

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

MONDAY, THE 6TH DAY OF APRIL 2015/16TH CHAITHRA, 1937

WP(C).No. 27755 of 2005 (D)

PETITIONER(S):

PRASANTHI CASHEW COMPANY, MANGAD,
KOLLAM-15, REPRESENTED BY ITS PROPRIETOR
SRI.B.MOHANACHANDRAN NAIR.

BY ADVS.SRI.ANIL NARAYANAN
SMT.A.K.PREETHA

RESPONDENT(S):

1. THE EMPLOYEES PROVIDENT FUND
ORGANISATION, BHAVISHYA NIDHI BHAVAN, PATTOM P.O.
THIRUVANANTHAPURAM REPRESENTED BY THE REGIONAL
PROVIDENT FUND COMMISSIONER.
2. THE RECOVERY OFFICER, EMPLOYEES
PROVIDENT FUND ORGANISATION, BHAVISHYA NIDHI BHAVAN
PATTOM P.O., THIRUVANANTHAPURAM.
3. ASMA CASHEW COMPANY, REPRESENTED BY ITS
PARTNER SHAHRUDEEN, KOCHUPUTHENPURA
KOPTTARAKKARA P.O., KOLLAM.

R,R1 & 2 BY ADV. SRI.N.N.SUGUNAPALAN (SR.)
R,R1 & 2 BY ADV. SMT.T.N.GIRIJA, SC, PF.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 06-04-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONERS EXHIBITS:

- EXT.P1 COPY OF LEASE DEED DATED 26.10.1999.**
- EXT.P2 COPY OF ORDER PASSED BY THE 1ST RESPONDENT DATED
19.7.2000.**
- EXT.P3 COPY OF JUDGMENT DATED 14.3.01 IN O.P. NO.8676/01.**
- EXT.P4 COPY OF NOTICE DATED 23.2.05 FROM THE 1ST RESPONDENT.**
- EXT.P5 COPY OF OBJECTION DATED 1.3.05 FROM THE PETITIONER TO
THE 1ST RESPONDENT.**
- EXT.P6 COPY OF NOTICE DATED 6.5.05 FROM THE 2ND RESPONDENT TO
THE PETITIONER.**
- EXT.P7 COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER
BEFORE THE ASSISTANT PROVIDENT FUND COMMISSIONER
(RECOVERY), THIRUVANANTHAPURAM DATED 26.5.5.**
- EXT.P8 COPY OF LETTER ISSUED BY THE 1ST RESPONDENT TO THE
PETITIONER DATED 23.6.05.**

RESPONDENTS EXHIBITS:

- EXT.R1(a) COPY OF LETTER NO. KR/2456/ENV.V(4)/05 DATED 23.6.05 ISSUED
TO THE PETITIONER BY THE RESPONDENTS.**

// TRUE COPY //

PA to Judge

SB

'CR'

K. VINOD CHANDRAN, J.

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W.P.(C) No.27755 of 2005 - D

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Dated this the 6th day of April, 2015

J U D G M E N T

The petitioner is aggrieved with the proceedings taken for realising the liability mulcted under Sections 7Q and 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for brevity, 'EPF & MP Act'). The petitioner's specific contention is that, the petitioner had taken a Cashew Factory on lease from the 3rd respondent and the liability now sought to be realised is the liability prior to the said period of lease. The petitioner also contends that, no orders were issued under Section 7Q and 14B of the EPF & MP Act.

2. The petitioner had taken lease of the factory premises from the 3rd respondent for a period of 20 years as per Ext.P1 Lease Deed, dated 26.10.1999. True, there is a clause in the said agreement that, the petitioner would not

be liable for any dues to the Government prior to such orders. No such agreement between the parties can interdict a recovery based on a statutory provision, which will be noticed later. In any event, the Provident Fund authorities initiated enquiry under Section 7A of the EPF & MP Act, which culminated in Ext.P2 order being passed. Ext.P2 order dated 19.07.2000; sought coverage between the period 12/1996 and 07/1998 ie., prior to the lease of the petitioner. However, the petitioner being in possession of the Cashew Factory was issued with notice and the assessment order was passed as evident at Ext.P2.

