
(2009) 12 MAD CK 0004

In the Madras High Court

Case No : Criminal O.P. No's. 31933, 31931, 31932, 32286 to 32303 of 2004 and Criminal M.P. No's. 10127, 10234, 10236, 10238, 10240, 10242, 10246, 10248, 10250, 10252, 10254, 10256, 10258, 10260, 10262, 10264, 10266 and 10268 of 2004

Solidaire India Limited and Shri A.S. Ramana Prasad
Managing Director Solidaire India Limited

APPELLANT

Vs

S. Ramakrishnan Provident Fund Inspector/Enforcement
Officer Employees Provident Funds

RESPONDENT

Date of Decision : 21-12-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 468
Employees Provident Fund and Miscellaneous Provisions (Amendment) Act, 1988 — Section 14B
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14(1B), 14A, 6C
Negotiable Instruments Act, 1881 (NI) — Section 138
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 16, 17, 18, 19

Citation : (2009) 12 MAD CK 0004

Hon'ble Judges : K. Mohan Ram, J

Bench : Single Bench

Advocate : K.M. Santhanagopalan, for the Appellant; V. Vibhishanan, for the Respondent

Final Decision : Dismissed

Judgement

K. Mohan Ram, J.—The petitioners in the above Criminal Original Petitions are the accused 1 and 2 in C.C. Nos. 4857 to 4877 of 2004

on the file of the XI Metropolitan Magistrate, Saidapet, Chennai, wherein they are facing trial for the alleged offence under Sections 6-C read with

Sections 14(1B)/14A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the Employees Deposit Linked Insurance

Scheme 1976. The petitioners are seeking quashing of all further proceedings in

the aforesaid cases.

2. In the complaint filed by the respondent against the petitioners herein it is alleged that the first accused is an establishment within the meaning of

Employees Provident Fund Act and as such the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, and the two schemes

framed thereunder, namely, Employees Provident Funds Scheme, 1952 and the Employees Pension Scheme 1995 are applicable to the

establishment. The first accused has been allotted Code No. TN/10349. It is further alleged in the complaint that the second accused is the person

incharge of the establishment and is responsible for the conduct of the day today affairs of the business and as such the second accused is required

to comply with the provisions of the said Act and schemes in respect of the said establishment.

3. In the complaint it is alleged that under paragraphs 7 and 8 of the Employees' Deposit Linked Insurance Scheme 1976, the accused are

required to pay the contribution and the Administrative Charges for every month within fifteen days of the close of every month in respect of the

employees of the establishment, but inspite of several requests, the accused failed to pay the Employees Deposit Linked Insurance Contributions

and the Administrative Charges, for the purpose, the details of which have been furnished in the respective complaints. The complaints numbering

twenty-one filed by the respondent were taken on file as C.C. Nos. 4857 to 4877 of 2004. Being aggrieved by that, the petitioners are before this

Court.

4. Heard the learned Counsel on either side.

5. Learned Counsel for the petitioners submitted that all the twenty-one criminal cases have been filed against the petitioners by the respondent for

the non-payment of the Employees Deposit Linked Insurance Contributions and the Administrative Charges for the period commencing from

November 1998 to July 2000. Learned Counsel for the petitioners submitted that since the first accused company became sick, a reference was

made u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) (hereinafter referred to as "the SICA") and after a

detailed consideration of facts, by proceedings of the Board for Industrial and Financial Reconstruction (BIFR), dated 01.10.1997, the company

was declared as a sick industrial company u/s 3(1)(O) of the SICA; the Industrial Development Bank of India, Chennai, was appointed as the

Operating Agency u/s 17(3) of the SICA. By order dated 01.10.1997, the following direction was issued:

The Bench directed the company/promoters u/s 22A of the Act not to dispose of any fixed or current assets of the company without the consent of

the BIFR. However, if the unit is running, the current assets can be drawn down to the minimum extent required for day to day operations of which

proper accounts would be maintained.

Therefore, according to the learned Counsel for the petitioners, no payment can be made by the company or its Directors to anyone including the

respondent towards the debt or liability because of the express restraint order of the BIFR passed u/s 22A of the SICA. He further submitted that

the cause of action for launching a prosecution u/s 138 of the Act arises and culminates in an offence only in case of non-payment of the amount of

the cheque within fifteen days of the date of receipt of the notice of dishonour; in case the SICA provides a bar to make such payment or makes it

obligatory to take express permission of the Board or the appellate authority then no criminal prosecution is maintainable without the express

permission of the Board or the appellate authority, as the case may be. He further submitted that even assuming without admitting the facts set-out

in the complaint as true, yet the non-payment of the employees' contribution and administrative charges during the relevant periods was due to the

reasons beyond the control of the petitioners; in such factual background, it will be unfair to compel the petitioners herein to face the criminal trial.

