IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

Wednesday, the Fourth day of April Two Thousand Eighteen

PRESENT

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

WMP Nos.5236 & 5237 of 2018

in WP No.4259 of 2018

PHOENIX ARC PVT LTD [PETITIONER IN BOTH the PETITIONS]
ACTING AS TRUSTEE ON BEHALF OF PHOENIX TRUST
FY 09-7, TRUSTEE OF PHOENIX TRUST FY 11-01,
TRUSTEE OF PHOENIX TRUST FY - 16-15,
5TH FLOOR, DANI COPORATE PARK,
158 CST ROAD,KALINA, SANTACRUZ
(E) MUMBAI 400 098.
REP BY ITS AUTHORISED OFFICER

Vs

1 THE ASST PROVIDENT FUND [RESPONDENTS IN BOTH THE PETITIONS]
COMMISSIONER & RECOVERY OFFICER,
O/O THE RECOVERY OFFICER, NEAR FIVE ROAD,
SALEM, 1ST AND 2ND FLOOR,
S.J. PLAZA, ANNA SALAI,
SWARNPURI, SALEM

2 M/S. MSTC LTD
LEELAVATHI BUILDING, 2ND FLR,
NO.69,ARMENIAN STREET, CHENNAI 600 001

3 M/S. MSTC LTD
LEELAVATHI BUILDING, 2ND FLR,
NO. 69, ARMENIAN STREET, CHENNAI 1

4 M/S SALEM TEXTILES LTD
L.R.N. BUILDING, II FLOOR,
SARATHA COLLEGE ROAD, SALEM 636 007

5 THE DISTRICT COLLECTOR
(DISTRICT MAGISTRATE),
SALEM DISTRICT, SALEM

Petitions praying that in these circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to

(1)grant an order of interim injunction restraining the first and second respondents from handing over of machineries/movables to the prospective purchaser in pursuant to the impugned auction sale notice dated 18.01.2018 in No.CB/SL/6517/RECY/CP-13/SLM/2017 and the auction held on 14.02.2018 (in WMP.5236/2018) and

(2)to grant an order of interim stay of all further proceedings of the impugned auction sale notice dated 18.01.2018 No.CB/SL/6517/RECY/CP-13/SLM/2017 issued by the first respondent and auction held on 14.02.2018(in WMP.5237/2018) respectively pending WP.No.4259 of 2018.

Order :These petitions coming on for orders upon perusing the petitions and the respective affidavits filed in support thereof and upon hearing the arguments of MR.E.OM.PRAKASH SENIOR COUNSEL for M/S.RAMALINGAM AND ASSON, Advocate for the petitioner and of MR.R.THIRUNAVUKARASU Advocate for the 1st respondent and of MR.V.KADHIRVELU SPL.GOVT.PLEADER for the 4th respondent the court made the following order:-

The relief sought for in respect of W.M.P.No.5236 of 2018 is to grant an order of interim injunction, restraining the first & second respondents from handing over of Machineries/Movables to the prospective purchaser in pursuant to the impugned auction sale notice dated 18.01.2018 No.CB/SL/6517/RECY/CP-13/SLM/2017 and the auction held on 14.02.2018 and the relief sought for in respect of W.M.P.No.5237 of 2018 is to grant an order of interim stay of all further proceedings of the impugned auction sale notice dated 18.01.2018 No.CB/SL/6517/RECY/CP-13/SLM/2017 issued by the first respondent and auction held on 14.02.2018.

2.The writ petitioner is constrained to move the present miscellaneous petitions on the ground that aggrieved by an action of the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer in having issued a sale notice for sale of movable assets of the 3rd respondent company without due process of law and in without any notice to the petitioner, who is holding possession of the factory land and building and other hypothecated assets under the provisions of the SARFAESI Act as the primary charge holder.

3.The grievances of the writ petitioner is that the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer has not served any notice to the petitioner and the sale was proceeded with on the basis of the alleged attachment of the movables, which had not been done in the manner known to law.

