer or his transferee being prohibited from running the factory, which would affect not only the employer or his transferee but the employees as well. Paralyzing the establishment is not what is meant by the process of recovery.

14. In view of the interim order dated 29.10.2009, it was not possible to sell the movables. The movables were released to the Petitioner on condition of her furnishing bank guarantee for Rupees One lakh. Now the only course open to the first Respondent is to invoke the bank guarantee. The first Respondent would be free to do so. The balance amount shall be recoverable from the employers or the transferee from the employers in accordance with law.

15. The Writ Petition is disposed of as above.

