

(2011) 08 MAD CK 0461

In the Madras High Court

Case No : Writ Petition No. 8999 of 2010 and M.P. No. 1 of 2011

V.S. Murugan

APPELLANT

Vs

The Regional Provident Fund Commissioner, The Regional
Provident Fund Commissioner and The Indian Overseas Bank

RESPONDENT

Date of Decision : 23-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 7A
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 15,
17, 17B, 7A

Citation : (2011) 08 MAD CK 0461

Hon'ble Judges : N. Paul Vasanthakumar, J

Bench : Single Bench

Advocate : V. Ayyadurai and S.U. Srinivasan, for the Appellant; K. Gunasekaran
and A.A. Mohan, for the Respondent

Judgement

N. Paul Vasanthakumar, J.

The prayer in the writ petition is to quash the order of the second Respondent Dated 19.10.2010 and direct the second Respondent to collect interest of Rs. 51,60,267/- which is lying with the third Respondent out of the bank guarantee of Rs. 1 crore furnished by the Petitioner.

2. The brief facts necessary for disposal of the writ petition are as follows:

(a) One Jawahar Mills Limited, Salem, had availed various loans from the third Respondent Bank, which defaulted in repayment of the loan dues. The third Respondent brought the secured assets furnished by the said Mill for sale by invoking the provisions of SARFAESI Act, 2002 by inviting sealed tender-cum-public auction by way of notification in the newspaper dated 29.3.2005.

(b) The Petitioner was declared as the successful bidder in the auction conducted by the Bank. One of the conditions in the tender notification was that the entire sale consideration will be appropriated towards the dues to the bank exclusive of

encumbrances of statutory dues/workers dues/other dues of charge holders if any and all of which have to be paid/settled by the proposed purchasers out of his own sources by making necessary arrangements. The sale certificate will be issued to the purchaser only after payment of the said dues, if any and on production of satisfactory evidence before the third Respondent bank and till such time bank will not release its charge over the property. According to the Petitioner he is ready and willing to settle all the dues.

(c) After the said Mill was purchased by the Petitioner through auction, there were several rounds of litigation including W.A. No. 50 of 2007. The said writ appeal was disposed of by order dated 10.12.2007 in terms of the joint memo entered into between the Petitioner and all the Trade Unions insofar as Workers' claims.

(d) The Petitioner had furnished bank guarantee of Rs. 1.00 crore with the third Respondent in lieu of the statutory dues payable to the Employees State Insurance Corporation and towards Employees Provident Fund. All the statutory dues payable were also communicated to the third Respondent earlier and subsequently to the Petitioner by the concerned authorities as per the request made by the Petitioner. The second Respondent by communication dated 24.7.2007 informed that a sum of Rs. 1,01,03,993/-is payable towards damages and Rs. 51,60,269/-towards interest u/s 7Q of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act") and the same is to be paid by the Petitioner apart from damages for the period from April, 2001 to April,2003 which will be intimated separately.

(e) On 18.7.2007 again a communication was received. According to the Petitioner on receipt of the said communication Petitioner paid the entire dues amounting to Rs. 98,69,032/-and the second Respondent by letter dated 24.7.2007 had stated that the Petitioner cleared the entire contribution (arrears) payable in respect of M/s. Jawahar Mills Limited, Salem. According to the Petitioner he was not informed why damages are being levied and no notice as per Section 14B of the Act was issued and no enquiry was also conducted to fix the damages payable by the then management of the Mill.

(f) On 3.4.2008 a show cause notice was issued to the Petitioner by the second Respondent as to why recovery action should not be initiated for realisation of the arrears. Ten days time was granted to submit the reply. According to the Petitioner the said notice was not received by the Petitioner and only the subsequent notice dated 6.5.2008 was received on 9.7.2008 for which the Petitioner has submitted a detailed reply/explanation on 19.7.2008, which was also acknowledged by the second Respondent.

(g) The Petitioner requested to inform how the quantum of interest and damages were arrived at and also when notice was issued u/s 14B of the Act and whether enquiry was conducted against the erstwhile Mill for levying interest and damages and also sought for copies of the same so as to give effective reply to

the show cause notice.

