
Jugal Koshore Jhunjhunwala Vs Assistant Provident Fund Commissioner

Writ Petition Nos. 1935-40 and 1943 (MS)/2009

Court: Uttarakhand High Court

Date of Decision: Aug. 23, 2014

Acts Referred:

Companies Act, 1956 " Section 530#Employees Provident Funds and Miscellaneous Provisions Act, 1952 " Section 11, 14B, 15, 17, 8#Presidency Towns Insolvency Act, 1909 " Section 49#Provincial Insolvency Act, 1920 " Section 61

Citation: (2014) 143 FLR 999 : (2014) LabIC 4227 : (2014) LLR 1212

Hon'ble Judges: Alok Singh, J

Bench: Single Bench

Advocate: Amar Shukla, Advocate for the Appellant; D.S. Patni, Advocate for the Respondent

Judgement

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Alok Singh, J.

All these writ petitions are inter-connected involving identical questions of law and fact, therefore, all these writ petitions are

taken up together and are being disposed of by this common judgment with the consent of learned counsel for the parties.

Undisputedly, petitioner

is one of the share holders/Director of M/s. Magnesite and Minerals Ltd., Deo Niwas, Vidyut Marg, Bhubneshwar; dues under the Employees"

Provident Funds and Misc. Provisions Act, 1952 are outstanding against the Company namely M/s. Magnesite and Minerals Ltd.; impugned

notices were issued to the petitioner being Director of the Company for recovery of the outstanding amount from the petitioner; official liquidator

was appointed by Allahabad High Court vide order dated 12.12.2001 in the Company; official liquidator had taken entire assets of the Company

under his control.

2. Now, very important question of law has been raised by learned counsel for the petitioner i.e. As to whether recovery of outstanding dues has

to be recovered, first from the assets of establishment or can be recovered from the Director/employer of the establishment simultaneously.

3. Section 8B and 11 of the Employees' Provident Funds and Misc. Provisions Act, 1952 are being reproduced as under:

Section 8B - Issue of certificate to the Recovery Officer--

(1) Where any amount is in arrear under section 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 recovering 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.

Section 11 - Priority of payment of contributions over other debts

[(1)] Where any employer is adjudicated insolvent or, being a company, an order for winding up is made, the amount due--

(a) From an 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 under section 14B, accumulations required to be

transferred under sub-section (2) of section 15 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 contribution to [the provident fund or any insurance fund]

(insofar as it relates to exempted employees), under the rules of [the provident fund or any insurance fund], [any contribution payable by him

towards the [Pension] Fund under subsection (6) of section 17,] damages recoverable under section 14B or any charges payable by him to the

appropriate Government under any provision of this Act or under any of the conditions specified under section 17, shall, where the liability

therefore has accrued before the order of adjudication or winding-up is made, be deemed to be included] among the debts which under Section

49 of the Presidency-towns Insolvency Act, 1909 (3 of 1909), or under Section 61 of the Provincial Insolvency Act, 1920 (5 of 1920), or under

section 530 of the Companies Act, 1956 (1 of 1956)] are to be paid in priority to all other debts in the contribution of the property of the insolvent

or the assets of the company being wound-up, as the case may be.

[Explanation.--In this sub-section and in Section 17 ""insurance fund"" means any fund established by an employer under any scheme for providing

benefits in the nature of life insurance to employees, whether linked to their deposits in provident fund or not, without payment by the employees of

any separate contribution or premium in that behalf.]

[(2) Without prejudice to the provisions of subsection (1), if any amount is due from an employer [whether in respect of the employee"s

contribution (deducted from the wages of the employee) or the employer"s contribution], the amount so due shall be deemed to be the first charge

on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all

other debts.]

4. Having perused Section 8B of the Act, I have no hesitation to hold that first of all, recovery of outstanding amount under the Act, shall be made

by attachment and sale of the property of the establishment. However, when amount recovered by sale of assets of the establishment fall short of

outstanding amount, balance outstanding amount can be recovered against the employer of the establishment. Without exhausting the remedy of

attachment and sale of property for realization of the outstanding amount, no proceeding can be initiated against the employer of the establishment

under the Act.

5. As per mandate of Section 11 of the Act, if order for winding of the establishment is passed or official liquidator is appointed, then for recovery

of the outstanding amount, under this Act, Department shall have first charge over the assets of the establishment.

6. In the present case, in paragraph 4 of the counter-affidavit, it is submitted that steps have already been taken by the Provident Fund Department

before official liquidator to create first charge over the assets of the establishment for recovery of the outstanding amount.

7. That being so, in view of settled position of law, as discussed hereinbefore, Department can proceed against the employer only when, after the

sale of assets of establishment, entire outstanding amount is not recovered. Therefore, question stands answered in favour of the petitioner and

against the respondents. In net result, all the writ petitions succeed and are hereby allowed. All the impugned notices stand quashed. Liberty is

granted to the respondent Department to initiate de novo recovery proceeding against the petitioner, if after sale of assets of the establishment,

amount falls short of outstanding amount, to recover the balance amount. In peculiar facts and circumstance of the case, no order as to costs. All

the applications also stand disposed of accordingly.