

(2019) 09 DEL CK 0387

In the Delhi High Court

Case No : Civil Writ Petition No. 6639 Of 2013, Civil Miscellaneous No. 14424 Of 2013

Sun Pharmaceuticals Industries Ltd

APPELLANT

Vs

Employees Provident Fund Organisation & Anr

RESPONDENT

Date of Decision : 25-09-2019

Acts Referred:

Employees' Provident Funds and Miscellaneous Provident Act, 1952 — Section 8B, 8C(2), 8F(3), 8F(3)(i), 8F(3)(vi)

Citation : (2019) 10 AD(Delhi) 389

Hon'ble Judges : Rekha Palli, J

Bench : Single Bench

Advocate : Manik Dogra, Arbaaz Hussain, Tanim Gaur, Sonali Jaitley Bakhshi, Sanya Kapoor, Rajesh Manchanda, Rajat Manchanda, Sidharth Shankar

Final Decision : Allowed

Judgement

Rekha Palli, J

1. The present writ petition seeks quashing of the letter dated 18.03.2013, the order dated 10.07.2013 and the subsequent show cause notices dated 06.08.2013 and 09.10.2013 issued by the respondent No.1/Employees' Provident Fund Organisation for recovery of provident fund dues of the respondent no.2.

2. The petitioner is a pharmaceutical company which, pursuant to an agreement dated 15.05.2009, purchased certain trademarks, product dossiers and marketing rights of dermatological and life style products from respondent no.2. The agreement set down the inter-se liability of the parties and the manner in which the sale consideration was to be paid. On 31.12.2009 the parties entered into an addendum agreement stipulating that, in order to conclude the transactions carried out in accordance with the agreement dated 15.05.2009, the petitioner would retain an amount of Rs. 9 crore to meet any trade claims and other claims or to make adjustments against any unfulfilled obligations of the respondent no.2 as set out in Annexure I of the agreement.

3. On 18.03.2013, the petitioner received a letter from the respondent no.1/ Employees' Provident Fund Organization stating that it had learnt of the petitioner's arrangement with the respondent no.2, which company was in default of its provident fund dues totaling a sum of Rs.34,82,267/- and that, consequently, the petitioner was liable to pay all the dues of the respondent no.2. The petitioner, thus, was directed by the respondent no.1 to pay the provident fund dues of the respondent no.2. In its reply dated 01.04.2013 to this demand letter, the petitioner informed the respondent no.1 that while it had only acquired certain specific trademarks from respondent no.2, the said respondent/Ochoa Laboratories continued to carry on its independent business with which the petitioner had no connection and, therefore, it could not be held liable, in any manner, for paying the provident fund dues of the respondent no.2. The petitioner also informed the respondent no.1 that the entire consideration towards the purchase of the brands/trademarks already stood paid to the respondent no.2 and no further amount was payable by the petitioner to the respondent no.2. The respondent no.1, on 10.07.2013 issued another recovery notice to the petitioner, this time with a prohibitory order of the same date inter-alia reiterating that as per the information provided by the respondent no.2, the petitioner had purchased its brand for a total sale consideration of Rs. 24 crore, out of which the petitioner was still withholding a sum of Rs. 3 crore under the retention fund. This retention amount of Rs.3 crore, the notice claimed, was now payable to the respondent no.2 and, therefore, the petitioner was liable to transfer the amount of Rs.34,99,987/- to the respondent no.1 as provident fund dues of the respondent no.2. The petitioner replied to this letter on 02.08.2013 seeking time till 14.08.2013 to make a detailed representation on its behalf and requested the respondent no.1 to give them an opportunity to make their submissions. Without even waiting for the petitioner's detailed response, respondent no.1 issued a notice dated 06.08.2013 addressed to two officers of the petitioner company asking them to show cause as to why they should not be committed to civil prison in execution of the certificate of arrears of provident fund dues of Rs. 34,99,987/- drawn up against respondent no.2. In response thereto, the petitioner submitted its reply dated 14.08.2013 reiterating that the amount of Rs.3 crore alleged by the respondent no.2 as having been retained by the petitioner was incorrect as only a balance amount of Rs.2,93,808/- was lying with the petitioner in the retention account. The petitioner thereafter transferred this amount of Rs. 2,93,808/- to the respondent no.1 and urged that, in these circumstances, it was not liable to make any further payment or settle any liabilities of the respondent no.2. The petitioner also furnished, on the specific directions of the respondent no.1, a certified copy of the ledger of Retention Account from 01.03.2013 till 21.08.2013 on 23.08.2013 to show that it did not hold any amount of the respondent no.2 in the Retention Account. Notwithstanding the petitioner's reply, a fresh notice dated 09.10.2013 was issued by the respondent No.1 to the petitioner's officers once again requiring them to deposit the said amount or to show cause as to why warrants of arrest be not issued against them.