(h) The second Respondent without providing any information and without furnishing copies of any proceedings sent another notice on 29.7.2008 demanding a sum of Rs. 1,64,70,124/-towards arrears and further informed that damages and interest payable will be intimated later. In the said demand notice, no reference was made regarding the Petitioner's representation submitted on 19.7.2008.

(i) Again the Petitioner submitted another representation on 31.7.2008 and requested to withhold the proceedings as particulars/documents sought for by the Petitioner had not been furnished. On 18.8.2008 the Respondents gave details of damages and interest and on 28.8.2008 the second Respondent issued a letter to invoke the bank guarantee submitted by the Petitioner to the third Respondent. According to the Petitioner, he was not furnished with copies of the final order passed u/s 14B of the Act.

(j) Petitioner submitted a representation on 1.9.2008 seeking more information and copy of the final order. The same having not been furnished, Petitioner filed W.P. No. 22569 of 2008 and this Court by order dated 15.10.2009 directed the second Respondent to furnish the information and document as demanded by the Petitioner. On 9.3.2010 again a show cause notice was issued for attaching and selling the immovable property for recovery of the said amount. The Petitioner gave reply on 13.3.2010 raising a contention that there was no mens rea and he being an auction purchaser is not liable to pay any amount towards damages. The same was rejected by a non-speaking order relying Section 17B of the Act and demanded a sum of Rs. 1,64,70,124/-.

(k) The said order is challenged in this writ petition on the ground that unless there is a mens rea, the damages are not leviable; that Petitioner being an auction purchaser, is unaware of the proceedings conducted by the second Respondent u/s 14B of the Act; that no final order was passed by the second Respondent and communicated the same to the erstwhile Mill; that there is no deliberate intention on the part of the erstwhile Employer for not making timely contribution for the period from October, 1998 to March, 2001; that no opportunity was given to the erstwhile Employer before imposing penalty u/s 14B of the Act; that the Petitioner being a purchaser of the Mill, cannot be proceeded u/s 17B of the Act as it has not taken over the Mill; and that, the impugned order is a non-speaking order, among other things.

3. Respondents 1 and 2 have filed counter affidavit contending that the erstwhile Jawahar Mills Limited, Salem is an establishment covered under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, and the said establishment defaulted in payment of provident fund dues from April 1992 and after affording opportunities provident fund dues for various spells from April, 1992 to April, 2003 were determined and corresponding penal damages u/s 14B and interest u/s 7Q were determined and the total amount payable was

Rs. 2.38 crores. The properties of the said mill were attached by the third Respondent bank for the outstanding loan availed by the establishment. The said fact came to the notice of the Respondents 1 and 2 and a notice in CP-10, dated 6.3.2006 was issued to the bank/third Respondent directing to remit the provident fund dues on priority before paying/ claiming other dues.

4. The Petitioner approached the second Respondent's office with a request to intimate the quantum of statutory dues to comply with the conditions stipulated in the auction notification and the Petitioner was informed about the penal damages and interest. While the provident fund dues were remitted the insurance and administrative charges to the tune of Rs. 10,05,862/-and total quantum of penal damages and interest to the tune of Rs. 1,52,64,262/-are still payable by the Petitioner. According to the counter affidavit the quantum of penal damages and interest to the tune of Rs. 1,39,40,087/-was determined on 14.2.2006 and the same was received by the erstwhile mill and the said establishment by letter dated 27.2.2006 accepted the said quantum to be correct. The third Respondent bank in spite of receiving the said communication of the first Respondent dated 6.3.2006 proceeded to sell the property and the Petitioner purchased the property as he was declared as the successful bidder and he was aware of the fact regarding the liability to pay the statutory dues and therefore the Petitioner is liable to pay the entire quantum as per the conditions contained in the auction notification.

5. It is also stated in the counter affidavit that the erstwhile mill/employer acknowledged the receipt of the show cause-cum-levy order dated 14.2.2006 and it was informed that if the employer desires he may appear before the authority and present the case and the employer by letter dated 27.2.2006 acknowledged the receipt of the order and accepted the quantum to be correct. Therefore the Petitioner who is the auction purchaser of the erstwhile mill is bound to pay the said amount, which is recoverable u/s 14B of the Act.

