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Madras High Court (Madurai Bench)

Case No: Writ Petition No. 6725 of 2007

Manipal Sowbhagya Nidhi Limited		APPELLANT
	Vs	
The Regional Provident Fund Commissioner, Employees Provident Fund Organization, Regional Office, Madurai - 625002, Recovery Officer, Employees Provident Fund Organization, Regional Office, No. 1, Lady Doak College Road, Chokkikulam, Madurai and P.K.S. Sambandhan		RESPONDENT

Date of Decision: Sept. 8, 2011

Acts Referred:

- Employees Provident Fund and Miscellaneous Provisions (Amendment) Act, 1973 - Section 11(2)
- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 11, 11(2), 14, 14B, 15(2)

Hon'ble Judges: Vinod K. Sharma, J

Bench: Single Bench

Advocate: K. Ramamoorthy, for the Appellant; G.R. Swaminathan, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Honourable Mr. Justice Vinod K. Sharma

1. This order shall dispose of W.P.(MD)Nos. 6725 and 6726 of 2007, as common questions of law, and facts are involved in these matters.

2. For the sake of brevity, the facts are being taken from W.P.(MD) No. 6725 of 2007.

3. The Petitioner/Manipal Sowbhagya Nidhi Limited, is a Company registered under the Companies Act, and Petitioner in both the writ petitions prays for issuance of Writ, in the nature of Certiorari, for quashing the order, passed by the Recovery Officer, in attaching the immovable properties of the third Respondent in both the writ petitions, for recovery of the amount u/s 14-B of The Employees" Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act"), from M/s. Swamiji Mills Ltd., Anaikottam, Sivakasi.

4. The Respondent No. 3 in both the writ petitions are said to be Directors of M/S. Swamiji Mills Ltd., Anaikottai, Sivakasi.

5. The Petitioner lent money to its registered members, who were individual persons. The Petitioner does not deal with Company or Firm. In the ordinary course of business, the registered members of the Petitioner company avail financial assistance from the Company and provide personal guarantee and security of immovable property by creating mortgage. The details of the Members are under:

i. Mr. A. Dhanapalan,
S/o. Mr. P.K.S.A. Arumuga Nadar,
No. 128, Police Station Street, Sivakasi.

ii. Mr. A. Brahmoraj,
S/o. Mr. P.K.S.A. Arumuga Nadar,
6-H/2, Periakulam Society Colony,
Sivakasi.

iii. Mr. P.K.S. Sambandan,
S/o. Mr. A. Samburaj,
128/1, Police Station Street, Sivakasi.

iv. Mr. R. Balachandran,
S/o. Mr. A. Ranjitham,
129, Police Station Street,
Sivakasi.

v. Mr. G. Sudhankaran,
S/o. Mr. A. Gurusilonmani,
26, Chairman A.R. Arunachalam Road,

Sivakasi.

6. The property attached by the second Respondent is the property mortgaged, by the third Respondent in both the writ petitions, to the Petitioner, to secure the financial assistance availed by them. The loan advanced is to the tune of Rs. 1,00,00,000/- (Rupees One Crore only).

7. The case of the Petitioner is, that how the financial assistance was used, by its member was not its concern, as the loan advanced was duly secured, after due verification of the mortgaged properties. The Respondent No. 3 in both the writ petitions were Directors of M/s. Swamiji Mills Ltd., Anaikottam, Sivakasi, which defaulted in payment of huge sum of employees provident fund.

8. The proceedings u/s 7-A/14-B of the Act, was initiated against M/s. Swamiji Mills Ltd., Anaikottam, Sivakasi, and an order was passed against the said Company. The certificate for recovery, was thereafter, issued to the Recovery Officer.

9. The Recovery Officer, in order to recover the amount, has ordered the attachment of individual property of Respondent No. 3 in both the writ petitions, being the Directors of the Company.

10. The case of the Petitioner is, that Respondent No. 3 are not "Employers" as defined u/s 2(e) of the Act, being distinct and different from that of the Company, and therefore, their property could not be attached, for recovery of amount from M/s. Swamiji Mills Limited, Anaikottam, Sivakasi. The Petitioner, on coming to know about the attachment of the property mortgaged to the Petitioner, wrote to the Enforcement Office on 05.01.2006, and to Respondent No. 2 on 31.01.2006, requesting them to withdraw the attachment. The request of the Petitioner was refused, by stating that the Recovery Officer had the jurisdiction u/s 8-B of the Act, to attach the personal properties of the Directors/Establishment, and that u/s 11(2) of the Act, the provident fund dues have priority over the other dues. Aggrieved over by the action of the Respondents, the Petitioners have approached this Court, by filing these two writ petitions.

11. These writ petitions are opposed by the Respondents, on the ground that the Respondent No. 3 in both the writ petitions are the Directors of M/s. Swamiji Mills Limited, Anaikottam, Sivakasi, and therefore, are liable to pay the contribution of Provident Fund and Damages imposed u/s 8-B of the Act, which reads as under:

8-B. 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 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.

12. It is also the stand of the Respondents, that in view of the judgment of the Calcutta High Court in Binod Kumar Biyala Vs. The Regional Provident Fund Organisation, West Bengal, , the Director of a Company is liable to pay the contribution, and therefore, the attachment of a property of the Director cannot be questioned.

13. In support of this contention, reliance is placed by the Learned Counsel for Respondents on the judgment of the Hon''ble Supreme Court, in the case of Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner, , wherein the Hon''ble Supreme Court has been pleased to lay down as under:

65. We shall now deal with the last argument of the learned Senior Counsel for the Appellant Bank that the interest payable in terms of Section 7-Q and damages imposed u/s 14-B of the Act cannot be treated as first charge on the assets of the establishment payable in priority to all other debts within the meaning of Section 11(2).

