

*** THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

+ WRIT PETITION No.3156 OF 2011

% 06.12.2016

M/s.Shivam Smelters (P) Ltd., Pregnapur Village, Gajwel Mandal, Medak District, rep. by its Managing Director Sri Govind Kumar.

... Petitioner

Vs.

\$ The Recovery Officer, Employees P.F. Organisation, Sub Regional Office, Opp. MPDO, Siddipet, Medak District and others

.... Respondents

! Counsel for the Appellant : Mr. Milind G.Gokhale

Counsel for the Respondent : Sri G.Venkateswarlu
Sri Y.N.Lohitha

<Gist :

>Head Note:

? Cases referred:

- 1) 1995(2) SCC 648
- 2) (2009) 2 SCC 121
- 3) (2013) 10 SCC 746
- 4) AIR 2014 SC 2573

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM**WRIT PETITION No.3156 OF 2011****ORDER:**

By invoking the Certiorari jurisdiction of this court, petitioner-M/s.Shivam Smelters (P) Limited, challenges the impugned warrant of attachment of movable property dated 03.02.2011 issued by the Recovery Officer, Employees Provident Fund Organization, first respondent, by this writ petition.

2. The case of the petitioner is that M/s.Shivam Smelters (P) Limited, which was established under the Companies Act, 1956, is that it was engaged in the business of casting of mild steel products. Pursuant to the advertisement issued by the Andhra Pradesh State Financial Corporation, third respondent (hereinafter referred to as, "Corporation"), petitioner-Company participated in the auction of the property belonging to M/s.Shree Jagannath Strips limited, a company in liquidation, and became a successful bidder for a valuable consideration of Rs.86,00,000/- and thereby, the Corporation executed a sale deed in favour of the petitioner. It is the further case of the petitioner that it has nothing to do with the alleged liabilities of the erstwhile Company in liquidation i.e., M/s.Shree Jagannath Strips limited and the property of the petitioner, which was acquired through the public auction, cannot be attached under the impugned order.

3. Respondent Nos.1, 2 and 4 filed a counter affidavit and while denying the allegations made by the petitioner submits that under Section 17B of the

Employees Provident Funds and Miscellaneous Provisions Act, 1952, (for short, “the Act”), petitioner is liable for the dues payable by the defaulter.

4. Heard learned counsel for the petitioner; learned counsel for the third respondent; and Sri G.Venkateswarlu, learned Standing Counsel for respondent Nos.1, 2 and 4.

5. Learned counsel appearing for the Andhra Pradesh State Financial Corporation, third respondent, submits that as the Company in liquidation i.e., M/s.Shree Jagannath Strips Limited was declared to be a sick company under Section 85 of the SICA Act, the Board For Industrial and Financial Reconstruction (BIFR) recommended the Company to be wound up and thereby this court passed winding up orders in C.P.No.62 of 1994 by order dated 17.12.1998. At that stage the third respondent, being a secured creditor, approached this Court in Comp.A.No.518 of 1999 seeking to liquidate the assets of the Company in liquidation, whereunder this Court by order dated 20.11.1999 permitted the Corporation to sell the assets through public auction, which was complied with by the Corporation. Learned counsel, supporting the case of the petitioner, also fairly submits that the issue as to whether the statutory or other dues of the properties of the defaulting company, which was sold through the public auction, would get attached to the purchaser is settled by various judgments of the Supreme Court, reported in *Isha Marbles Vs. Bihar Electricity Board*¹, which was reiterated in *Union of India v. SICOM Ltd.*,² and the latest being *Rana Girders Ltd., v. Union of India*³.

¹ 1995(2) SCC 648

² (2009) 2 SCC 121

³ (2013) 10 SCC 746

6. On the other hand, Sri G.Venkateswarlu, learned Standing Counsel appearing for the Employees' Provident Fund Organization, submits that by virtue of Section 11 r/w 17(B) of the Act, petitioner would be liable to make the payment as it had acquired the property on account of the transfer. Learned standing counsel by drawing specific attention to the condition imposed by the company court in Comp.A.No.518 of 1999 would also submit that in relation to the dues of the company in liquidation, the third respondent-Corporation had undertaken to comply with all the provisions prescribed under Section 529A of the Companies Act, 1956 and, as such, the petitioner would be liable to for the dues of the company in liquidation. Learned standing counsel would also contend that the original order determining the liability and warrant of the certificate issued in the year 1999 was not challenged and what is being challenged is only the warrant of attachment of movable property. Elaborating on the same, it is the contention of the learned standing counsel that the basic liability is not wiped out as the basic order determining the liability is not under challenge. Learned standing counsel by placing reliance on the judgment of the Supreme Court in ***McLeod Russel India Ltd. V. Reg. Provident Fund Commr., Jalpaiguri***⁴ submits that the Supreme Court had held that even damages are liable to be collected.

7. Having considered the respective submissions, it is pertinent to make a note of the relevant provisions viz., Sections 11 and 17B of the Act, on which reliance has been placed, which reads as under:

“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 the

⁴ AIR 2014 SC 2573

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 in so far 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 sub-section 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 distribution 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 sub-section 1, if any amount is due from an employer, whether in respect of the employee’s contribution deducted from the wages of the employees 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

...

17B. Liability in case of transfer of establishment –

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 upto 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.”

8. A reading of Section 11 of the Act, extracted above, it is clear it gives priority for payment of contributions over other debts. The real question, in controversy, in the present facts of the case is that whether the petitioner is liable for the dues of M/s.Shree Jagannath Strips Limited, which is not a party before this court and which is represented by the Official Liquidator. In that context it has to be seen whether there is any transfer of the establishment as envisaged under the provisions of Section 17B. It is not in dispute that the petitioner came to purchase the property of a company in liquidation. In other words, what all has been acquired by the petitioner is property of the Company in liquidation by way of a transfer through sale. It is not even the case of the respondent-Department that the petitioner Company acquired the property as a Corporate entity either through merger or amalgamation or by buying the entire equity shares of the company in liquidation. In the case on hand, the petitioner had not purchased the entire unit as a business and thereby, as per the statutory framework petitioner was not liable for discharging the dues of the Company in Liquidation. There is a clear distinction recognized in law with respect to transfer of establishment vis-à-vis transfer of the property through sale. The stress placed by the learned counsel in Section 17B on the expression ‘... in any other manner whatsoever ...’ would have to be read in conjunction with the preceding words in the Section by applying the well settled principles of interpretation, particularly, the doctrine of ‘*noscitur e sociis*’. In this context, the words preceding the expression ‘...or in any other manner...’ are

'... transfers that establishment in whole or in part, by sale, gift, lease, or license...'. In the present case, petitioner has purchased the property and there is no transfer of establishment as envisaged under Section 17B. In that view of the matter, Section 17B has no application to the present set of facts.

8. In ***Rana Girders Ltd.***, (3 supra), it is well settled that in the case of auction purchases, the statutory liabilities of the erstwhile vendor, would not get attached to the property simplicitor. In the case on hand, petitioner being the auction purchaser, would not be liable for the dues payable by the Company in liquidation and, as such, the distressed action initiated against the petitioner under the impugned notice of attachment of the movable property is unsustainable and is accordingly set aside.

Accordingly, the Writ Petition is allowed. As a sequel, the miscellaneous applications, if any, shall stand closed. There shall be no order as to costs.

JUSTICE CHALLA KODANDA RAM

December 6, 2016
LMV