4. Aggrieved by the persistent demands and threats of the respondent no.1, the petitioner instituted the present petition impugning the prohibitory orders and the showcause notices. This Court, vide its order dated 27.10.2013, while issuing notice in the present petition passed an interim order directing that no coercive steps be taken against the petitioner to recover the dues of the respondent no.2.

5. The respondent nos.1 and 2 have filed their respective counter affidavits opposing the petition. While the respondent no.1 has claimed that once the respondent no.2 informed them that retention fund of Rs.3 crore was lying with the petitioner, the respondent no.1 was justified in invoking its powers under Section 8 F(3)(i) of the EPF Act requiring the petitioner to deposit the pending provident fund dues of the respondent no.2. Similarly the respondent No.2, while reiterating that the petitioner was holding a sum of Rs. 3 crore as retention fund which it was liable to refund, also urged that the petitioner had specifically agreed to meet all the liabilities of the respondent no.2 and, as a result, it was also responsible for paying the provident fund dues of the employees of respondent no.2. It has further been urged that the respondent no.2 had already challenged the assessment order in question by instituting an appeal before the Employees Provident Fund Tribunal on 06.03.2014, which is currently pending adjudication. The respondent no.2 has also stated that the Tribunal has stayed the operation of the assessment order during the pendency of the appeal.

6. In support of the petition, Mr. Manik Dogra learned counsel for the petitioner has raised two primary contentions. Mr. Dogra firstly submits that the agreement entered into between the petitioner and respondent no.2 does not envisage the payment of any statutory dues of the respondent no.2. He submits that the petitioner has only purchased trademarks, product dossiers and marketing rights of certain dermatological and life style products from respondent no.2 and has not stepped into the shoes of the respondent no.2. It is, therefore, for the respondent no.2 alone to meet its statutory dues. In support of his aforesaid contention, he draws my attention to Clauses 2.2 and 11 of the Agreement dated 15.05.2009 as also to Annexure I of the addendum Agreement dated 30.12.2009. He submits that the representation of the respondent no.2 that the petitioner was holding the alleged amount is wholly incorrect as, in fact, it is the petitioner who has to recover a sum exceeding Rs. 84,00,000/- from the respondent no.2.

7. Mr. Dogra submits that as the case of the respondent no.1 itself is that the provident fund dues were payable by respondent no.2, the respondent no.1 was not justified in invoking its power under Section 8F(3)(1) of the EPF Act on the mere asking of the respondent no.2, without even ascertaining whether the petitioner was liable to pay any amount to respondent no.2 or whether it was holding any amount payable to the respondent no.2. He submits that once the petitioner had specifically denied being in possession of any amount payable to the respondent no.2, the respondent no.1 was not at all justified in directing the petitioner to deposit the amount payable by the respondent no.2 and to

thereafter take coercive steps by issuing showcause notices and prohibitory orders against them. He submits that even if the respondent no.1 had represented to the respondent no.2 that an amount of Rs.3 crore was lying with the petitioner, the respondent no.1 could not have acted in such an arbitrary manner without actually determining the veracity of the representation. He submits that a perusal of the show cause notice reveals that the respondent no.1 has, without any basis, come to the conclusion that the petitioner is in possession of the sum of Rs.3 crore payable to respondent no.2 which, in itself, shows that the respondent No.1 has acted in the most arbitrary manner, compelling the petitioner to approach this Court by invoking its writ jurisdiction.