4.The core contention of the learned senior counsel appearing on behalf of the writ petitioner is that the writ petitioner company is possessing a Recovery Certificate issued under the provisions of the Recovery of Debts and Bankruptcy Act, 1993. A symbolic possession of movable as well as the immovable assets belong to the 3rd respondent company are with the petitioner. The petitioner company and Kotak Mahindra Bank are the prior charge holders of the properties much earlier to the claim of the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer. The 1st respondent had attached the movable assets of the 3rd respondent company, cannot be accepted in view of the fact that no movables were taken possession by them since the attachment of movables can be made only by physical possession of the same.

5.The petitioner had already obtained a Recovery Certificate before the DRT pursuant to the final order passed in the OA filed by them seeking for recovery of the dues and enforcement of the securities. The Recovery Officer is seized of the matter exercising the powers under the Second Schedule to the Income Tax Act. This apart, the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer cannot have any priority of charge over the immovables in view of the specific provisions of SARFAESI Act, which provides primary right to the right to the secured creditors.

6.This apart, the 3rd respondent company is liable to pay about a sum of Rs.170 Crores to the writ petitioner. As the petitioner is the first charge holder in respect of the assets owned by the 3rd respondent company, the procedures adopted by the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer are in violation of the provisions of the Income Tax Act, 1961.

7.The learned senior counsel further contented by stating that the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer, has not followed the established procedures as contemplated under the second schedule to the Income Tax Act also. Therefore, in all means, the order impugned is liable to be scrapped. The core contention raised on behalf of the writ petitioner is that the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer, had not followed the procedures as contemplated under the Income Tax Act and they had proceeded without even providing an opportunity to the writ petitioner, before issuing the impugned order and proceeding with the auction of the machineries in the premises of the properties belongs to the 3rd respondent company.

8.The learned counsel appearing on behalf of the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer opposed the contentions by stating that the immovable properties are not dealt with by the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer. The movable machineries alone has been dealt with for the purpose of recovering the amount, which are all dues to the labourers /employees served in the 3rd respondent company. Nearly about five hundred(500) families of the labourers/employees are thronging the office of the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer for the settlement of their provident fund amounts. Those families are even struggling to meet out their day-to-day family expenditures, since they are retrenched from service and some of the labourers/employees are employed in some other company and some of them are without employment. Under these circumstances, the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer is finding it very difficult to answer these poor labourers/employees and their family members, who are frequently approaching the office of the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer for settlement of their claim of provident fund.

9.In order to substantiate the legal position in this regard, the learned counsel for the 1st respondent referred Section 11(2) of the Employee's Provident Fund and the Miscellaneous Provisions Act, 1952 and the said provision states that without prejudice to the provisions of sub section (1), if any amount is due from an employer in respect of the employee'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 force, be paid in priority to all other debts.

10.By referring the said provision, the learned counsel for the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer emphasized that the first charge falls on the provident fund authorities and this apart, the provision is unambiguous in respect of the settlement of other debts. Therefore, the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer is empowered to proceed in accordance with the said provisions, in order to settle the provident fund amount to the poor labourers/employees.

11.Certain larger issues are involved in these writ petitions, the learned senior counsel raised an issue that, which provision of the Act should prevail over in respect of the properties belong to the 3rd respondent company. The learned senior counsel said that the provisions of the Debt Recovery Act will prevail over the Employees Provident Fund and Miscellaneous Provisions Act. Further, it is contended that the writ petitioner is in symbolic possession of the properties both movable (machinery) and immovable assets and therefore, the 1st respondent/The Assistant Provident Fund Commissioner and Recovery Officer cannot intervene and issue an auction notice. However, these questions are to be adjudicated only at the time of the final hearing of the writ petition.

12.Prima facie, this Court is of an opinion that the order under challenge in the first writ petition is the proclamation of sale notice dated 18.01.2018 and the other writ petition is filed, challenging the rejection of the objections dated 13.02.2018.

13.The two separate writ petitions are filed, challenging the actions initiated by the 1st respondent/Assistant Provident Fund Commissioner. However, the fact remains that the present writ petitions are filed in respect of the actions initiated by the 1st respondent/ Assistant Provident Fund Commissioner under the provisions of the Provident Fund Act. The other related provisions are to be considered at the time of final adjudication of the present writ petitions. However, Section 11(2) of the Employee's Provident Fund and the Miscellaneous Provisions Act, 1952 unambiguously states that 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 force, be paid in priority to all other debts. Thus, the very purpose of Section 11(2) of the Act is unambiguous that notwithstanding anything contained in any other law for the time being force, the provident fund contributions are to be given priority to all other debts. The Act being a welfare legislation, the very purpose of settling the provident fund dues to the labourers are ensured and therefore, the same is to be achieved in all respects. Because of certain disputes between the management and the financial institutions, the plight of the poor labourers cannot be stalled. The Court has to ensure that the grievances of the labourers in respect of the provident fund dues are settled in all respects without any undue delay.

