

(1985) 10 MAD CK 0010

In the Madras High Court

Case No : Writ Petition No. 3760 and 4151 of 1979

Sri Angappa Spinning Mills and Others

APPELLANT

Vs

Regional Commissioner, Employees Provident Fund Tamilnadu
and Pondicherry

RESPONDENT

Date of Decision : 29-10-1985

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B,
15(2), 17, 17(5), 17B
Factories Act, 1948 — Section 2, 6, 7, 7(1), 8

Citation : (1987) 1 LLJ 235 : (1985) 98 LW 778

Hon'ble Judges : V. Ratnam, J

Bench : Single Bench

Judgement

1. An interesting question regarding the interpretation of section 17-B of the Employees Provident Funds and Miscellaneous Provisions Act, 1952,

Act 19 of 1952 (hereinafter referred to as "the Act") arises for decision in these writ petitions, impugning the order of the respondent herein in

proceedings No. E.7/TN/161/Regional dated 10th August, 1979. Though the petitioners are different in the Writ Petitions, the order impugned is

the same and as a common question arises for decision they are default with together.

2. The facts giving rise to the writ petitions may now be noticed. A partnership firm under the name and style of Kanakavel Nadar & Sons was

running a mill at Madurai known as Raja Mills. The site over which the mills had been put up belongs to a Mutt called Vyasarayya Mutt and the

partnership firm had obtained a lease of the site from it. The mill premises comprising of the superstructure as well as the machinery installed therein

belonged to the partnership firm Kanakavel Nadar and Sons. There is no dispute

that Raja Mills came under the purview of the provisions of the Act and the Schemes framed thereunder with effect from 1st November, 1952. For the period September, 1967, to October, 1969, it had not remitted contributions for the Employees' Provident Fund. Likewise, the administration charges and damages for the period March, 1966, to October, 1969, had remained unremitted. There is no dispute that the aforesaid amounts totalling to Rs. 1,19,648.10 p. were recoverable from the partnership firm Kanakavel Nadar and Sons, which was then running Raja Mills. However, in 1965 the partnership firm of Kanakavel Nadar and Sons executed a mortgage in favour of Bank of Madurai Limited over the assets belonging to it in Raja Mills comprising of the superstructure and the machinery installed therein. The amounts repayable under the mortgage having remained unpaid, the Bank of Madurai Limited instituted O.S. No. 118 of 1971. Sub Court, Madurai to enforce the mortgage and for the sale of hypotheca. In due course, the Bank of Madurai Limited obtained a preliminary decree and as the amount declared payable under the preliminary decree continued to remain unpaid, the Bank of Madurai Limited proceeded to obtain a final decree as well. In E.P. No. 172 of 1975, the Bank of Madurai Limited put the final decree obtained by it in O.S. No. 118 of 1971 into execution and sought the sale of hypotheca with a view to realise the amounts due to it under the final decree. In the court auction sale held on 30th August, 1976, Krishnamaraja, the petitioner in W.P. No. 4151 of 1979, became the purchaser. Meanwhile, from about 20th August, 1976, the partnership firm of Kanakavel Nadar and Sons stopped running Raja Mills. Owing to the pendency of proceedings for setting aside the Court sale and other proceedings, the petitioner in W.P. No. 4151 of 1979 was unable to take possession of the property purchased by him in court auction, though a sale certificate was obtained by him on 22nd March, 1977. On account of the inability of the petitioner in W.P. No. 4151 of 1979 to secure possession of the property, a receiver was appointed to take possession and he leased out what was purchased in Court auction to a firm called Shri Angappa Spinning Mills, the petitioner in W.P. No. 3760 of 1979. Ultimately, on the termination of the proceedings taken to set aside the sale, the petitioner in W.P. No. 4151 of 1979 took possession. Subsequently, he sold the property on

3rd November, 1977 to the petitioner in W.P. No. 3760 of 1979. That sale comprised of the superstructure as well as the items of machinery.

The petitioner in W.P. No. 3760 of 1979 took possession of the superstructure as well as the machinery pursuant to the sale dated 3rd

November, 1977 and also obtained a renewal of the lease from the owner of the site, namely, Vyasaray Mutt. Thereafter, carrying out renovation

and repairs, the petitioner in W.P. No. 3760 of 1979 started running the mill from 1st May, 1978.

