

(2009) 04 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 407 of 2003

Shri Vimalkumar Ravji Shah	Vs	APPELLANT
The Employees Provident Fund Organisation and Others		RESPONDENT

Date of Decision : 23-04-2009

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14(1), 14A, 2
Employees State Insurance Act, 1948 — Section 2(17)
Factories Act, 1948 — Section 100, 7
Penal Code, 1860 (IPC) — Section 405
Provident Funds Act, 1925 — Section 2, 8, 8B, 8F

Citation : (2009) 4 BomCR 681 : (2009) 122 FLR 562 : (2009) 4 LLJ 795

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : D.A. Dube, Surel S. Shah, for the Appellant; M.S. Karnik, for Respondent Nos. 1 and 4, Kalpesh Parekh, instructed by Pragna Thakkar and Co. for Respondent No. 5 and Kesar Dighe, for the Respondent

Final Decision : Allowed

Judgement

V.M. Kanade, J.—The petitioner is challenging order passed by the Assistant Provident Fund Commissioner dated 6th January, 2003 directing respondent No. 2-Bank to pay the amount lying in the petitioner's account as the petitioner in arrears of an amount of Rs. 60,08,210/- which is an amount due and payable as arrears of account of Provident Fund Dues/interest/cost. It is further stated therein that pursuant to the said order, Saving Bank Account No. 3739 was frozen. Brief facts are as under:

2. The petitioner was the Managing Director of Chetan Foundries Ltd., a public limited company situated at Solapur. The said company was not functioning since May 2001. The petitioner and the Directors approached the BIFR under the Sick Industries Company Act, 1985 and thereafter, the said company has been taken over by respondent No. 5. Respondent No. 5 had taken symbolic possession of

the assets of the company and various attempts were made by the said respondent No. 5 for sale of the assets of the company. Further, thereafter, Official Liquidator which was added as respondent No. 6 in this writ petition is incharge of this company. The Official Liquidator has taken over the said company and liquidation proceedings have commenced.

3. The learned Counsel for the petitioner submitted that the petitioner being the Managing Director of the company was not an employer within the meaning of Section 2-e of the said Act and as such, no recovery could be made from the personal property of the petitioner. It was submitted that the Saving Bank Account No. 3739 belonging to the petitioner is his personal account in which there is a balance approximately of Rs. 5,31,000/- out of which the petitioner had received an amount of Rs. 5,21,106/- under the Provident Fund vide cheque No. 719845 dated 9th January, 2003 which was issued by respondent No. 1. It was, therefore, submitted that the said notice and the impugned order was liable to be quashed and set aside, that money recovered from the petitioner's bank by the respondent should be returned to the petitioner herein. In support of the said submission, he relied on the judgment of the Apex Court in the case of Employees' State Insurance Corporation v. S.K. Aggarwal and Ors. reported in 1998 II CLR 518. He also relied on the judgment of the learned Single Judge of this Court in the case of Mansingh L. Bhakta v. The State of Maharashtra and Ors. reported in 1991 II CLR 586. He also relied on another judgment of this Court in the case of Employees State Insurance Corporation and Anr. v. G.N. Mathur and Ors. reported in 1994 MLJ 855.

4. Shri Karnik, the learned Counsel appearing on behalf of respondent No. 1, on the other hand, submitted that the petitioner being the Managing Director of the said company occupier of the said factor and as such would liable and was duty bound to make good the payment towards the arrears in respect of the employer's contribution towards the provident fund. He relied on the judgment of the Apex Court in the case of Srikanta Datta Narasimharaja Wodiyar Vs. Enforcement Officer, Mysore, .

5. The learned Counsel for the petitioner also invited my attention to another judgment of the learned Single Judge of this Court in the case of Garware Marine Industries and Ors. v. Union of India and Ors. reported in 2005 Bom.C.R. 677

6. I have heard both the parties at length. It is an admitted position that so far as the company is concerned, it is under liquidation and Official Liquidator has been appointed. Respondent No. 5 had taken symbolic possession of the assets of the company and has taken various steps for the purpose of selling the assets of the company. However, sale by public auction could not take place despite best efforts being taken by respondent No. 5. Thereafter, respondent No. 5 had made an attempt to sell the property by private treaty, however, permission was not granted by the Official Liquidator to sell by private treaty. It is, however, admitted position that even if the assets of the company are sold, the provident fund dues would have topmost priority and only after the said provident fund

dues are deposited with respondent No. 1, the balance amount is mainly distributed among the other creditors. A short question which falls for consideration before this Court is whether the personal property of a Managing Director can be attached and confiscated towards the arrears of provident fund contribution which is payable by the owner.