14.Therefore, the *prima facie* opinion of this Court is that the first charge shall be of the provident fund claims and all the debts are to be treated as secondary, because the said provision unambiguously stipulates that notwithstanding anything contained in any other law for the time being in force. When such a phraseology is used in the provision itself, then the Court has to interpret the same in a constructive manner.

15.After all, the Employee's Provident Fund and Miscellaneous Provisions Act, is a welfare legislation. In a welfare legislation, when certain benefits are extended to the labourers/employees, the same cannot be denied on certain technical grounds. It is the constitutional obligation on the part of the Court to see that the poor families struggling to meet out their day-to-day expenditure are saved.

16.The Constitution makers were highly influenced by the feeling of social equality and welfare of the common man. On principle, they agreed that this sacrosanct work could only be done by State. For this reason, they incorporated such provisions in the Constitution of India which made the role of state important and went towards social welfare and ideal state.

17.The Concept of government in which the state plays a key role in protecting and promoting the economic and social well-being of its citizens, is based on the principles of equality of opportunity, equitable distribution of wealth, and public responsibility for those who lack the minimal provisions for the good life. The term may be applied to a variety of forms of economic and social organization. A basic feature of the welfare state is social insurance, intended to provide benefit during periods of greatest need (Example: old age, illness, unemployment). The welfare State also usually includes public provision for education, health services, and housing.

18.A welfare state strives to achieve many ideals, some of them are -

- Removal of inequalities in distribution of economic resources
- Equality of opportunity for employment
- Equal pay for equal work.
- Elimination of exploitation of labourers
- Establishment of a welfare state
- Initiation of schemes relating to health, education, social security, and other such essential matters.

19.The Constitution Bench of the Hon'ble Supreme Court of India in the case of ***D. S. Nakara v. Union of India*, reported in (1983) 1 SCC 305**, held that the principal aim of a Socialist State is to eliminate inequality in income, status and standards of life. The basic frame work of socialism is to provide a proper standard of life to the people, <u>especially, security from cradle to grave</u>. Amongst there, it envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism, leaning heavily on Gandhian socialism. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society reveals a long march, but, during this journey, every state action, whenever taken, must be so directed and interpreted so as to take the society one step towards the goal.

20.The Apex Court in the case of ***Excel Wear v Union of India, reported in AIR (1979) SC 25*** held that the addition of the word "socialist" might enable the courts to learn more in favour of nationalisation and State ownership of an industry. But, so long as private ownership of industries is recognized which governs an overwhelming large principles of socialism and social justice can not be pushed to such an extent so as to ignore completely, or to a very large extent, the interest of another section of the public, namely the private owners of the undertaking.

21.The Indian Constitution set certain values which striked happy balance between individualism and socialism. It eliminates the vices of unbridled private enterprises, and protects interests by social control and welfare measures. The value system structured by our Constitution finds its expression in its various provisions and, more particularly, in Part III, Part IV and the Preamble of the Constitution.

22.In ***Meneka Gandhi v. Union of India, reported in AIR 1978 SC 597***, the Hon'ble Supreme Court of India gave a new dimension to Article 21.It held that the right to “live'” is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. Article 38 of the Indian Constitution provides State to secure a social order for the promotion of welfare of the people. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social, economic and political justice shall inform all the institutions of the national life. The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

23.Employee's Provident Fund Act is one such Act enacted for the purpose of achieving constitutional perceptions. Therefore, this Court is of an opinion that the the provisions contained in such Act to be given paramount importance, more specifically, in the matter of settlement of provident fund to the employees/labourers.

24.Undoubtedly, the writ petitioner is a company and now, the 1st respondent is initiating steps to settle the provident fund amount dues to the five hundred(500) families, who all are approaching them frequently for the settlement of provident fund amount.