8. Mr. Dogra, further submits that Section 8F(3) of the EPF Act lays down the complete procedure for the manner in which a third party can be required to pay the provident fund dues of a defaulting employer. He submits that even if the respondent no.1 was of the view that the petitioner was making any false statement, it could have initiated action in accordance with Section 8F(3)(vi) of the EPF Act instead of prejudging the whole issue and directing the petitioner to deposit the amount or threatening its senior officer with imprisonment in the event of their failure to deposit the said amount. He prays that, therefore, the show cause notices as also the prohibitory orders issued by the respondent no.1 are wholly without any jurisdiction and are liable to be set aside. In support of his aforesaid contentions, he places reliance on *Ferro Concrete Construction (1) Pvt. Ltd. Vs. Regional Provident Fund Commissioner* 2002 (1) M.P.L.J 116, *Keystone India (Pvt.) Ltd. Vs. Regional Provident Fund Commissioner and Ors.* (2003) II LLJ 657 and *Mad and Vijaya Bank Vs. EPFO and Ors*, 2014 (213) DLT 741.

9. On the other hand Mr. Rajesh Manchanda, learned counsel for the respondent no.1 while vehemently opposing the writ petition submits that the petitioner has not approached this Court with clean hands as it has concealed the fact that it was only being asked to produce a copy of the retention fund account and that no coercive steps were being taken against the petitioner after it had deposited the amount of Rs. 2,93,808/-. He draws my attention to paragraphs 5(G) & 5(H) of the counter affidavit and submits that the enquiry to determine whether the petitioner is liable to pay any amount to the respondent no.2 is still pending and, therefore, prays that the writ petition is wholly premature. He further submits that since the claim of the respondent no.2 that an amount of Rs.3 crore is being retained by the petitioner is denied by the petitioner, there are disputed questions of fact being raised herein and that, in these circumstances, the present writ petition is not maintainable.

10. Mr. Manchanda further submits that the EPF Act is a piece of social welfare legislation and by placing reliance on *Maharashtra State Co-op. Bank Ltd. Vs. Assistant P.F. Commissioner* AIR 2010 SC 868, contends that provident fund dues payable under the EPF Act ought to be given precedence over all other debts and, therefore, this Court ought not to interfere with the actions of the respondent no.1 which, in accordance with the provisions and spirit of the EPF

Act, is only trying to secure the dues of helpless employees. He submits that the actions of the respondent no.1 are strictly in consonance with the provisions of Section 8F(3) of the EPF Act which entitles it to direct any party, which is in possession of any amount payable to a defaulting employer, to pay the provident fund dues directly to the respondent no.1. He, therefore, prays that the writ petition be dismissed.

11. Mr. Sidharth Shankar, learned counsel for respondent No.2 while adopting the contentions of Mr. Manchanda, reiterates that the petitioner is liable to refund a sum of Rs.3 crore to the respondent no.2 which it was wrongly withholding and contends that, therefore, the respondent no.2 was fully justified in informing the respondent no.1 that the petitioner is holding huge amounts payable to them. By placing reliance on Clause II of Annexure I to the Agreement dated 30.12.2009, he submits that in terms of the agreements executed between the parties, it is the petitioner's liability to pay the provident fund dues of the respondent no.2's employees, which it has failed to discharge. As a result, the petitioner is guilty of breaching the terms of the agreements and he, therefore, prays that the writ petition be dismissed.

12. I have considered the submissions of the parties and with their assistance perused the record.

13. In the light of the submissions made by the parties, it is evident that the parties are ad idem that the respondent no.2 is a defaulter on account of non-deposit of the provident fund dues of its employees, as assessed by the respondent no.1. There are, however, disputes on whether the petitioner is holding any amount of the respondent no.2, as has been claimed by the latter as also whether the petitioner is liable to pay the provident fund dues of the employees of respondent no.2, in terms of the agreements executed between the parties.

