Sarvaraya Textiles Ltd. Vs Commissioner, Employees Provident Fund Commission, Hyd. and others

Court: Andhra Pradesh High Court

Date of Decision: Aug. 14, 2001

Acts Referred: Constitution of India, 1950 â€" Article 21, 226, 39, 41
Employees Provident Funds and Miscellaneous Provisions Act, 1952 â€" Section 5
Sick Industrial Companies (Special Provisions) Act, 1985 â€" Section 15, 16, 17, 18, 19
Sick Industrial Companies (Special Provisions) Amendment Act, 1988 â€" Section 22

Citation: (2001) 5 ALD 560 : (2001) 5 ALT 749 : (2001) 107 CompCas 342

Hon'ble Judges: I. Venkatanarayana, J

Bench: Single Bench

Advocate: Mr. C. Kodanda Ram, for the Appellant; Mr. R.N. Reddy, SC for PF, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

1. The petitioner is a public limited company and has invoked Article 226 of the Constitution of India questioning the order of attachment in Notice

No. AP/VP/ Recy/2814/2001/240, dated 5-7-2001 issued under Sections 8-B read with 8-G of the Employees Provident Fund Miscellaneous

Provisions Act, 1952 (for short "the EPF Act") and seeking for a declaration that the order appointing a receiver for the petitioner"s business in

Notice No. A.P/VP/ Recy/2814/241, dated 5-7-2001 issued under Sections 8-B read with 8-G of the EPF Act as illegal and arbitrary.

2. The factual matrix leading to filing of the present writ petition is set out hereunder. The petitioner-company on account of various factors, which

are not germane to the writ petition has run into financial problem whereby the net worth of the petitioner-company has eroded substantially and

the petitioner has been declared as a sick industrial company under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985

(Act of 1 of 1986) (for short SICA, 1986). The petitioner company, under the provisions of the EPF Act is liable to file monthly returns and also

pay the Employees contributions. The petitioner-Company has been filing the monthly returns and has been contributing to the fund regularly. The

petitioner-Company is liable to pay the Employees" share of the contribution from November, 1992 to November, 2000. Hence the respondent

authorities issued the aforementioned impugned proceedings of attachment, appointing a receiver. Assailing the said proceedings, the present

petition has been filed by the petitioner.

3. Sri C. Kodanda Ram, the learned Counsel appearing for the petitioner submits that the petitioner-Company has been declared as a Sick

Industrial Company as defined u/s 3(1)(o) of SICA, 1985 and hence, the petitioner-company is not liable to pay any amounts which are included

in the scheme and that the respondents are not entitled to initiate any proceedings for any recovery. He places strong reliance on Section 22 of the

SICA, 1985 and contends that it operates as a blanket bar for any recovery proceedings.

4. Sri R.N. Reddy, learned Standing Counsel appearing for the respondent authorities submits that recovery of provident fund and other dues

under the Act does not come within the purview and scope of Section 22(1) of the SICA, 1985. The learned Standing Counsel further submits

that the respondent authority is not seeking recovery of entire amount Rs. 1,63,34,775.85 Ps. which is due. All that the respondents are seeking to

recover is the share of the workers, i.e., a sum of Rs.72,96,915/- for the period from November, 1992 to November, 2000. The learned Counsel

submits that the amount mentioned above relates to the default committed by the writ petitioner with regard to employees'' share of contribution

which has been deducted from the salaries of the workers. In short it is his contention that the writ petitioner cannot claim immunity for paying the

amount which was deducted and recovered out of the salaries of the workers. The learned Counsel further submits that the scheme mandates that

the employer make a deduction from the wages payable to the employee who is a member of the fund, equal to the contribution of the employee to

the Fund every month. The employee''s contribution together with the employer''s contribution is required to be paid into the Fund by the employer

within the stipulated period. These amounts, whether by way of a contribution or the employee or the contribution of the employer, are monies,

which belong to the employee, which being a total security scheme, the same cannot come within the ambit of Section 22(1) of the SICA, 1985.

5. Having regard to the rival submissions, the question that arises for consideration before this Court is - whether the petitioner is entitled to

question the recovery proceedings initiated by the respondent authorities.