6. Mr. V. Ayyadurai, learned Counsel for the Petitioner submitted that the Petitioner being the auction purchaser of the erstwhile mill, cannot be directed to pay any amount which is more than the amount payable by the erstwhile employer/mill, as demand of damages is penal in nature which can be levied only if there is intentional omission to pay the contribution or dues within the time. The learned Counsel also submitted that the letter issued by the erstwhile mill dated 27.2.2006 accepting the calculations as correct, as contended by the Respondents 1 and 2, is not correct as the said letter states that the mill is unable to locate all the records to verify the correctness of the figures quoted in the order dated 15.6.2006 and in all probability the same may be correct which is not an unconditional acceptance of the liability and therefore the impugned proceedings may be set aside and the matter may be remitted to the second Respondent to give an opportunity to the Petitioner to give reply to the show cause-cum-levy order dated 14.2.2006 so that the Respondents will be in a position to satisfy the Petitioner regarding the liability fastened on the erstwhile

mill for demanding penal damages.

7. Mr. K. Gunasekaran, learned Counsel appearing for the Respondents 1 and 2 on the other hand submitted that the Petitioner is bound by the terms and conditions contained in the auction notice and the Petitioner having purchased the mill through auction, is bound to pay all statutory dues which has got priority over other dues and he having agreed to pay the same, it is not open to the Petitioner to contend that the amount calculated was not correct.

8. Heard the learned Counsel appearing for the third Respondent bank also.

9. The point in issue is as to whether the order dated 19.4.2010 directing the Petitioner to pay penal damages for the non-payment of EPF contribution to the second Respondent is justified ?

10. The facts about the liability of the erstwhile mill/employer to pay the EPF contribution to its employees upto 11.4.2003 and the SARFAESI proceedings initiated by the third Respondent bank and order of attachment and the sale of erstwhile mill on auction by issuing the auction notice as well as the condition contained in the auction notice to clear the statutory dues by the buyer/auction purchaser and the Petitioner being declared as a successful bidder is liable to pay the statutory dues are not in dispute.

11. The only dispute raised by the Petitioner in this writ petition is that the erstwhile employer was not given opportunity to prove that it was not liable to pay the penal damages. Show cause notice was issued to the erstwhile employer/mill on 14.2.2006 calling upon the authorised representative to appear on 15.2.2006 at 3.00 p.m. or to send his written representation to reach the second Respondent is evidenced in the show cause notice dated 14.2.2006, a copy of which is file din the typed set of papers. From the reply given by the erstwhile employer dated 27.2.2006 it could be seen that the Managing Director of the erstwhile Mill appeared on 15.2.2006 along with his personal officer and promised to reply on or before 27.2.2006 and the same is reflected in the reply dated 27.2.2006. It is stated in the reply that since the said Unit was not functioning since 11.4.2003 and all staff are employed elsewhere, the Employer was unable to locate all the records to verify the correctness of the figure quoted in the show cause notice and in all probability the same may be correct. The stand of the employer establishes a fact that the erstwhile employer has not admitted the liability in toto and he was not sure about the quantum arrived at is correct or not.

12. The Petitioner was informed of about the dues i.e, a sum of Rs. 1,01,03,993/- towards damages u/s 14B and Rs. 51,60,267/-payable towards interest u/s 7Q and he was requested to pay the said amount. The said damages was subsequently stated as Rs. 1,26,02,763/-and interest was stated as Rs. 62,51,387/-.The said communication was sent to the Petitioner on 22.7.2007 i.e, within one month from the previous communication. The said communications reveal that the Respondents 1 and 2 are not sure about the quantum of damages

and interest payable by the Petitioner.

13. Section 7A(2) of the Act contemplates conducting enquiry and according to the Petitioner the erstwhile employer was not able to appear for enquiry due to non-availability of records. The Division Bench of this Court in the decision reported in Q-793, Madathupatti Weavers Co-operative Production and Sales Society Ltd. Vs. Regional Provident Fund Commissioner and Others, considered similar question regarding conducting of enquiry and in paragraph 9 held thus,