7. It is an admitted position that the definition of a "employer" is defined under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 u/s 2(e) and definition of "principal employer" is defined u/s 2(17) the Employees' State Insurance Act, 1948 is paramateria and both the definitions clearly are couched in the same words. Before deciding the rival contentions, therefore, it is necessary to consider the relevant provisions of the Act and Rules framed thereunder. Section 2(e) gives the definition of a "employer" which reads as under:

2. Definitions.-In this Act, unless the context otherwise requires,:

(e) "employer" means:

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under Clause (f) of sub-section of Section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent;

So far as the recovery of dues are concerned, the Provident Fund Act has become procedure for the recovery of the dues in Section 8 of the said Act.

Section 8 reads as under:

8. Mode of recovery of moneys due from employers.-any 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 under Sub-section (5) of Section 17, 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 damages recoverable u/s 14B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified u/s 17 or in respect of the contribution payable by him towards the Pension Scheme under the said Section 17. may, if the amount is in arrear, be

recovered by the Central Provident Fund Commissioner or such other officer as may be authorised by him, by notification in the Official Gazette, in this behalf in the same manner as an arrear of land revenue.

8. Perusal of the said section clearly discloses that the dues of the employer's contribution towards provident fund are recovered from the owner. In the present case, the establishment is a public limited company. The short question which is to be taken into consideration is whether the dues can be recovered either from the owner or from the occupier as defined u/s 2(e) of the said Act. This question has been considered by the Apex Court in the case of Employees' State Insurance Corporation v. S.K. Aggarwal and Ors. reported in 1998 II CLR 518. The Apex Court has held that the words "owner" or "occupier" which is found in Section 2(e) of the said Act have been used disjunctively and therefore, in a case where the owner is public limited company, in that case while construing the definition of "owner", it would not be necessary to refer to the word "occupier". The Apex Court in the said judgment in para 7 has observed as under:

7. u/s 40 the words "owner" and "occupier" have been used disjunctively. The Court also referred to Section 100 of the Factories Act and said that even under the Factories Act, 1948, the Legislature has clearly contemplated that in the case of a factory, a company can be the "occupier". Therefore, when the owner of a factory is a company it is the company which is the principal employer and not its director.

The Bombay High Court overruled the judgment of the Single Judge of the Bombay High Court in so deciding.

In para 10, therefore, the Apex Court has observed as under:

10. Therefore, even if we read the definition of "principal employer" under the Employees' State Insurance Act, 1948 in Explanation 2 to Section 405 of the Indian Penal Code, the directors of the company, in the present case, would not be covered by the definition of "principal employer" when the company itself owns the factory and is also the employer of its employees at the head office.

9. The Apex Court has referred to judgement of Division bench of this Court in the case of Suresh Tulsidas Kilachand and Ors. etc. v. Collector of Bombay and Ors. etc., reported in 1984 MLJ 117 and also judgment of the Apex Court in the case of Employees' State Insurance Corporation, Chandigarh v. Gurdial Singh and Ors. reported in 1991 LIC 52. The Apex Court also relied on the judgment of the Madhya Pradesh High Court in the case of Employees' State Insurance Corporation, Indore v. Kailaschandra and Ors. reported in 1989 LIC 760.