6. Before adverting to the rival contentions, it is necessary to go into the object of the Sick Industrial Companies (Special Provisions) Act, 1985

(SICA, 1985). The said SICA was enacted for the public interest with a view to securing the timely detection of sick and potentially sick

companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other

measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters

connected therewith or incidental thereto. Section 3(1)(o) of the SICA defines the expression ''sick industrial company''. Under sub-section (1) of

Section 15, where an industrial company has become a sick industrial company, the Board of Directors of the company shall, within sixty days

from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a

sick industrial company, make a reference to the Board for determination of the measures which shall be adopted with respect to the company.

Under sub-section (1) of Section 16 of the SICA, the Board is empowered to make an enquiry for determining whether any industrial company

has become a sick industrial company. Under sub-section (2) of Section 16, the Board can appoint an operating agency to enquire into and make

a report with respect to such matter as may be specified by it. Section 17 of the SICA specifies that after making an enquiry u/s 16, if the Board is

satisfied that a company has become a sick industrial company, the Board shall decide as to whether it is practicable for the company to make its

net worth exceed the accumulated losses within a reasonable time. Under sub-section (3) of Section 17, the Board can direct the operating agency

to frame a scheme where the Board decides that it is not practicable for the sick industrial company to make its net worth exceed its accumulated

losses within a reasonable time and that it is necessary and expedient in the public interest to adopt the measures referred to in Section 18. Section

18 of the SICA contemplates the framing of a scheme by the operating agency where an order is passed by the Board u/s 17(3) of the SICA.

After the scheme is prepared, it is required to be examined by the Board and the Board is empowered to make such modifications as it may deem

fit after considering the suggestions and objections received thereto. The scheme is thereafter sanctioned under sub-clause (4) of Section 18 and

after it comes into operation the scheme binds the company, its shareholders, creditors, guarantors and the employees amongst others.

7. Now it is necessary to examine the scope of Section 22(1) of the SICA, 1985, which inter alia provides for suspension of legal proceedings and

contracts in certain cases in relation to sick industrial companies. Sub-section (1) of Section 22(1) of the SICA, 1985 provides as follows:

22. Suspension of legal proceedings, contracts etc. :-- (1) Wherein respect of an industrial company, an enquiry u/s 16 is pending or any scheme

referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an

industrial company is pending, then notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the

Memorandum and Articles of Association of the industrial company or any other instrument having effect under the said Act or other law, no

proceedings for the winding-up of the industrial company or for execution, distress or the like against any of the properties of the industrial

company or for the appointment of a Receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security

against the industrial company or of any guarantee in respect of any loans, or advance granted to the industrial company shall lie or be proceeded

with further, except with the consent of the Board or, as the case may be, the Appellate Authority"".

8. The provisions of Section 22(1) have been amended in 1993. By virtue of this amendment, it is not merely proceedings for execution, distress or

the like or for the appointment of a Receiver that can lie or be proceeded with except with the permission of the Board or the Appellate Authority

but no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any

loans or advance granted to the industrial company shall lie or be proceeded with further, except with such consent of the Board or the Appellate

Authority. The provisions of Section 22(1) of the SICA, 1988 have an overriding effect notwithstanding anything contained in the Companies Act,

1956 or in any other law. In fact, once a scheme is made, even the scheme is given an overriding effect by Section 32 of the SICA, 1985. The

provisions of the SICA, 1985 have been interpreted in several judgments of the Apex. Court. In Maharashtra Tubes v. SIIC of Maharashtra 1993

(78) C C 803, the Apex Court considered the applicability of the provisions of Section 22(1) of the SICA, 1985 in relation to the provisions of the

State Financial Corporation Act, 1951. The Supreme Court held that both the 1951 Act as well as the 1985 Act are special statutes, the former

having been enacted to assist industrialisation by the grant of financial assistance and the later to provide for the revival and rehabilitation of sick

industrial companies. The Court held that the underlying object and purpose of the SICA, 1985 is that during the pendency of the enquiry u/s 16,

the preparation of a scheme u/s 17, the implementation of a sanctioned scheme or the pendency of the Appeal u/s 25 actions for execution,

distress, or the like shall not lie or be proceeded with and should be frozen unless expressly permitted by the specified authorities until the

notification for the revival of the industrial undertaking is finally determined. In short, the Apex Court held that the provisions contained in SICA,

1985 would prevail over the State Financial Corporation Act, 1951.