He further basing reliance on a decision of a learned Single Judge of this Court reported in 1977 LAB. I.C. 1715 : 1977 LW CrI. 119 Pankaja

Mills v. N.S. Iyer submitted that the offences arising under the Provident Funds Act is not a continuing offence and he also based reliance on a

decision reported in 1973 Law Weekly (CrI.) 129 State of Bihar v. Deokaran Nenshi in support of the aforesaid contention. According to the

learned Counsel for the petitioners, since the complaints have admittedly been filed beyond the period of limitation prescribed u/s 468 of the

Criminal Procedure Code, the complaints ought not to have been taken on file.

6. The learned Senior Counsel based reliance on a decision reported in Kusum

Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd.

and Others, wherein in paragraph 19 it is laid down as under:

19. ...Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on

which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR u/s 22A was passed

against the company then it cannot be said that the offence u/s 138 NI Act was completed. In such a case it may reasonably be said that the

dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its Directors is for reasons beyond the

control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in

view of the ban order passed by the BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to

hold that the Directors should be compelled to face trial in a criminal case.

The said decision has been followed by a learned Single Judge of this Court in the decision reported in 2001 (2) TLNJ 266 Sivanandha Mills Ltd.

v. Tirumalai Traders and Ors.

7. Learned Counsel for the petitioners based reliance on a decision of the learned single Judge reported in T. Venkatesan Vs. The District

Collector, The Tahsildar and Sivanandha Steels Limited, wherein it has been held that no recovery proceedings can be initiated in respect of the

arrears of gratuity payable to the employees, when an order passed u/s 22(1) of the SICA is in force. He also relied on a decision reported in The

Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others, wherein the Apex Court has held that when an order passed u/s

22(1) of the SICA is in force, no recovery proceedings can be initiated for recovering the property tax dues. He also based reliance on a decision

reported in Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, . In the said decision, in

paragraph 14, it has been laid down as follows:

14. ...It must be realised that in the modern industrial environment large industries are generally financed by banks and statutory corporations

created specially for that purpose and if they are permitted to resort to independent action in total disregard of the pendency of inquiry under

Sections 15 to 19 of the 1985 Act the entire exercise under the said provisions would be rendered nugatory by the time the BIFR is able to evolve

a scheme of revival or rehabilitation of sick industrial concern by the simple device of the Financial Corporation resorting to Section 29 of the 1951

Act. We are, therefore, of the opinion that where an inquiry is pending u/s 16/17 or an appeal is pending u/s 25 of the 1985 Act there should be

cessation of the coercive activities of the type mentioned in Section 22(1) to permit the BIFR to consider what remedial measures it should take

with respect to the sick industrial company. The expression "proceedings" in Section 22(1), therefore, cannot be confined to legal proceedings

understood in the narrow sense of proceedings in a Court of law or a legal tribunal for attachment and sale of the debtor's property.

Basing reliance on the aforesaid decision, the learned Counsel for the petitioners submitted that since the Apex Court has held that when

proceedings u/s 15(1) of the SICA are pending and the order u/s 22(1) of the SICA is in force, there should be cessation of the coercive activities

of the type mentioned in Section 22(1) to permit the BIFR to consider what remedial measures it should take with respect to the sick industrial

companies. According to the learned Counsel, coercive activities will include a prosecution for the non-payment of the Employers and Employees

Contribution under the Provident Funds Act.

8. Learned Counsel for the petitioners submitted that the respondent can approach the BIFR for consent of the Board to initiate proceedings

against the company for recovery of the dues under the EPF Act and the prosecution of the petitioners herein is not the only remedy available to

the respondent to recover the dues. He further submitted that when a ban order u/s 22-A of the SICA is in force and the company is barred from

dealing with its assets no coercive steps like prosecution can be initiated against the accused as is sought to be done in these cases. He also

submitted that it is not the intention of the petitioners that they should not pay the contributions under the Act and the scheme framed thereunder

but only because of the ban order passed by the BIFR u/s 22-A of the SICA, they were unable to pay the contributions.