3. The petitioner was before this Court contending that the petitioner is only a lessee and the prior liability cannot be mulcted on the petitioner. Before this Court, the petitioner undertook to satisfy the contribution. Hence, this Court directed that the contribution would be satisfied and the interest and other dues would depend upon the final decision in the matter. Subsequently, notices

have been issued under Sections 7Q and 14B of the EPF & MP Act by Ext.P4. The petitioner filed Ext.P5 objection, which were not considered and the petitioner was issued with a notice of demand as per Ext.P6. The petitioner contends that after the objections were filed, Ext.P8 dated 23.06.2005 alone was issued, which is not an order as contemplated under Sections 7Q and 14B of the EPF & MP Act.

4. Dealing with the first contention that the petitioner would not be liable, it is to be noticed that Section 17B of the EPF & MP Act mulcts such liability on the transferee of an establishment to the extent of the assets so transferred. Section 17B of the EPF & MP Act is extracted hereunder:-

Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or [the [Pension] Scheme or the

Insurance Scheme], as the case may be, in respect of the period up to the date of such transfer;

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer]

5. The petitioner relies on a decision of the Division Bench of the Karnataka High Court reported in **Regional Provident Fund Commissioner, Mangalore v. Karnataka Forest Plantations Corporation, Ltd. Bangalore [2000 (2) L.L.N. 250]**, which stated so:-

S.17B cannot be interpreted to mean that the transferee-employer would be liable also to pay penalty for the default committed by the previous employer during the period anterior to the transfer. The penalty as correctly interpreted by the learned Single Judge cannot be treated as either "contribution" or as "other sums due from the employer". Such an interpretation would be opposed to the principles of natural justice. Penalty cannot be saddled on somebody who is not guilty.

6. True the penalty cannot be saddled on a person, who is not guilty of the delay in the contributions. Hence, what would be required is a proceeding initiated against the 3rd respondent itself. The petitioner also would have to be heard since he is in

possession of the establishment at present. If penalty is mulcted on the 3rd respondent, then definitely, the amounts mulcted as damages under Sections 7Q and 14B of the EPF & MP Act would amount to “sums due under the Act” and then the petitioner as a subsequent transferee would have to satisfy the liability, to save distress action on the property, in which the petitioner is running a Cashew Factory on lease. The petitioner would not have any personal liability to satisfy the dues as such. The liability would be limited to the extent of the value of the assets, if any transferred; as per the proviso to Section 17B of the EPF & MP Act.

7. The proceedings for realisation of penalty interest or even contributions, can only be against the assets transferred by the earlier owner to the subsequent owner. In the present case, it is also contended that since the petitioner is in possession only as a lessee; there is no transfer of assets as such. The Provident Fund

Organisation even then, would be entitled to proceed against the immovable property and the factory building in which the petitioner is carrying on business as a lessee of the 3rd respondent.

8. The property even now belongs to the 3rd respondent, definitely, no penalty can be cast on the petitioner, a subsequent transferee, for the period in which the establishment was carried on by the 3rd respondent. However, with all the respect at my command, this Court is not inclined to agree with the proposition laid down in the aforesaid decision that penalty would not include "other sums due from the employer". It has to be declared that if at all, the liability is cast on the 3rd respondent, then the 2nd respondent can be proceeded with only as against the assets, which stood transferred from the 3rd respondent to the petitioner. Herein, there is no such transfer effected is the contention, since, the petitioner is carrying on the operations as per a lease agreement.

9. It is to be further noticed that, there is no order passed under Sections 7Q or 14B of the EPF & MP Act. After notice was issued as indicated in Ext.P4, only Ext.P8 dated 23.06.2005 was issued. The respondent also does not in their counter affidavit produce any other order, but, Ext.R1(a). Ext.P8 [Ext.R1(a)] can only be considered as a decision on the question of liability to pay interest and penalty as indicated in Ext.P3 judgment. Ext.P8 would stand modified on the question of liability under Section 17B of the EPF & MP Act to be only to the extent of the value of the assets transferred by the earlier owner to the petitioner. There is no order determining the liability under Sections 7Q and 14B of the EPF & MP Act, as such, as of now.

10. The respondent Organisation would be entitled to proceed as provided under Sections 7Q and 14B of the EPF & MP Act against the 3rd respondent. The 3rd respondent who was the owner of the establishment during

the subject period will have to be issued notice before the same is determined. The petitioner also shall be issued with notice, since, the petitioner is at present the occupier of the premises. However, the penalty and interest even if determined as against the 3rd respondent, it could be enforced as against the petitioner only to the extent as directed herein above.

The writ petition would stand allowed with the above observations.

Sd/-
K. VINOD CHANDRAN,
JUDGE

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// true copy //

P.A to Judge