9. A similar view was taken in another judgment in The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others, , wherein

the Supreme Court held that coercive steps to recover dues for the payment of property tax under the Bombay Village Panchayat Act, 1959

would fall within the contemplation of Section 22(1) of the SICA, 1985 and that no coercive steps could, therefore, be taken without the

permission of BIFR. The contention of the tearned Counsel for the petitioner is that in view of the law laid down by the Supreme Court in relation

to Provisions of Section 22(1) of the SICA, 1985, the recovery of provident fund dues of employees would fall within the purview of that section.

Therefore, the respondent authorities cannot resort to coercive steps to enforce the recovery of provident fund dues in view of the provisions of

Section 22(1) of the SICA, 1985.

10. At this juncture, it is necessary to state object of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, which came to be

amended by Act 33 of 1988. The amendment of 1988, insofar as it is material for the present purposes expressly notices the position of a sick

industrial company under the SICA, 1985. Section 14B empowers the Provident Fund Commissioner to levy damages where there is a default in

the payment of provident fund dues. The levy of damages presupposes the existence of a default in the payment of a contribution, which is due and

payable to the Fund. By virtue of the Amendment of 1988, the second proviso came to be inserted in Section 14-B as a result of which the

Central Board constituted u/s 5-A of the EPF Act was empowered to reduce or waive damages in relation to an establishment which is a sick

industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial

Reconstruction under the provisions of the SICA, 1985 subject to the terms and conditions of the scheme. In order to render the second proviso

applicable, it has become essential that the establishment must be a sick industrial company and a scheme should have been sanctioned by the

BIFR in respect of such sick industrial company under the SICA, 1985 for its rehabilitation and that reduction or waiver of damages would be

subject to the terms and conditions as may be specified in the scheme framed under the SICA, 1985. Para 32 of the Employees" Provident Fund

Scheme, 1952 expounds upon the second proviso to Section 14-B. Clause B of Para 32-B postulates that the Central Board may allow a waiver

of damages upto 100 per cent in cases where the BIFR for the reasons to be recorded in the scheme recommends such waiver.

11. By virtue of the amendment to the EPF Act, the Parliament empowered the Central Board to reduce the quantum of damages that may be

required to be paid u/s 14-B. It is relevant to point out that there is no provision by which the liability of the employer to pay the contribution of the

employer or the contribution of the employee has been excused or exempted. Even in the case of a sick industrial undertaking, the obligation of the

employer to deduct and pay the employee"s contribution together with his own contribution continues to subsist. Parliament as a matter of

legislative policy has enacted that the employer shall, however, be granted a waiver of damages payable u/s 14-B where the undertaking of the

employer is a sick industrial undertaking and a scheme for its rehabilitation has been sanctioned. It is relevant to note that the eligibility to the grant

of waiver u/s 14-B is subject -to those conditions, which have been prescribed. Even the amendment to the EPF Act, 1952 took into

consideration the position of a sick industrial undertaking, the extent of the immunity which has been conferred upon such undertaking with

reference to provident fund dues under the Act, must be confined to what has been legislated by Parliament. Thus the extent of immunity or

exemption cannot be extended beyond what was allowed in terms of the amendment to the EPF Act, 1952. Hence, the only question that arises

for consideration is as to whether a company which is a sick industrial undertaking can claim the benefit of the provisions of Section 22(1) in

respective of the dues payable towards provident fund and other benefits under the EPF Act, 1952. In the case on hand, it must be noticed that

the reference to the BIFR came to be made some time in 1998. The dues which have become payable relates to the period both prior and

subsequent to the making of the reference. The dues cover contributions of the employees as well as of the employer. The contributions of the

employees have been deducted by the employer in the instant case but have not been paid into the Fund. Hence, it is clear that the monies have

been unlawfully retained by the petitioner.