25.Under such context, the pragmatic approach of the Court is of paramount importance. The legislations are to be interpreted in a constructive manner so as to see that a social justice is achieved. It is the preamble of the Constitution, which states that social justice is also one of the principles to be followed, while dealing with the statutes and while interpreting the statutes in a constructive manner.

26.The disputes between certain companies and financial institutions should not cause injustice to the poor labourers, who served for a considerable length of time in an organization/company. Of course, from and out of the bloodshed of these employees, those employers earned so much of profits and acquired properties. Without the contributions of these employees/labourers, those companies would not have accumulated so much of wealth. Therefore, their contributions cannot be underestimated nor undermined.

27.On a perusal of the counter affidavit filed on behalf of the 1st respondent, it is stated that the 3rd respondent totally owes a sum of Rs.5,49,14,608/-(Rupees Five Crore Forty Nine Lakhs Fourteen Thousand and Six Hundred Eight only) being the provident fund dues to their employees calculated as per the Employee's Provident Fund and the Miscellaneous Provisions Act, 1952. In order to recover the said amount, continuous efforts and action has been taken by the 1st respondent/Assistant Provident Fund Commissioner, so that more than five hundred(500) employees of the 3rd respondent company shall be benefited by the Provident Fund and Pension scheme.

28.Thus, the respondents submit that after diligently observed all the formalities, the movables of the 3rd respondent alone were attached and the auction proceedings were successfully conducted. Accordingly, H1 bidder (MG textiles) was designated as buyer. The buyer has initially paid a sum of Rs.1,00,70,000/- (Rupees One Crore and Seventy Thousand Only) in pursuance of the bid result, further sale order was issued by the 2nd respondent dated 21.02.2008 with instructions to the buyer to pay the balance amount by 07.03.2018. Under these circumstances, the writ petitioner approached this Court and stalled the further payment of the sale amount.

29.This Court raised a question that whether the 1st respondent would settle all the provident fund amount to the five hundred(500) families within a short span of period in the event of collecting the sale amount from the buyer.

30.The learned counsel for the 1st respondent across the bar, ensured that such settlements would be done maximum within a period of four weeks from the date of receipt of the balance sales consideration from the buyer.

31.In this regard, Paragraph 28 of the counter affidavit states that on conclusion of the auction proceedings and handing over the machineries at the earliest would facilitate the recovery of the balance amount from the successful bidder, which in turn would benefit more than five hundred(500) employees of the 3rd respondent company and their families, who are approaching this office frequently in the hope of getting their life time savings in the form of provident fund.

32.Under these circumstances, the 1st respondent is directed to recover the balance amount from the buyer within a short span of period as per the terms and conditions of the sale. Soon after the amount is recovered from the buyer, the 1st respondent is directed to settle the entire provident fund amount and all the dues and the pension scheme for five hundred (500) families within a period of four weeks from the date of settlement of the balance dues by the buyer.

33.The balance amount if any, shall be kept in an interest bearing fixed deposit account in any one of the Nationalized Bank by the 1st respondent, subject to the final orders to be passed in these writ petitions.

34.With these terms, both the Miscellaneous Petitions are disposed of. No costs.

-sd/-
04/04/2018

/ TRUE COPY /

Sub Assistant Registrar (Statistics / C.S.)
High Court, Madras - 600 104.

TO

1 THE ASST PROVIDENT FUND
COMMISSIONER & RECOVERY OFFICER, O/O THE
RECOVERY OFFICER, NEAR FIVE ROAD, SALEM,
1ST AND 2ND FLOOR, S.J. PLAZA, ANNA SALAI,
SWARNPURI, SALEM

2 THE DISTRICT COLLECTOR
(DISTRICT MAGISTRATE), SALEM DISTRICT, SALEM

+4 C.C. to M/S.RAMALINGAM AND ASSOCIATES Advocate SR.Nos.4272 & 4273

C.C. to MR.R.THIRUNAVUKARASU Advocate SR.NO. 4264

Order

in
WMP.5236 & 5237/2018

in
WP.4259/2018

Date :04/04/2018

From 26.2.2001 the Registry is issuing certified copies of the Interim Orders in this format
VS 11.04.2018