14. The petitioner has urged that none of the agreements executed between the parties ever contemplated any liability on its part to pay the provident fund dues of the respondent no.2, for which purpose Mr. Dogra drew my attention to Clauses 2.2 and 11 of the agreement dated 15.05.2009 as also Annexure I to the addendum agreement dated 30.12.2009. It has also been contended that the petitioner is not holding any amount of the respondent no.2 but, in fact, is entitled to receive a sum exceeding Rs. 84 lakh from the respondent no.2. On the other hand, the respondent no.2 has vehemently urged the opposite by contending that under the terms of these agreements, it was incumbent upon the petitioner to clear all the provident fund dues of the employees of the respondent no.2, for which purpose he has laid emphasis on Clause 1(a) of Annexure I to the Agreement dated 15.05.2009. It has also been urged that the petitioner is liable to refund a sum of Rs.3 crore to the respondent no.2 which it continues to unauthorizedly hold as retention amount. Having given my thoughtful consideration to both these questions, I am of the opinion that they relate to the inter-se liability of the petitioner and the respondent no.2 and,

being disputed questions of fact, can be decided only by way of appropriate proceedings before a civil court or by way of arbitration proceedings in accordance with the Agreement dated 15.05.2009, as the case may be, and not in the present proceedings where only the validity of the actions of the respondent no.1 is in issue. I am, therefore, of the view that for the purpose of the present petition, it will not be proper for this court to decide these questions of fact and it will be open to the parties to agitate them before the appropriate forum.

15. In the light of the aforesaid, the primary question arising out of the present petition is whether the respondent no.1 could demand the provident fund dues of the respondent no.2 from the petitioner, only on a claim made by the respondent no.2, who was the defaulter in the first place. An ancillary question arising therefrom is whether the respondent no.1 was empowered under the EPF Act to issue any prohibitory orders against the petitioner or notices to its officers asking them to show cause as to why they should not be arrested for failing to deposit the amount payable by the respondent no.2, even when the petitioner had specifically disputed that it was holding any amount of the respondent no.2. These questions, being primarily legal issues, do not require me to venture into the disputed questions of fact.

16. As the learned counsel for the respondent no.1 has not disputed that it is the respondent no.2 who is liable to pay the provident fund dues claimed by them, but has instead relied on the provisions of Section 8F(3) of the EPF Act to contend that the provident fund commissioner is entitled to require any person, from whom money is due or may become due to the defaulting employer, to pay such amount to the provident fund commissioner in discharge of the dues owed by the defaulting employer. In this regard, it is deemed appropriate to reproduce Section 8F(3) in its entirety and the same reads as under:

"Section 8F(3)(i) to (vi) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952

"8F.

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(3) (i) The Central Provident fund Commissioner or any other officer authorised by the Central Board in this behalf may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the employer or, as the case may be, the establishment or any person who holds or may subsequently hold money for or on account of the employer or as the case may be, the establishment, to pay to the Central Provident Fund Commissioner either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due from the employer in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the employer jointly with any other person and for the purposes of this sub-section on, the shares of the joint holders in such account shall be presumed, until the contrary is proved, to be equal.

(iii) A copy of the notice shall be forwarded to the employer at his last address known to the Central Provident Fund Commissioner or, as the case may be, the officer so authorised and in the case of a joint account to all the joint holders at their last addresses known to the Central Provident Fund Commissioner or the officer so authorised.

(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, bank or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made notwithstanding any rule, practice or requirement to the contrary.

(v) Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.

(vi) where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the employer or that he does not hold any money for or on account of the employer, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Central Provident Fund Commissioner or the officer so authorised to the extent of his own liability to the employer on the date of the notice, or to the extent of the employer's liability for any sum due under this Act, whichever is less.