10. Though the issue involved in the said case was whether the directors of the company could be made liable for the offence punishable u/s 405 for Criminal Breach of Trust, while considering the said issue, the Apex Court had an occasion to deal with and consider the relevant provision u/s 2(17) which defines the term "principal employer". It is an admitted position that the definition of "principal

employer" as defined u/s 2(17) of the ESI Act is paramateria with the provisions of Section 2(e) of the Provident Funds Act. In this view of the matter, therefore, in view of the decision of the Apex Court, it is apparent that the word "owner" or "occupier" has to be used disjunctively and in cases where the owner of factory is a company, it is the company which is the principal employer and not a director. Similarly, the learned Judge of this Court in the case of Mansingh L. Bhakta (supra) has also taken a similar view holding that the Managing Director of a company cannot be personally liable towards arrears of provident fund contribution by the company. Similar view has been taken by the learned Single Judge of this Court in the case of Employees State Insurance Corporation and Anr. v. G.N. Mathur and Ors. (supra). That being the settled position, it was not open for the respondent No. 1 to attach the personal property of the Managing Director.

11. Shri Karnik, learned Counsel for respondent No. 1, on the other hand, has relied on the judgment of the Apex Court in the case of the Srikanta Datta Narasimharaja Wodiyar v. Enforcement Officer, Mysore (supra) wherein the Apex Court was pleased to consider the provisions of Section 14-A and Section 2(e) & (k) and Section 14(1-a) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. It was submitted that the Apex Court in the said case had held that so far as the criminal liability is concerned, the person who is incharge of management of the company would also be liable. There cannot be any doubt regarding the ratio of the Apex Court in the said case. The Apex Court in the said case was considering the criminal liability of the employees of the company though the principal employer and company refers to Section 14A of the said Act which relate to offence by the company. The Apex Court held that the expression "was incharge of and was responsible to the Company for the conduct of the business" are very wide in their import and therefore, it could not be confined to employer only. The submissions made by Shri Karnik that therefore, even the occupier would also be liable personally to pay the arrears of Provident Fund contribution, cannot be accepted. In this context, therefore, it would be relevant to have a look at the relevant provision viz. Section 14A of the said Act. Section 14A reads as under:

14A. Offences by companies.- (1) If the person committing an offence under this Act, the Scheme or the Pension Scheme or the Insurance Scheme is a company, every person, who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in Sub-section (1), where an offence under the Act, the Scheme or the Pension Scheme or the Insurance Scheme has

been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-For the purposes of this section,:

(a) "company" means any body corporate and includes a firm and other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

and also Section 8 of the Provident Funds Act.

12. It can be seen that in Section 14A, it has been expressly provided that if the person committed the offence under the Act is a company, every person, who at the time of the offence was committed was incharge of, and was responsible to the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence. It can be seen that these words are not found in Section 8 of the Provident Funds Act and that the said section says that monies could be recovered from the employer. Therefore, in this context, the Apex Court in the case of Employees' State Insurance Corporation v. S.K. Aggarwal and Ors. (Supra) had observed that the said words have to be construed disjunctively. The ratio of the judgment of the Apex Court on which reliance is placed by Mr. Karnik, learned Counsel for respondent No. 1, therefore, will not be of any assistance to the respondent No. 1. Similarly, in the case of Garware Marine Industries and Ors. (supra) wherein the learned Single Judge of this Court has observed that the person so named as the employer under the meaning of Section 2(e) of the EPF and MP Act, alone can be prosecuted under provisions of Section 8B(b) of the Act. However, the judgment in the case of Employees' State Insurance Corporation v. S.K. Aggarwal and Ors. (supra) and the judgment of the two learned Single Judge of this Court were not cited before the learned Single Judge. The said observation, therefore, also cannot be of any assistance to respondent No. 1. In view of these, the impugned notice-cum-Order dated 6th January, 2003 issued u/s 8F of the said Act is quashed and set aside. Respondent No. 1 is directed to refund the said amount to the petitioner which is recovered from the petitioner's bank in pursuance of its notice dated 6th January, 2003.

13. Rule is made absolute in terms of prayer Clauses (b) and (b-1). It is clarified that the Official Liquidator can proceed with the sale of the assets of the company and out of the sale proceeds, the arrears of provident fund dues shall first be deposited with respondent No. 1 and only thereafter, the balance amount may be distributed to the other creditors. It is also clarified that the said order has been restricted to the civil personal liability of the petitioner and not the "criminal liability.

14. Writ Petition is, accordingly, allowed and disposed of in the aforesaid terms.