66. Section 11 gives statutory priority to the amount due from the employer vis-■-vis all other debts. Clause (a) of Sub-section (1) of Section 11 is applicable to cases where an employer is adjudicated insolvent or, being a company, an order of its winding up is made. In that situation, the amount due from the 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 u/s 14-B, accumulations required to be transferred u/s 15(2) or any other charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme. Clause (b) is applicable to cases where the amount is due from the employer in relation to exempted establishment in respect of any contribution to the provident fund or any insurance fund insofar it relates to exempted employees under the rules of provident fund or any insurance fund, any contribution payable by him towards the Pension Fund u/s 17(6), damages recoverable u/s 14-B or any charges payable by

him to the appropriate Government under the Act or under any of the conditions specified in Section 17. This Sub-section then lays down that such amount shall be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up. Sub-section (2) lays down that any amount due from the employer whether in respect of the employees'' contribution deducted from the wages of the employee or the employer''s contribution shall be deemed to be the first charge on the assets of the establishment, and shall be paid in priority to all other debts.

67. The expression "any amount due from an employer" appearing in Sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including Sub-section (1) of Section 11 and Sections 7-A, 7-Q, 14-B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7-Q. Likewise, default on the employer''s part to pay any contribution to the Fund can visit him with the consequence of levy of damages.

68. As mentioned earlier, Sub-section (2) was inserted in Section 11 by Amendment Act 40 of 1973 with a view to ensure that payment of provident fund dues of the workers are not defeated by the prior claims of the secured and/or of the unsecured creditors. While enacting Sub-section (2), the legislature was conscious of the fact that in terms of existing Section 11 priority has been given to the amount due from an employer in relation to an establishment to which any scheme or fund is applicable including damages recoverable u/s 14-B and accumulations required to be transferred u/s 15(2). The legislature was also aware that in case of delay the employer is statutorily responsible to pay interest in terms of Section 17. Therefore, there is no plausible reason to give a restricted meaning to the expression "any amount due from the employer" and confine it to the amount determined u/s 7-A or the contribution payable u/s 8.

69. If interest payable by the employer u/s 7-Q and damages leviable u/s 14 (sic Section 14-B) are excluded from the ambit of expression "any amount due from an employer", every employer will conveniently refrain from paying contribution to the Fund and other dues and resist the efforts of the authorities concerned to recover the dues as arrears of land revenue by contending that the movable or immovable property of the establishment is subject to other debts. Any such interpretation would frustrate the object of introducing the deeming provision and non obstante clause in Section 11(2). Therefore, it is not possible to agree with the learned Senior Counsel for the Appellant Bank that the amount of interest payable u/s 7-Q and damages leviable u/s 14-B do not form part of the amount due from an employer for the purpose of Section 11(2) of the Act.

14. It is also the contention of the Learned Counsel for the Respondents, that "Occupier", as disclosed in Form 5A, would also be liable, to pay the contribution, and therefore, the

property of the Petitioner could be attracted and sold for recovery, as the charge of Department will be the first charge.

15. On consideration, I find force in the contentions raised by the Learned Counsel for the Petitioner.

16. In W.P.(MD) No. 11546 of 2010 (R. Balachandran and Anr. V.. Regional Provident Fund Commissioner and Three Ors.) decided on 07.09.2011, this Court has been pleased to lay down, that the attachment of a property in exercise of powers u/s 8-B of the Act, is outside the scope of powers available with the Recovery Officer, for attachment of properties of the Directors, as the Company has a distinct, and separate identity from that of the Directors, and shareholders, and is deemed to be employer, and responsible for the payment of dues under the Act. The liability, therefore, cannot be fastened.

17. It is also pertinent, to notice here, that the Respondent No. 3 was not shown to be the "Occupier", under Form 5A of the Act, and therefore, will not fall within the definition of "Employer", who can be held responsible, for the dues under the Act. Even otherwise, there cannot be two employers i.e., the Company and its Director.

18. The Judgments relied upon by the Learned Counsel for the Respondents has no relevance, as the question involved in the writ petitions is not with regard to the priority of the charges on the property of the establishment, but as to whether there is any jurisdiction with the Respondents, to recover the amount from the property of the Director in exercise of powers u/s 8-B of the Act.

19. As already observed above, at the sake of repetition, it may be stated herein, that in view of the judgment of this Court in W.P.(MD) No. 11546 of 2010 (R. Balachandran and Anr.. V.. Regional Provident Fund Commissioner and Three Ors.) decided on 07.09.2011, the impugned order cannot be sustained.

20. In this case, there is additional ground for setting aside the order of attachment, for the reason, that even if, for the sake of argument, it is taken, that the Respondent had any right to recover, or initiate proceedings qua the property of the Director by treating him to be the employer, in that event also, the property of the Director is being subject to charge, can be taken as charged property and not free from encumbrances, as provisions of Section 11(2) of the Act, would not be applicable, as it deals with property of the employer, which is admittedly a Company, that too for the purposes of satisfaction of debts in distribution of properties of insolvent or assets of the Company being wound up, which certainly would not include the property of a Director.

21. The Respondents also cannot take any advantage from the judgment of this Court in W.P. No. 43577 of 2006 (Central Bank of India. V.. The Authorised Officer and Two Ors.) decided on 08.04.2011, as it has no application to the issue raised in this writ petition.

22. For the reasons stated above, these writ petitions are allowed, the impugned orders are set aside.

23. No costs.