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17. A perusal of the aforesaid provision makes it evident that the authority under the EPF Act can require a third party to pay the recoverable provident fund dues of a defaulting employer only when it is an undisputed position that the third party holds money for or on account of the said employer. Undoubtedly, the statute enables the recovery of provident fund dues directly from the debtors of the defaulting employer, but it does not, in any manner, envisage that the provident fund commissioner should take upon itself the task of determining as to who is the debtor of the defaulting employer. In a case like the present, where the petitioner has specifically disputed that it owes any amount to the respondent no.2 and has already deposited the amount as was available in its retention account on the date of receipt of the show cause notice, the respondent

no.1 could not, on the mere behest of the respondent no.2, assume the role of determining the inter-se liability of the petitioner and the respondent no.2. The provisions of the EPF Act, under which the respondent no.1 derives its authority, does not envisage vesting it with such power to move against a third party purely on the basis of a bald claim made by a defaulting employer.

18. The power vested in the authorities under Section 8F(3) of the EPF Act is meant to prevent unscrupulous employers from avoiding payment of its employees' provident fund dues by transferring the amount to a third party or asking its debtors not to pay the amount. The said provisions cannot be used in the manner to raise claims on parties who specifically dispute their liability qua the defaulting employer. Merely because the EPF Act is a beneficial piece of legislation, it cannot be read in such a manner so as to authorize the authorities to take upon itself to decide the inter-se liabilities of the parties or perform an adjudicatory task in this regard. In my view, such disputes have to be determined in appropriate legal proceedings and cannot be left to the provident fund authorities. If the provisions of Section 8F(3) of the EPF Act are interpreted in the manner as sought by the respondents, it would lead to absolute chaos and give unbridled power to the authorities to adjudicate upon disputes between parties, one of whom has nothing to do with provident fund dues. Once the petitioner had specifically disputed its liability, the respondent no.1 could only take action against the petitioner in accordance with Section 8F(3)(vi) of the EPF Act if it were subsequently discovered that the petitioner's statement was false in any manner. In this regard, reference may be made to the decision of the High Court of Madras in *Keystone India (Pvt.) Ltd.* (supra) wherein it was held that a mere claim by a defaulting employer to the effect that a third party has a financial liability towards it, cannot be sufficient to determine the liability of such entity; the said order reads as under:

"ORDER

1. The petitioner has filed the above writ petition seeking for the issuance of a writ of certiorari, to call for and quash the proceedings, dated 24 January, 2000, under which the petitioner was asked to pay a sum of Rs. 19,83,176 payable to the defaulter, M/s. Sivananda Steels, Ltd., Chennai, the fourth respondent herein.

2. It is not in dispute that the fourth respondent is a defaulter by non-payment for the amount to the first respondent as demanded under the Act. But on the basis that the petitioner was having money payable to the defaulter, to the tune of Rs. 19.16 lakhs, the impugned order directing the petitioner to pay the said sum was passed.

3. According to the petitioner, the said amount though is payable by the petitioner to the fourth respondent, has to be adjusted against the amount payable by the fourth respondent, towards the interest and the said Sivananda Steels, Ltd., is liable to pay Rs. 2.19 lakhs more and above the said amount.

4. The learned counsel appearing for the respondents submits that the fourth

respondent is not liable to pay any such interest as claimed by the petitioner and so, the petitioner has to be directed to pay the said amount as demanded by the respondents.

5. I am not able to accept the said submission. In this proceedings, this Court is not expected to decide about the dispute between the petitioner and the fourth respondent. When the petitioner has come forward with a specific plea that the said Sivananda Steels, Ltd., the defaulter, is liable to pay certain amount and the amount mentioned by the respondents has to be adjusted towards the same, this Court cannot direct the petitioner to pay the amount as if the petitioner is liable to pay the amount to the fourth respondent. Admittedly, when the parties raised a dispute regarding the payment of amount, the respondents cannot insist the petitioner to pay the amount irrespective of the dispute regarding the claim between the petitioner and the fourth respondent. Hence, the impugned order cannot be sustained against the petitioner and the same is set aside.

6. If the respondents are able to get materials to show that the petitioner is having money payable to fourth respondent, they can proceed against the said money on that basis. Giving such liberty, the writ petition is allowed. No costs. Consequently, connected W.M.Ps. and W.V.M.P. are closed."