3. While so, the Regional Provident Fund Commissioner, Tamil Nadu, sent a communication to the petitioner in W.P. No. 4151 of 1979 in 1978

that Provident Fund contributions in respect of persons employed by the firm Kanakavel Nadar and Sons for the years 1966 to 1969 had not

been remitted. By another notice dated 23rd February, 1979 purporting to be u/s 7-A of the Act, the petitioner in W.P. No. 4151 of 1979 was

informed that he would also be liable to pay the arrears of contributions due from the firm Kanakavel Nadar and Sons u/s 17-B of the Act. To this,

the petitioner in W.P. No. 4151 of 1979 sent a detailed explanation on 3rd May, 1979 that he was only a purchaser in court auction sale in

execution of the decree in O.S. No. 118 of 1971 and as such the provisions of section 17-B of the Act would be inapplicable. In so far as the

petitioner in W.P. No. 3760 of 1979 is concerned, on 11th June, 1978, a letter addressed to Raja Mills was served on it to the effect that a sum

of Rs. 70,384 should be remitted and that in default, proceedings under Revenue Recovery Act would be resorted to. Thereupon, the petitioner in

W.P. No. 3760 of 1979 wrote to the Tahsildar setting out the facts and disputing its liability in respect of the amount demanded. Yet another

communication was also sent to the petitioner in W.P. No. 3760 of 1979 on 31st October, 1978 persisting in the demand and requiring payment

of the amount as aforesaid. Then again, the petitioner in W.P. No. 3760 of 1979 disputed its liability and prayed for the dropping of the

proceedings. The dispute raised regarding the liability was not countenanced, but the Tahsildar was directed to take immediate steps to collect the

amount of Rs. 70,384 from the petitioner in W.P. No. 3760 of 1979. Thereupon, the petitioner in W.P. No. 3760 of 1979 again prayed for the

dropping of the proceedings under the Revenue Recovery Act while disputing its liability. While matters stood thus, on 4th December, 1978, the

Regional Provident Fund Commissioner, Tamil Nadu sent a communication to the petitioner in W.P. No. 3760 of 1979 to the effect that the

petitioner therein would be liable for the contributions due from the erstwhile Raja Mills taken over by it, as it had failed to submit the returns and

remit the provident fund contributions. The petitioner in W.P. No. 3760 of 1979 also disputed its liability on the ground that section 17-B of the

Act can have no application. Finally, the petitioners were informed that the matter would be enquired into : Before the Regional Provident Fund

Commissioner, Tamil Nadu, the petitioners contested their liability on the ground that section 17-B of the Act would not stand attracted as what

was contemplated thereunder was only a transfer inter vivos and not an involuntary sale as had taken place in this case. However, the Regional

Provident Fund Commissioner, Tamil Nadu, took the view that even an involuntary sale, like the court sale in this case, would be covered by

section 17-B of the Act and the petitioners cannot dispute their liability for the contributions not remitted by Raja Mills during the time when it was

run by the partnership firm of Kanakavel Nadar and Sons. Purporting to exercise powers u/s 7A of the Act, the respondent concluded that the

partners of Raja Mills, namely, Vajravel, Vijayavel and Seethalakshmi, Krishnamaraja, the petitioner in W.P. No. 4151 of 1979, and the partners

of the firm running the petitioner mills in W.P. No. 3760 of 1979 would all be jointly and severally liable to pay the amounts due by Raja Mills for

the period when it was run by the partnership firm Kanakavel Nadar & Sons. It is the correctness of this order that is challenged by both the

petitioners on identical grounds.

4. Mr. M. R. Narayanaswamy, the learned Counsel for the petitioners in these Writ Petitions, invited attention to the definition of "employer" in

section 2(e) of the Act, contended that the transfer contemplated u/s 17-B of the Act is a transfer inter vivos and not an involuntary transfer like a

court sale and that on the transferee, by virtue of a court sale, no liability can be fastened for the payment of contribution and other sums due from

the erstwhile employer. Elaborating this, the learned Counsel pointed out that the words ""in any other manner whatsoever"" occurring in section 17-

B of the Act would cover transactions like sale, gift, lease or license, which again should be transactions entered into by an employer with the

transferee and would not take in execution sales. On the other hand, the learned Counsel for the respondent submitted that whatever be the method by which the transfer is effected, so long as there is a transfer of an establishment, that would suffice to attract section 17-B of the Act and, therefore, the petitioners cannot escape their liability to pay the contributions. Strong reliance was also placed by the learned Counsel for the respondent upon the decision in C. T. Senthilnathan V. The Regional Commissioner, Employees' Provident Funds, Madras, W.A. No. 8 of 1973 dated 13th August, 1974.

5. Before proceeding to consider these rival contentions, it would be necessary to refer to a few of the relevant provisions in the Act. u/s 2(e) of

the Act, "employer" is defined as follows :

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

(1) of section 7 of the Factories Act, 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;

Section 2(k) of the Act defines "occupier" as follows :

"occupier of a factory" means the person who has ultimate control over the affairs of the factory, and, where the said affairs are entrusted to a

managing agent, such agent shall be deemed to be the occupier of the factory.