9. Countering the said submissions, the learned Counsel for the respondent submitted that the offences arising under the Employees Provident

Funds Act is a continuing offence, as has been laid down by the Apex Court in the decision reported in Bhagirath Kanoria and Others Vs. State of

M. P., . In the said decision, the Apex Court in paragraph 19 has laid down as follows:

19. The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence.

Turning to the matters before us, the offence of which the appellants are charged is the failure to pay the employer's contribution before the due

date. Considering the object and purpose of this provision, which is to ensure the welfare of workers, we find it impossible to hold that the offence

is not of a continuing nature. The appellants were unquestionably liable to pay their contribution to the Provident Fund before the due date and it

was within their power to pay it, as soon after the due date had expired and they willed. The late payment could not have absolved them of their

original guilt but it would have snapped the recurrence. Each day that they failed to comply with the obligation to pay their contribution to the Fund,

they committed a fresh offence. It is putting an incredible premium on lack of concern for the welfare of workers to hold that the employer who has

not paid his contribution or the contribution of the employees to the Provident Fund can successfully evade the penal consequences of his act by

pleading the law of limitation. Such offences must be regarded as continuing offences to which the law of limitation cannot apply.

10. Learned Counsel for the respondent brought to the notice of this Court that the decision relied upon by the learned Counsel for the petitioners,

namely, 1977 LAB. I.C. 1715 : 1977 LW CrI. 119 (referred to supra) has been overruled by a Division Bench decision of this Court reported in

1980 LW (CrI.) 226 Premium Studs & Chaplets Co. v. In Re:. He also brought to the notice of this Court that the decision reported in T.

Venkatesan Vs. The District Collector, The Tahsildar and Sivanandha Steels Limited, which relies on a decision rendered in W.A. No. 1831 of

2001 of a Division Bench of this Court, has been overruled by a Full Bench decision of this Court reported in (2006) 4 MLJ 1261 Gowri Spinning

Mills (P) Ltd. v. Asst. P.F. Commr., wherein the learned Counsel relied upon the following observations of the Full Bench contained in paragraphs

15 and 22, which read as follows:

15. In our opinion, the provision of Section 22(1) of the SICA has no application to the provident fund dues and the provisions of the EPF Act

would not come within the purview thereof. The provident fund and other dues payable under the EPF Act are part of the legitimate statutory

settlements of the workers. The employer is obligated to pay the contribution of the employees as well as his contribution to the Fund, which is set

up under the Act, and the Scheme framed thereunder. The employees' contribution together with the employer's contribution is required to be

paid into the Fund by the employer within the stipulated period. These amounts whether by way of contribution of the employee or the contribution

of the employer, are moneys which belong to the employee. An account which is required to be maintained in the name of each member of the

provident fund, contains contribution of the employee, the employer as well as the interest which has been credited. Provident Fund is the

foundation of an important measure of social security provided to employees of those establishments to whom the Act applies. In the aforesaid

situation, an employer cannot refuse to comply with the statutory mandate to pay the contribution made by the employees as also his share, which

was by way of social security scheme. Although the object of the SICA is laudable, but, in our view, the same should not deprive the hard earnings

of the employees. It does not and cannot stay the recovery proceedings for recovery of money to which employees are entitled by way of social

security scheme. The money does not belong to the company, it belongs to the employees. These moneys can be withdrawn by the employees in

certain eventualities even prior to the attainment of age of superannuation. The Scheme makes provision for withdrawal from the Fund and for the

grant of advances from the Fund in special cases.

22. In the light of the provisions of the EPF Act, and the Scheme framed thereunder, we are of the view that the rights of the employees under the

Scheme are protected and the proceedings under the EPF Act do not come within the purview of the provisions of Section 22(1) of the SICA. An

amendment to the EPF Act was made by Act 33 of 1988 in terms whereof proviso to Section 14-B has been introduced. u/s 14-B where an

employer makes default in payment of any contribution to the Fund, the Central

Provident Fund Commissioner has been authorized to recover the damages by way of penalty and exceeding the amount of arrears. However, under the proviso appended thereto, the Central Board has been empowered to reduce the quantum of damages that may be required to be paid by a company in relation to an undertaking which is a sick industrial undertaking and in respect of which the scheme for rehabilitation has been sanctioned by the BIFR, subject to such terms and conditions as may be specified under the scheme. Parliament thus as a matter of legislative policy has enacted that the employer be granted a waiver of damages payable u/s 14-B where the undertaking of the employer is a sick industrial undertaking and the scheme for its rehabilitation has been sanctioned. There again, it must be noticed that the eligibility to grant waiver u/s 14-B is subject to those conditions which have been prescribed therein. Parliament having thus amended the EPF Act had taken within its purview the position of a sick industrial undertaking, the extent of the immunity which have been conferred upon such undertaking with reference to provident fund dues under the Act, must be confined to what has been legitimized by Parliament. The extent of the immunity or exemption cannot be extended beyond what was allowed in terms of the amendment to the EPF Act.