12. In another significant judgment in Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, , the Apex Court

considered the question as to whether dues on account of sales tax which had occurred after the date of the sanctioned scheme would fall within

the purview of Section 22(1) of the SICA, 1985. The Supreme Court held that while the language of Section 22(1) was wide, it would have to be

construed reasonably to apply only to those dues which were reckoned or included in the sanctioned scheme. Consequently where a sick industrial

company had after the date of their sanctioned scheme collected the amount of sales tax, but had failed to pay it over to the Revenue, it would not

be open to the company to seek shelter under the provisions of Section 22(1). Observing so, the Supreme Court held as follows:

The language of Section 22(1) of the Act is certainly wide. But, in the totality of the circumstances, the safeguard is only against the impediment,

that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by

Section 22(1) of the Act. So, we are of the view that though the language of Section 22(1) of the Act is of wide import regarding suspension of

legal proceedings from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal u/s 25 of the Act, it

will be reasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues reckoned or

included in the sanctioned scheme. Such amounts like sales tax etc., which the sick industrial company is enabled to collect after the date of the

sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22(1) of the

Act. Any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due

to the Revenue and withhold it indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against spirit of the statute in a

business sense, should be avoided"".

13. From the circumspection of the judgment of the Apex Court, it has to be held that the payment of earned wages could not have been within the

purview of Section 22(1) SICA, 1985 and that the provisions of the SICA, 1985 must be held to apply only to such proceedings which are not

required for the day-to-day running of the sick industrial company. Section 22(1) had been amended by Parliament in 1993 to expand its scope.

The object of Section 22(1) was to ensure that the attempts at revival of a sick industrial company are not rendered nugatory by predatory

creditors nibbling away at the capital and other assets of the industrial company which is being revived. Hence it should be held that Section 22 of

the SICA, 1985 must be reasonably construed to refer to only those proceedings which are not required for the day-to-day operation of the

company. The payment of earned wages is clearly required for the day-to-day operation of the company and therefore a proceeding for the

recovery of earned wages would not fall within the purview of Section 22(1). Hence it has to be held that it is not open to the petitioner to take

shelter of Section 22(1) of SIC A, 1985 in respect of contributions made by the workers towards employee''s provident fund. The petitioner-

company having deducted the contribution from the wages of the workers cannot withhold the same without paying into the provident fund to the

workers. Hence, certainly the workers are entitled to be paid their contributions and other statutory benefits. Viewing from Article 21 of the

Constitution of India, it is the worker''s fundamental right to get their benefit under the provisions of the EPF Act. As such, payment of wages and

terminal benefits is a part of the right to life and consequently in enacting Section 22(1) of the SICA, 1985, Parliament could not have

contemplated that these dues, which were part of the right to livelihood of the workmen under Article 21 should not be recovered. It should also

be noted that the provident fund and other dues payable under the provisions of the EPF Act, 1952 are part of the legitimate statutory settlements

of the workers. The employer is obligated to pay the contribution to the Fund, which is set up under the Act. The contribution of the employees is,

in fact, a deduction from the wages which are due and payable to the employees. The deduction which is made from the wages is required to be

deposited into the Fund by the employer. These contributions belong to the employees. The employees are entitled to those contributions and can

draw upon them even while they are in service for meeting the unforeseen eventualities and exigencies that may arise in the life of an employee.

They constitute an important measure of social security. The circumstances in which withdrawals and advances can be given to an employee in

service are specified in the scheme. No industrial undertaking can work or operate without the work, which is rendered by the employees. The

payment of provident fund dues to the Fund, therefore, stands on the same footing as the payment of wages, which is due to the employees. There

can be no doubt that it is an entitlement to which the employees are entitled by dint of the work, which they have put in. These are dues which are

payable whether or not as undertaking is sick. They constitute an intrinsic part of the employees'' right to life under Article 21 of the Constitution.

Hence, this Court is of the view that the recovery of provident fund and other dues under the EPF Act, 1952 does not fall within the scope and

purview of Section 22(1) of the SICA, 1985.