Section 6 of the Act which obliges the employer and the employee to contribute is in the following terms :

The contribution which shall be paid by the employer to the Fund shall be six and a quarter per cent of the basic wages, dearness allowance and

retaining allowance (if any) for the time being payable to each of the employees whether employed by him directly or by or through a contractor,

and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may if any employee so desires

and if the scheme makes provision therefor, be an amount not exceeding eight and one-third per cent of his basic wages, dearness allowance and retaining allowance (if any).

Section 8 of the Act provides for the mode of recovery of moneys due from the employers in the following terms :

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 14-B, 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 Family 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.

Section 17-B of the Act runs as follows :-

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 licence 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, 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.

It is not necessary to refer to the other sections of the Act for purposes of these

writ petitions.

6. The definition of the word "employer" takes within its fold the owner or occupier of the factory inclusive of the agent of such owner or occupier,

the legal representative of a deceased owner or occupier as well as the manager so named u/s 7(1)(f) of the Factories Act. This is with reference

to an establishment, which is a factory. With reference to any other establishment, the person or the authority exercising ultimate control would be

the employer and where such authority or control is entrusted to a manager managing director or managing agent, such manager managing director

or managing agent. There is no dispute that the establishment in this case is a factory and section 2(e)(i) of the Act would apply. There is no

question of occupier agent of owner or occupier, legal representative of a deceased owner or occupier or other named person as the manager in

this case, for admittedly, the partnership firm of Kanakavel Nadar & Sons was the owner of Raja Mills. There is no dispute that for the period in

question, u/s 6 of the Act, the contribution in respect of the employees of Raja Mills should have been paid by the partnership firm of Kanakavel

Nadar & Sons as owner of the factory and as such the employer as well u/s 2(e)(i) of the Act. For the non-payment of the contribution and other

amounts in respect of the employees of Raja Mills by the employer, namely, the partnership firm of Kanakavel Nadar & Sons, those amounts

could have been recovered in the same manner as an arrear of land revenue from the firm of Kanakavel Nadar & Sons as per section 8 of the Act.

Section 8 of the Act indicates that the defaulting employer is liable to be proceeded against for the recovery of the amounts due either by way of

contribution and others by resorting to the procedure applicable for the recovery of the arrears of the land revenue. In other words, section 8 of

the Act contemplates recovery from the employer as defined in section 2(e) of the Act. The liability to pay contribution and other sums on transfer

of an establishment is specially provided for u/s 17-B of the Act. The need for making special provision fastening liability for the payment of

contribution and other sums on the transferee is a clear pointer that otherwise no person other than the employer would be liable for its payment.

To put it differently, the underlying principle behind section 17-B of the Act is that the employer, who is liable u/s 6 of the Act to pay the

contribution and other sums, cannot by merely resorting to the device of transfer, be permitted to avoid such liability and, therefore it is, provision is made u/s 17-B of the Act that the employer as well as his transferee shall be jointly and severally liable to pay the contribution and other sums up to the date of transfer. The specification of the period also indicates that primarily the liability would be that of the transferring employer, and by reason of the transfer, the liability on the employer would not cease, but would continue to exist and would also be fastened upon the transferee, though limited to the value of the assets obtained by the transferee by such transfer. Section 17-B of the Act, by making a special provision for the joint liability of the transferor and the transferee with reference to contributions and other sums due from the employer up to the date of such transfer, also clearly brings out that but for section 17-B of the Act, the transferor-employer alone would be liable. In other words, the employer cannot be permitted to defeat his obligation to pay the contributions and other sums by transferring the establishment and, therefore it is, that up to the date of the transfer, the transferor and the transferee are both made liable jointly and severally. But at the same time, the transfer contemplated u/s 17-B of the Act is a transfer by an employer. The use of the words "'where an employer transfers clearly indicates that the act of transfer must be attributed or referable to the employer if section 17-B of the Act, fastening the liability on the employer and the transferee for the payment of contribution and other sums, is to operate. The transfer by the employer of the establishment contemplated u/s 17-B of the Act is by an act of transfer by the employer; as otherwise, the word used would not have been "transfers" as found. If transfers other than a transfer by the employer had been contemplated, the language employed would have been different, for instance, if a transfer not attributable to an employer had also been contemplated, then the words "'where the establishment had been transferred'" could have been used. There is thus no indication that section 17-B of the Act contemplated transfers otherwise than by an employer as defined in the Act in relation to an establishment. A court sale takes place by operation of law and not by any transaction inter vivos. In that sense, it is an involuntary sale against the wishes of the person whose property is sold. That can hardly be called a transfer, as ordinarily understood, which connotes a voluntary transaction entered into between two parties. In

this connection, it has also to be remembered that the provisions of the Transfer of Property, Act generally dealing with all kinds of transfers do not

affect transfers by operation of law or by, or in execution, of, a decree or order of a Court of competent jurisdiction u/s 2(d) of the Transfer of

