

(2014) 07 DEL CK 0197

In the Delhi High Court

Case No : W.P. (C). 1726/2012 and C.M. No. 3811/2012

Vijaya Bank

APPELLANT

Vs

EPFO

RESPONDENT

Date of Decision : 30-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A, 8, 8B, 8F, 8F(3)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4)

Citation : (2015) 213 DLT 741 : (2015) 144 FLR 103

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Vaibhav Dang, Advocate for the Appellant; Rajesh Manchanda and Rajat Manchanda, Advocate for the Respondent

Final Decision : Allowed

Judgement

Vibhu Bakhru, J.—The present writ petition has been filed by the petitioner Bank seeking quashing of two prohibitory orders dated 20.01.2012, whereby the petitioner Bank was restrained by respondent nos.1 & 2 (hereinafter collectively referred to as "EPFO") from delivering certain immovable properties (Industrial Plot Nos.44 & 45, Block-B, Sector 58, NOIDA), which the petitioner Bank had taken physical possession of u/s 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"). The petitioner has also challenged an attachment order dated 20.01.2012 passed by the respondent nos.1 & 2 u/s 8B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "EPF Act").

2. Brief facts of the present case are that petitioner Bank had granted various credit facilities to one M/s Creative Home Fashions Pvt. Ltd/ respondent no.3 (hereinafter referred to as the "CHF"). The said credit facilities were secured by

M/s G.K. Products Pvt. Ltd/ respondent no.4 (hereinafter referred to as the "GKP") and M/s Well Computer Exim Pvt. Ltd/ respondent no.5 (hereinafter referred to as the "WCE"), who had stood as guarantors. GKP and WCE are hereinafter collectively referred to as "guarantors". GKP and WCE also created equitable mortgage in favour of the petitioner, in respect of their immovable properties, i.e. Industrial Plot No.44, Block-B, Sector 58, NOIDA and Industrial Plot No.45, Block-B, Sector 58, NOIDA respectively. The said properties are hereinafter referred to as the "subject properties".

3. The CHF defaulted in the repayment of the credit facility and the loan accounts of the CHF were declared as Non-Performing Assets (NPA). Thereafter, the petitioner bank issued a notice dated 02.12.2008 u/s 13(2) of the SARFAESI Act to CHF as well as to the guarantors demanding a sum of Rs. 29,12,40,939 alongwith interest. Since the said demand was not satisfied, the petitioner took measures u/s 13(4) of the SARFAESI Act and symbolic possession of the aforementioned subject properties was taken by the petitioner on 31.03.2009.

4. Subsequently, on 14.11.2011, the petitioner took over physical possession of the subject properties in question and invited bids for sale/ auction of the said properties. Thereafter, the EPFO issued a letter dated 05.01.2012 to the petitioner whereby the EPFO informed that CHF has committed a default in payment of Provident Fund (PF) dues for a sum of Rs. 81,83,988/- till October 2011 and requested the petitioner not to take any action against the property and assets of CHF by way of sale/auction till the PF dues were recovered. The petitioner, by its letter dated 15.01.2012, clarified that CHF was not the owner of the mortgaged subject properties and the legal owners of the subject properties were the two guarantors i.e. GKP and WCE and therefore, the subject properties could not be attached for recovering the PF dues payable by CHF.

5. Thereafter, the EPFO issued an order dated 20.01.2012 (Order No.15162) u/s 8B of the EPF Act to the petitioner thereby restraining the petitioner from delivering the said properties to any person till further orders. The EPFO then served another prohibitory order dated 20.01.2012 (being No.55035) whereunder, the respondent stated that CHF is in default of PF dues to the tune of Rs. 2,93,82,088/- and again restrained the petitioner from delivering the said properties to any person till further orders. In pursuance to the said prohibitory orders, the EPFO issued an attachment order dated 20.01.2012, thereby attaching the subject properties mortgaged with the petitioner Bank. The petitioner has filed the present petition impugning the said prohibitory orders and the attachment orders (hereinafter collectively referred to as the "impugned orders").

6. The controversy involved in the present petition is whether in the given facts and circumstances, the subject properties of GKP and WCE can be proceeded against the PF dues assessed as payable by CHF.