19. Even otherwise, in view of the petitioner's specific assertion that it was not holding any funds of the respondent no.2, the respondent no.1 was not entitled to direct the petitioner to deposit the provident fund dues payable by the respondent no.2, without determining whether the petitioner was, in fact, liable to pay any amount to the respondent no.2. Merely because the payment of provident fund dues is to be given priority to all other debts, as held by the Supreme Court in Maharashtra State Co-op. Bank Ltd. (supra), cannot entitle respondent no.1 to take coercive action against a third party who specifically denies owing any amount to a defaulting employer and that too without the factum of such debt or liability being established. On the other hand, even in Ferro Concrete Construction (supra) the High Court of Madhya Pradesh has held that before passing any orders under Section 8F(3) of the EPF Act are passed against a third party, it is obligatory for the Recovery Officer to hold an inquiry, after providing adequate opportunity to the alleged debtor before directing him to make any deposit. In the present case, the respondent no.1 has virtually acted on the unsubstantiated dictates of the respondent no.2 and has directed the petitioner to pay the amount even when it had specifically denied holding any amount of the respondent no.2, which action is not in consonance with the scheme of Section 8F(3) of the EPF Act.

20. Before I conclude, I am also constrained to observe that the respondent no.1, despite being aware that the petitioner has specifically disputed its liability, has not only persisted in proceeding against the petitioner but has issued show cause notices to its senior officers virtually threatening them with arrest in the event that the amount as directed, was not deposited. Though Mr. Manchanda has urged that the said notices were only requiring the petitioner to participate in

an enquiry which it was proposing to conduct to determine whether the petitioner was in fact holding any amount for the respondent no.2, a perusal of the impugned notice dated 06.08.2013 which is reproduced hereinbelow shows that the language used therein warns the officers of the petitioner Company with arrest and imprisonment in the event of their failure to discharge the provident fund dues of the respondent no.2, rather than requiring them to participate in the inquiry proceedings.

"NOTICE TO SHOW CAUSE WHY A WARRANT OF ARREST SHOULD NOT BE ISSUED.

To

1. Sh. Arun Swahney, CEO/MD M/s Ranbaxy Laboratories Ltd. 90, Sector-32 Gurgaon

Whereas M/s Ochoa Laboratories has failed to pay the amount of arrears Rs.3499987/- & Rs 550/- (Cost and Charges) specified in Certificate no.DL/PF/Enf./18537/14B/C-II/dated 01.04.2013 drawn up by the undersigned / Recovery Officer, Delhi (South) a certified copy of which has forwarded by the said Authorized Officer to the undersigned under section 8C(2) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, for recovery of arrears from you under employees" Provident Funds and Miscellaneous Provisions Act, 1952 and Schemes framed there under, and it is proposed to execute the above certificate by arrest and imprisonment of your person;

Whereas, in exercise of the power conferred on me under Section 8B of the Employees" Provident Funds and Miscellaneous Provisions Act, 1952, you are hereby required to appear before the undersigned on the 14th day of Aug 2013 at 11:00 A.M. and to show cause why you should not be committed to the civil prison in execution of the said certificate.

Given under my hand and seal at Delhi this 1st day of Aug 2013"

21. An additional factor which assumes significance is that the assessment order, on the basis of which the respondent no.1 has proceeded against the petitioner, has already been stayed in the appeal instituted by the respondent no.2 which appeal is still pending adjudication before the Employees' Provident Fund Tribunal. The respondent no.1 cannot, therefore, even otherwise claim any amount from the petitioner once the assessment order forming the very basis of its actions has been stayed in judicial proceedings.

22. For the aforesaid reasons, the letter dated 18.03.2013, the order dated 10.07.2013 and the subsequent show cause notices dated 06.08.2013 and 09.10.2013 are wholly unsustainable and are hereby quashed. The respondent no.1 would, however, be at liberty to claim the amount from the petitioner if it is held, in any appropriate proceedings, that the petitioner is, in fact, liable to pay to the respondent no.2 or is holding any amount payable to the said respondent.

23. The writ petition, along with pending applications, is allowed in the aforesaid terms.