Property Act. It is also settled that a purchaser at a court sale is a transferee by operation of law. A court auction sale cannot, therefore, be

considered as a transfer by an employer of the establishment to the transferee. In this case, after the passing of the final decree in O.S. No. 118 of

1971, Sub-Court, Madurai, the mortgagors-judgment-debtors therein, namely, the partnership firm of Kanakavel Nadar & Sons, had nothing left

in it which it could have thereafter transferred in favour of other persons. No doubt, some proceedings were taken to have the sale set aside, but

they were not under the provisions of Order 34, Code of Civil Procedure. In other words, after the passing of the final decree, in the events that

happened, the partnership firm of Kanakavel Nadar & Sons, did not possess any transferable right as such and thus the sale that eventually took

place through court could not be put on a par with a transfer by the employer.

7. The enumeration of the nature of the transaction of transfer like sale, gift, lease or licence is also significant in that a transfer by sale or gift or

lease or licence is normally between one person and another. It will be useful in this connection to refer to section 5 of Transfer of Property Act

which sets out that an act by which one person conveys property either in present or in future to one or more living persons, or to himself, and one

or more other living persons is a transfer of property. The provisions of the Transfer of Property Act governs sales, gifts, leases, etc., The

enumeration of these several transactions by which the transfer can be effected also indicates that the transfer contemplated is a transfer by an

employer and not any other. The words "in any other manner whatsoever" occurring in section 17-B of the Act would not cover a case of

involuntary sale or court sale. The transaction of transfer may not be brought about by sale, gift, lease or licence, but in some other manner.

However, by whatsoever transaction a transfer is brought about, again, it must be attributed to an act of transfer on the part of the employer in

bringing it about in any manner whatsoever. Therefore the words, in any other manner whatsoever cannot be interpreted in a manner to

comprehend court sales. Again, the words "in any other manner whatsoever" would cover only transactions like sale, gift, lease or licence. In other words, the use of the words in any other manner whatsoever is only with a view to rope in transactions like sale, gift, lease or licence, though not in that form. But that does not however dispense with the requirement of a transfer by an employer. Looked at from this point of view also, section 17-B of the Act cannot be interpreted as taking within its fold involuntary sales. In my view, therefore, the learned Counsel for the petitioners is certainly well-founded in his contention that court sales are outside the pale of section 17-B of the Act.

8. The decision in C. T. Shenthilnathan V. The Regional Commissioner, Employees' Provident Funds, Madras, W.A. No. 8 of 1973 dated 13th

August, 1974 relied on by the learned Counsel for the respondent to sustain the demand made against the petitioners may now be noticed. From

the facts as could be culled out from W.P. No. 3096 of 1972 which gave rise to W.A. No. 8 of 1973, it is seen that there was an agreement

between the transferor and the transferee, but that was not produced before the Regional Provident Fund Commissioner in order to establish that

the transferor was not liable to pay the contribution and other charges and that the transferee had agreed to take over that liability as part of the

transfer. That was why it was also stated in the course of the order in W.P. No. 3096 of 1972 that in the event of the petitioner therein being

compelled to pay the entire arrears, he had the remedy to seek contribution from those responsible to so contribute and this could be only on the

basis of a contract in that regard. It is therefore, obvious that in that case there was a transfer by the employer and an understanding was arrived at

between the employer and the transferee regarding the payment of contribution and other charges. However, on appeal, it was observed as

follows :

..... the liability is a continuous one and it is realised from the owner for the time being. In such cases, the transferee, when there are arrears, will

have to make arrangement with the transferor for payment thereof. That is a matter of adjustment between the transferor and transferee. So far as

the Commissioner is concerned, he only looks to the owner or occupier at the time and not to the owners or occupiers at different times.

This proceeds on a recognition of an arrangement between the employer-transferor and the transferee in regard to the payment of the arrears. This

is precisely the case provided for u/s 17-B of the Act. It has been stated therein that in so far as the Commissioner is concerned, he can look to the

owner or occupier at the time and not the owners or occupiers at different times. This is also justified by stating that there is a charge on the

factory. A careful consideration of the provisions of the Act does not reveal that any charge was intended to be created on the establishment so

that irrespective of the hand into which the establishment may pass, the then owner or occupier would be liable even in respect of contributions and

other charges remaining unpaid at the time when the then owner was not the employer. Unfortunately, section 8 of the Act had gone unnoticed.

That decision can at best be held applicable to a case to which section 17-B of the Act may stand attracted and not to a case like the present.

9. For the foregoing reasons, section 17-B of the Act cannot be applied at all on the facts and circumstances of this case to fasten liability on the

petitioners in these writ petitions for the contributions and other charges which had remained unpaid in respect of a period long prior to the

petitioners becoming the employers as defined in the Act. Consequently, the rule nisi is made absolute and the Writ petitions are allowed. There

will be however, no order as to costs.