7. This Court, by an order dated 27.03.2012, directed the authorized officer of

EPFO to take a definite stand in the matter. Pursuant to the said order, an additional affidavit was filed by Assistant Provident Fund Commissioner on behalf of the EPFO wherein it was stated that "having management and working concern with M/s Creative Home Fashion Pvt. Ltd and in fact M/s Creative Home Fashions Pvt. Ltd. is mainly owned and organized by M/s Well Computers Exim Pvt. Ltd and M/s G.K. Products Pvt. Ltd."; the EPFO justified its stand to attach the subject properties, essentially, on the following grounds:

That Mrs Sophy Joseph and Mr T.O. Joseph, the Directors of CHF were also actively involved in management of GKP and WCE.

Thus, CHF, GKP and WCE were companies under the same management.

That the registered office of WCE was also the residential address of persons involved in CHF.

That the balance sheet of CHF indicated that GKP and WCE were major shareholders of CHF and had provided funds to CHF.

On the basis of the aforesaid facts, the EPFO concluded that WCE, GKP and CHF were owned and controlled by the same set of persons.

8. The learned counsel for the EPFO contended that the Authorised Officer of the EPFO could resort to modes of recoveries as provided in Section 8F(3) of the Act and, therefore, the impugned orders were valid and enforceable as against GPK and WCE in respect of the dues payable by CHF. The learned counsel also referred to an order dated 11.03.2013 passed by the Regional Provident Fund Commissioner (RPFC) u/s 7A of the EPF Act whereby the RPFC had assessed that a sum of Rs. 2,96,87,014 was payable by CHF. It was contended that the impugned orders have been issued in furtherance of the said proceedings and to recover the amount as assessed by the RPFC.

9. Before proceeding further, it would be relevant to note that, while prohibitory orders have been issued in respect of the subject properties, no proceedings have been initiated under the EPF Act against GKP or WCE. The proceedings u/s 7A of the EPF Act were, apparently, in respect of an enquiry against CHF which was referred to as the "establishment" having the PF Code No.UP/23373. Although, it was contended by learned counsel for EPFO that an enquiry was conducted to ascertain the assets of CHF, no material has been placed on record which would indicate that the subject properties formed a part of the assets of the said company.

10. Although, the learned counsel for the EPFO has referred to Section 8F(3) of the EPF Act, the impugned orders do not mention the said provision but refer to Section 8B of the EPF Act and are apparently, issued in exercise thereof. It is, thus, necessary to refer to Section 8B of the EPF Act which reads as under:

8B. Issue of certificate to the Recovery Officer.

(1) Where any amount is in arrear u/s 8, the authorised officer may issue, to the

Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the establishment or, as the case may be, the employer by one or more of the modes mentioned below:

- a) attachment and sale of the movable or immovable property of the establishment or, as the case may be, the employer;
- b) arrest of the employer and his detention in prison;
- c) appointing a receiver for the management of the movable or immovable properties of the establishment or, as the case may be, the employer:

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

(2) The authorised officer may issue a certificate under sub- section 1, notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

11. A plain reading of Section 8B of the EPF Act indicates that on receipt of the certificate by the Recovery Officer, the Recovery Officer is required to proceed to recover the amount specified in the certificate from the establishment or as the case may be from the employer by the modes specified therein. The modes of recovery indicated in Section 8B of the EPF Act are attachment and sale of property of the "establishment" or of the "employer". Section 8B of the EPF Act does not contemplate any proceedings for recovery of dues by the Recovery Officer against assets of any entity other than the establishment. In the present case, the attachment order refers to CHF as the establishment. It is, thus, apparent that the impugned orders have been issued only in respect of the assets of CHF. In the given facts, where, evidently, the subject properties do not belong to CHF but to GKP and WCE, therefore the impugned orders are plainly erroneous.