and submitted that the object of the EPF Act was a measure to provide social security to the employees; the contribution of the employees as well as the employer towards provident fund is not a tax due; it is also not an amount recoverable under a contract; the moneys, which have been deducted from the wages of the employees as well as the amounts, which the employer is required to pay as its contribution, belong to the employees, and constitute their rightful and just entitlement for the eventual payment of provident fund benefits; therefore, the ban order passed u/s 22-A of the SICA will not come in the way of the respondent filing the complaints against the petitioners for the offences committed under the EPF Act.

11. I have considered the aforesaid submissions made by the learned Counsel on either side and perused the materials available on record.

12. The contention of the learned Counsel for the petitioners that the offences u/s 6-C read with Sections 14(1B)/14A of the Employees"

Provident Funds and Miscellaneous Provisions Act, 1952 and the Employees Deposit Linked Insurance Scheme, 1976 is barred by limitation

since it is not a continuing offence, cannot be countenanced in the light of the decisions of the Apex Court reported in AIR 1984 Supreme Court

1688 (referred to supra) and 1980 Law Weekly (Crl.) 226 (referred to supra). Similarly, the contention put forth by the learned senior counsel

based on the decisions relied upon by him, which dealt with the effect of an order passed u/s 22(1) of the SICA on a prosecution u/s 138 of the

Negotiable Instruments Act and the proceedings initiated for the recovery of sales tax, property tax, etc., are not relevant for deciding the issue that

arises for consideration in these cases. In fact, in the decisions reported in AIR 2000 Supreme Court 954 : (2000) 2 Supreme Court Cases 745

(referred to supra) and 2001 (2) TLNJ 266 (referred to supra) while considering the scope or effect of an order passed u/s 22 of the SICA on a

criminal prosecution launched u/s 138 of the Negotiable Instruments Act, the Apex Court has by referring to the decision rendered in the case of

BSI Ltd. v. Gift Holdings Pvt. Ltd. and reported in 2000 AIR SCW 521 has held that Section 22(1) only deals with proceedings for recovery of

money or for enforcement of any security or a guarantee in respect of any loans or advance granted to the company and a proceedings for winding

up of the company and the section does not refer to any criminal proceedings. Therefore, the contentions put fourth by the learned Counsel basing

reliance on the decisions arising out of Section 22(1) of the SICA and Section 138 of the Negotiable Instruments Act, etc., cannot be

countenanced.

13. The main thrust of the contention of the learned Counsel for the petitioners is based on the decision reported in Kusum Ingots and Alloys Ltd.,

etc. Vs. Pennar Peterson Securities Ltd. and Others, wherein the Apex Court while considering the validity of a prosecution launched u/s 138 of

the Negotiable Instruments Act, when the ban order passed by the BIFR u/s 22-A of the SICA was in force, has observed that if before the date

on which the cheque was drawn or before expiry of the statutory period of fifteen days after notice, a restraint order of the BIFR u/s 22-A of the

SICA was passed against the company, then it cannot be said that the offence u/s 138 of the Negotiable Instruments Act was completed. In such a

case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or

its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not

recoverable from the assets of the company in view of the ban order passed by the BIFR. In such circumstances it would be unjust and unfair and

against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case.

14. But the learned Counsel for the respondent submitted that the said decision cannot be applied to a prosecution launched under the EPF Act,

since the EPF Act, as has been laid down by a Full Bench decision of this Court in (2006) 4 MLJ 1261 (referred to supra), was a measure to

provide social security to the employees and the moneys, which have been deducted from the wages of the employees as well the amounts, which

the employer is required to pay as its contribution, belong to the employees, and constitute their rightful and just entitlement for the eventual

payment of provident fund benefits. On the aforesaid reasonings, the Full Bench has held that the order passed u/s 22(1) of the SICA is not a bar

for levying the recovery proceedings under the EPF Act against the defaulting establishment. It should be held that the ban order u/s 22-A of the

SICA passed by the BIFR cannot be a bar for prosecuting the petitioners herein.