14. The Apex Court in Organo Chemical Industries v. Union of India AIR 1979 SC 1803, held that the EPF Act, 1952 is a social security

measure intended to effectuate the Directive Principles of State Policy contained in Articles 39 and 41 of the Constitution. The Apex Court in its

lucid exposition of the object and purpose of the Act, held as hereunder:

.....The Scheme of the Act is that each employer and employee in every ''establishment'' falling within the Act do contribute into a statutory fund a

little, viz., 6 1/4% of the wages to swell into a large fund wherewith the workers who toil to produce the nation''s wealth during their physically fit

span of life may be provided some retrial benefit which will "keep the pot boiling" and some source wherefrom loans to face unforeseen needs may

be obtained. This social security measure is a human homage the State pays to Articles 39 and 41 of the Constitution. The viability of the project

depends on the employer duly deducting the workers" contribution from their wages, adding his own little and promptly depositing the mickle into

the chest constituted by the Act. The mechanics of the system will suffer paralysis if the employer fails to perform his function. The dynamics of this

beneficial statute derives its locomotive power from the Hinds regularly flowing into the statutory till"".

15. The object of the scheme under the EPF Act, 1952 would be defeated if the employer is permitted to make use of the fund for its own

purposes. It would also lead to the unjust enrichment on the part of the employer to deduct and get away with it even after default in his own

contribution. In the event of an employer neglects to remit or diverts the moneys for alien purposes, the Fund gets dry and exhausted and the

workers are denied the meager support when they most need it. This prospect of destitution demoralises the working class and frustrates their

lives.

16. The Apex Court in another lucid judgment in Deputy Commercial Tax Officer v. Coromandal Pharmaceuticals (supra) had an occasion to

analyse the scope of Section 22(1) of the SICA, 1985 and held as hereunder:

On a fair reading of the provisions contained in Chapter III of Act 1 of 1986 and in particular Sections 15 - 22, we are of the opinion that the plea

put forward by the Revenue is reasonable and fair in all the circumstances of the case. Under the statute, the BIFR is to consider in what way

various preventive or remedial measures should be afforded to a sick industrial company. In that behalf, BIFR is enabled to frame an appropriate

scheme. To enable the BIFR to do so, certain preliminaries are required to be followed. It starts with the reference to be made by the board of

directors of the sick company. The BIFR is directed to make appropriate inquiry as [provided in Sections 16 and 17 of the Act. At the conclusion

of the inquiry, after notice and opportunity afforded to various persons including the creditors, the BIFR is to prepare a scheme which shall come

into force on such date as it may specify in that behalf. It is in implementation of the scheme wherein various preventive remedial or other measures,

are designed for the sick industrial company, steps by way of giving financial assistance etc., by Government, banks or other institutions, are

contemplated. In other words, the scheme is implemented or given effect to, by affording financial assistance by way of loans, advances or

guarantees or reliefs or concessions, or sacrifices by Government, banks, public financial institutions and other authorities. In order to see that the

scheme is successfully implemented and no impediment is caused for the successful carrying out of the scheme, the Board is enabled to have a say

when the steps for recovery of the amounts or other coercive proceedings are taken against sick industrial company which during the relevant time,

acts under the guidance/ control or supervision of the Board (BIFR). Any step for execution, distress or the like against the properties of the

industrial company or other similar steps should not be pursued which will cause delay or impediment in the implementation of the sanctioned

scheme. In order to safeguard such state of affairs, an embargo or bar is placed u/s 22(1) of the Act against any step for execution, distress, or the

like or other similar proceedings against the company without the consent of the board or as the case maybe, the appellate authority. The language

of Section 22(1) of the Act is certainly wide. But, in the totality of the circumstances, the safeguard is only against the impediment, that is likely to

be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by Section 22(1)

of the Act. So we are of the view that though the language of Section 22(1) of the Act is of wide import regarding suspension of legal proceedings

from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal u/s 25 of the Act, it will be

treasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues reckoned or included in the

sanctioned scheme. Such amounts like sales tax., etc., which the sick industrial company is enabled to collect after the date of the sanctioned

scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22(1) of the Act. Any

other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the

Revenue and withhold it indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against spirit of the statute in a

business sense should be avoided"".

17. For the foregoing discussions, this Court is of the clear view that the provisions of Section 22(1) of SICA, 1985 would not confer any

immunity to the petitioner under the facts and circumstances of the case. Having regard to the nature of payment required to be made by the

employer/ petitioner by way of Provident Fund and other contributions under the provisions of EPF Act, 1952, this Court does not see any reason

or ground to entertain the present writ petition in exercise of jurisdiction under Article 226 of the Constitution of India warranting interference with

the attachment proceedings. The writ petition is devoid of merits and it is accordingly dismissed. No costs.