12. GKP and WCE are companies incorporated under the Companies Act, 1956 and as such are separate juridical entities. The assets of GKP and WCE cannot be proceeded against for recovery of dues of CHF. Although, the EPFO has sought to justify the impugned orders on the basis that GKP, WCE and CHF are one and the same entity, the same cannot be accepted, firstly, for the reason that the three entities are separate companies incorporated under the Companies Act and more importantly, the EPFO has not commenced any proceeding where this issue has been adjudicated. As stated earlier, no proceedings against GKP and WCE were commenced by EPFO and it would not be permissible for EPFO to simply assume the said entities as subsumed in CHF without notice to the said parties and

without any adjudication in this regard. Although in certain circumstances, corporate veil may be pierced, however, the same cannot be done without following due process of law. Ownership of assets owned by companies cannot be imputed to another entity only because the said companies have common directors or function from the same address.

13. The provisions of Section 8F of the EPF Act as referred to by the learned counsel for EPFO are also clearly mis-placed. The relevant provisions of Section 8F of the EPF Act, which were referred to by the learned counsel for the respondent is quoted below.

8F. Other modes of recovery.

(1) Notwithstanding the issue of a certificate to the Recovery Officer u/s 8B, the Central Provident Fund Commissioner or any other officer authorised by the Central Board may recover the amount by any one or more of the modes provided in this section.

(2) If any amount is due from any person to any employer who is in arrears, the Central Provident Fund Commissioner or any other officer authorised by the Central Board in this behalf may require such person to deduct from the said amount the arrears due from such employer under this Act, and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Central Provident Fund Commissioner or the officer so authorised, as the case may be:

Provided that nothing in this sub-section shall apply to any part of the amount exempt from attachment in execution of a decree of a civil court u/s 60 of the Code of Civil Procedure, 1908 (5 of 1908).

(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, 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 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.

(vii) The Central Provident Fund Commissioner or the officer so authorised may, at any time or from time to time, amend or revoke any notice issued under this sub-section or extend the time for making any payment in pursuance of such notice.

(viii) The Central Provident Fund Commissioner or the officer so authorised shall grant a receipt for any amount paid in compliance with a notice issued under this sub-section, and the person so paying shall be fully discharged from his liability to the employer to the extent of the amount so paid.

(ix) Any person discharging any liability to the employer after the receipt of a notice under this sub-section 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 so discharged or to the extent of the employer's liability for any sum due under this Act, whichever is less.

(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Central Provident Fund Commissioner or the officer so authorised he shall be deemed to be an employer in default in respect of the amount specified in the notice and further proceedings may be taken

against him for the realisation of the amount as if it were an arrear due from him, in the manner provided in sections 8B to 8E and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers u/s 8B.

14. The provisions of Section 8F(3) of the EPF Act provide for a machinery to recover amounts which are due from an establishment by directly recovering the same from its debtors. Thus if any amount or an asset is owed by any person to the establishment, the authorized officers of the Provident Fund Organization can directly recover the same from such persons. The proceedings u/s 8F(3) of the Act are similar to garnishee proceedings and the authorized officer of the Employees Provident Fund Organisation is placed in a position similar to that of a garnishee. And, can directly reach out to the funds owed to or held on account of, the establishment by other persons. However, the precondition to proceeding u/s 8F(3) is a conclusion that the third parties hold money for or on account of the establishment, which is liable to pay the provident fund dues.

15. It, therefore, follows that EPFO should first of all conclude that there is any money which is held by GKP and WCE "for or on account" of CHF. In the present case, there is no material to indicate that GKP or WCE either owed any money or held any money for or on account of CHF.

16. According, to EPFO, CHF is owned and funded by GKP and WCE. It is also asserted that all the said three entities are held by common shareholders. None of these facts are sufficient to enable EPFO to proceed against the assets of GKP or WCE. As stated earlier, the proceedings u/s 8F(3) are in the nature of garnishee proceedings and the same would clearly not be available for proceeding against assets of entities in the event the said entities do not hold any amount on account of the establishment in question.

17. More importantly, there has been no notice issued to GKP or WCE as contemplated u/s 8F(3)(i) requiring the said entities to make over any money which may be alleged to be held by them on account of CHF. The reference to Section 8F of the Act is, thus, clearly without any basis.

18. The impugned orders are thus wholly without authority of law and are accordingly set aside. The writ petition is allowed. However, the parties are left to bear their own costs.

19. CM No. 3811/2012 also stands disposed of in view of the above judgment.