15. In these cases, it is not in dispute that the establishment namely the first accused has committed default in the payment of the dues under the

Act and the Schemes framed thereunder and it is also not in dispute that the BIFR has passed an order on 01.10.1997 u/s 22-A of the SICA.

Therefore, in the light of the order passed u/s 22-A of the SICA by the BIFR, it has to be seen as to whether the failure to pay the dues under the

Act and the Scheme is beyond the control of the accused/petitioners herein. The contentions of the learned Senior Counsel for the petitioners is

that the failure to make the payment of the dues by the company and its Directors is for reasons beyond their control. Basing reliance on the

decision reported in Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, it is contended that the amounts claimed

by the complainant is not recoverable from the assets of the company in view of the ban order passed by the BIFR. In the said decision, the Apex

Court has held that it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case. But this Court is of the considered view that the same analogy and the ratio laid down in the said decision cannot be applied to the cases on hand for the reasons stated here-under.

16. In paragraph 8 of the quash petitions the petitioners have stated that the first petitioner company could not continue its activities for want of

adequate funds and total non-cooperation of the employees, resulting in the closure of both the factories by April 2000. Thus, it could be seen that

the first petitioner company was running the unit though declared as sick even after 01.10.1997 i.e., the date on which the ban order u/s 22-A of

the SICA was passed by the BIFR. The order dated 01.10.1997 passed by the BIFR u/s 22-A of the SICA is not a total ban prohibiting the first

petitioner company or its Directors from dealing with the assets of the company but it is a qualified order. In the order dated 01.10.1997 the BIFR

has permitted the running of the unit on the following terms, namely, "however, if the unit is running, the current assets can be drawn down to the

minimum extent required for day to day operations of which proper accounts would be maintained". From the averments contained in the quash

petitions, as extracted above, it could be seen that the first petitioner company was running the unit by taking advantage of the aforesaid order of

the BIFR. It has also come to the notice of this Court from the materials produced by the very same petitioners in CrI.O.P. No. 20009 of 2003,

which has been disposed of by me today, that the first petitioner company was running the unit even after the orders dated 01.10.1997 and

09.05.2001 passed by the BIFR. In fact, the facts of the case in CrI.O.P. No. 20009 of 2003 shows that the first petitioner company was placing

orders with various suppliers for the raw materials for running the unit and was also transacting business with various parties and was also operating

the bank account and thereby dealing with the current assets of the first petitioner company. That being so, it cannot now be contended by the

petitioners that because of the ban order passed u/s 22-A of the SICA by BIFR, the petitioners were unable to deal with the current assets of the

first petitioner company and that was the reason why they were unable to make payments of the amounts due towards the Employees Deposit

Linked Insurance Contribution and the Administrative Charges. In fact, the prosecution relates to the non-payment of various dues commencing from November 1998 to July 2000 i.e., when the first petitioner company was running the unit. As pointed out above, it is the admitted case of the petitioners themselves that the first petitioner company closed the factories only in April 2000. Therefore, in the considered view of this Court, when the first petitioner company was running the unit and dealing with the assets of the company, it cannot be heard to say that because of the ban order passed by the BIFR u/s 22-A of the SICA, the petitioners were unable to pay the dues under the EPF Act. Under paragraphs 7 and 8 of the Employees Deposit Linked Insurance Scheme 1976, the establishment is required to pay the contribution and administrative charges for every month within fifteen days of the close of every month in respect of the employees of the said establishment. Once before the expiry of fifteen days of close of every month, the contribution and the administrative charges are not paid, then the offence is said to be committed. As pointed out above, the petitioners were running the unit admittedly and therefore they have to comply with the statutory requirements, but they have failed to make the payments due. On the other hand, if the first petitioner company was not running the unit and was not dealing with the assets of the company, because of the ban order u/s 22-A of the SICA, the contention of the learned senior counsel for the petitioners could be accepted. But that is not the case here as stated above. Therefore, the decision of the Apex Court reported in AIR 2000 Supreme Court 954 : (2000) 2 Supreme Court Cases 745 (referred to supra) is not applicable to the facts of these cases.

17. For the aforesaid reasons, the above Criminal Original Petitions fail and the same are dismissed. Since C.C. Nos. 4857 to 4877 of 2004 are pending from the year 2004, the learned XI Metropolitan Magistrate, Saidapet, Chennai, is hereby directed to dispose of the same within a period of six months from the date of receipt of a copy of this order. Consequently, the connected Crl.M.Ps are closed.