9. As far as the determination u/s 7-A of the Act is concerned, it is seen that the provision comprises two parts. Firstly, the authority has to decide whether the Act applies to the establishment and secondly, he has to determine the amount due from the employer. For the purpose of this determination, the officer has to conduct such inquiry as deemed necessary. A reading of Sub-section (2) of Section 7-A of the Act shows that the officer conducting the inquiry has to decide the issue as if he is trying a suit in a civil Court with powers under the Code of Civil Procedure. The inquiry shall be deemed to be judicial proceedings. Sub-section(3) shows that no order shall be made under Sub-section (1), unless the employer concerned is given a reasonable opportunity of representing his case. Sub-section (3) empowers the officer to compel the attendance of the person concerned or the production of documents to decide the applicability of the Act or determination of the amount due from the employer. From the reading of these provisions, it is clear that no order u/s 7-A of the Act can be passed without conducting a full-fledged inquiry as if the matter is decided in a suit and that the officer determining the question has to decide both the coverability as well as the determination of the amount.

(Emphasis Supplied)

The said decision was followed by the Division Bench of Madurai Bench of this Court, in which I was also a party, in W.A. (MD) Nos. 833 to 835 of 2010 judgment dated 4.1.2011 and set aside the demand and remitted the matter to follow Section 7A and pass fresh orders by conducting enquiry.

14. The power to recover damages is provided u/s 14B of the Act, which reads thus,

14-B. Power to recover damages.- Where an employer makes default in the payment of any contribution to the Fund the Pension Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under Sub-section (2) of Section 15 or Sub-section (5) of Section 17 or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified u/s 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme. Provided that before levying and recovering such damages, the employer shall be given a reasonable

opportunity of being heard.

15. The scope of levying damages u/s 14B was considered by the Division Bench of this Court in 2010 (4) LLN 706 R.P.F. Commissioner II, Employees' Provident Fund Organisation, Madurai and Anr. v. Sree Visalam Chit Funds Ltd., Palathur and Anr. In the said decision it was held that for claiming damages u/s 14B mens rea is required to be proved. In paragraph 30 of the decision it is held thus,

30. In our considered opinion, as we have already concluded, unless it is established that such failure to pay the contribution was attributable to the mens rea or actus reus on the part of the employer, question of levying damages u/s 14B of the Act does not arise. It has been repeatedly held by the Hon'ble Supreme Court that simply because the statutory provision enables an authority to impose penalty, it does not mean that such penalty should be imposed in a mechanical manner without looking into the attending circumstances and the facts as to whether there was any mens rea or actus reus on the part of the employer.

The said decision was rendered taking note of the judgments of the Supreme Court reported in 1995 (2) LLN 667 Prestolite (India) Ltd. v. Regional Director and Anr.; M/s. Hindustan Times Limited Vs. Union of India and Others, ; Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another, ; Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, .

16. The Supreme Court in the decision reported in M/s. Hindustan Times Limited Vs. Union of India and Others, in para 29 pointed out what are all relevant factors to be considered by the authority while passing order u/s 14B of the Act, and the relevant para 29 reads thus,

29. The authority u/s 14-B has to apply his mind to the facts of the case and the reply to the show-cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages u/s 14-B. The fact that proceedings are initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings u/s 14-B would be taken; mere delay in initiating action u/s 14-B cannot amount to prejudice inasmuch as the delay on the part of the Department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest. However, the employer can claim

prejudice if there is proof that between the period of default and the date of initiation of action u/s 14-B, he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an "irretrievable" nature; he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to "irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defence in the reply to the show-cause notice and must satisfy the authority concerned with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect.

In the decision reported in *Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another*, . in paragraph 26 it is held as follows,

26. Existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.

17. In this case the erstwhile employer has not accepted the liability unequivocally. Whether there was any mens rea to delay the payment of contribution or not was not considered by the second Respondent at any time. Conducting of enquiry and specific finding regarding mens rea are mandatory before imposing penal damages against whom the penal damages are demanded.

18. Applying the said decisions to the facts of this case, the impugned order passed against the Petitioner so far as the demand for damages is concerned is not legal. Hence the matter is remitted to the second Respondent to consider the matter afresh after affording opportunity to the Petitioner and find out as to whether the damages can be claimed u/s 14B of the Act from the Petitioner, who is the successor-in-interest of Jawahar Mills Limited, Salem. Necessary order is directed to be passed by the second Respondent bearing in mind the decisions cited, within a period of three months from the date of receipt of copy of this order.

The writ petition is disposed of with the above directions. No costs. Connected miscellaneous petition is closed.