THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

WRIT PETITION Nos.21032 & 21343 of 2007

COMMON ORDER:

These two writ petitions give rise to common issue and hence they are being disposed of by this common order.

2. Brief facts leading to the filing these two writ petitions are as follows:

The petitioners in both the writ petitions are the purchasers of the property, which is located adjacent to the land of M/s.Bio-Vaccines Private Limited, Nunidyala village, Chevella Mandal, Ranga Reddy District.

The petitioners in W.P.No.21032/2007 are said to have purchased an extent of Ac.10.32 gts in Sy.No.334 (part) of Nunidyala village from their vendor Reena Sadana under a registered sale deed, dated 30.05.2005. Their Vendor Reena Sadana had purchased the said land from one C.S.Ravi under registered sale deed, dated 11.03.2004. The said C.S.Ravi had purchased the said land on behalf of Bio Vaccines Private Limited on 28.03.1988.

The petitioner in W.P.No.21343/2007 is purchased an extent of Ac.3.00 in Sy.No.332 (part) of Nunidyala village from his vendor Reena Sadana under a registered sale deed, dated 30.05.2005. His Vendor Reena Sadana had purchased the said land from one C.S.Ravi under registered sale deed, dated 17.03.2004. The said C.S.Ravi had purchased the said land in the capacity of Director of Bio Vaccines Private Limited on 05.08.1982.

It is stated that the petitioner in both the writ petitions have received proceedings No.52.Q/2650-67, dated 10.08.2007 issued by the 1st respondent-Recovery Officer, Employees State Insurance Corporation, Hyderabad, stating that the property purchased by them belong to M/s.Bio Vaccines Private Limited, which was covered under the ESI Act and it became defaulter in payment of Rs.22,35,874/- with further interest upto 22.10.2007 towards contribution, and hence the sale of the said property in favour of the petitioners is *ab initio* null and void and the petitioners are prohibited from transferring and changing the nature of the property. Questioning the said impugned proceedings, these two writ petitions are filed.

The contention of the petitioners is that they have not received any notice or attachment order prior to their purchase, that the property purchased by them do not belong to M/s.Bio Vaccines Private Limited and that as their sale deeds and their respective vendors' sale deeds are prior to the attachment, the 1st respondent could not issue the impugned proceedings.

3. The respondents filed counter denying the contentions of the petitioners. It is submitted that M/s.Bio Vaccines Private Limited is covered under ESI Act and it fell due of Rs.22,35,874/- towards contributions to the respondent Corporation, as claimed under impugned order, dated 10.08.2007. The 1st respondent is empowered by the provisions of the ESI Act, 1948 to effect recovery of arrears, as provided under Sections 45-C to 45-I of the Act. Under Section 93-A of the Act, the employer as well as other transferees are jointly and severally liable to pay the dues, payable to the Corporation. Therefore, the petitioners are liable to pay the dues and the impugned proceedings are legal and valid.

4. Before proceeding further, the provision under Section 93-A of the Employees State Insurance Act, 1948 (for short "the Act") under which the respondent corporation made its claim, to be looked into.

> Sec.93-A: A liability in case of transfer of establishment – Where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part, by sale, gift, lease or license or in any other manner whatsoever, the employer and the person to whom the factory or establishment is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods 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 main contention of the petitioners is that they and their vendors are neither the transferees of business of M/s.Bio Vaccines Private Limited nor conduct any business in the subject premises. The provisions of the Act are not applicable in the present case, as the petitioners and their vendors had purchased the subject property long prior to the impugned proceedings.

6. According to the respondents as per Section 35-A of the Act, the employer as well as other transferees are jointly and severally liable to pay the dues, payable to the corporation and hence the 1st respondent has rightly passed the order of attachment on 01.08.2007 by issuing proclamation of sale of the subject property after due process of law.

7. The petitioners contended that they are the partners or took over the business of M/s.Bio Vaccines Private Limited and they cannot be treated as principle employers. The petitioners had purchased the subject property long prior to the issuance of the proclamation proceedings.

8. In support of their contentions, the learned counsel for the petitioners relied upon the following judgments.

*Hotel Sri Karpaga Vinayaka v. Employees State Insurance Corporation*[1]. The petitioner therein challenges the recovery notice of dues payable by its vendors Hotel Leela and Sri Krishna Appalam. After going into the facts of the case, the High Court of Madras observed that provisions under Section 93-A of the Act are not applicable, as the petitioner therein was not a transferor of business of its vendors and hence the direction to pay the arrears payable by its vendors cannot be issued.

9. The learned counsel for the petitioner contended that the property purchased by the petitioners is non-factory area and no manufacturing

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[1] LAWS (MAD) 2011 (2) 192

process is carried on and hence the provisions of Section 2 (12)(a) or 2 (12)(b) are not applicable, for which, he relied upon a judgment of our High Court in *Indian Airlines v. E.S.I.Corporation*[2], wherein this Court clearly held that if the establishment is large and only in some part of the establishment manufacturing is carried on, only that part where manufacturing process is carried on in accordance with Section 2(12)(a) or 2 (12) (b) would be factory. In the present case, no establishment and manufacturing process takes place in the property purchased by the petitioners.

10. In *Nagpur Electric Light and Power Company Limited v. E.S.I*[3] the Supreme Court held that the premises constituting a factory may be a building or open land or both. Inside the same compound wall, there may be two or more premises; the premises used in connection with manufacturing processes may constitute a factory, and the other premises within the same compound wall may be used for purposes unconnected with any manufacturing process and may form no part of the factory.

11. In *ANK Seals, Nagpur v. ESI Corporation, Nagpur*[4] the High Court of Bombay interpreted the Section 93-A of the Act, and observed as under:

> "Plain reading of Section 93-A makes it clear that the word "transfer" in section 93-A has a different connotation than "transfer" under the Transfer of Property Act; it means creation of rights whether by sale or gift or any other manner whatsoever; the section seeks to avoid the employer's mischief by executing agreements of transfer in favour of a third party and yet retaining his dominance over the factory. The petitioner cannot be fastened with the liability to pay dues as in the first place he has not accepted the liability to pay the dues of respondent Nos.1 and 2 and secondly, he has

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[2] 2005 (2) ALT 598
[3] AIR 1967 SC 1364
[4] LAWS (BOM) 2006 (2) 114

purchased the property not by virtue of transfer effected by employer but by intervening secured creditor.

12. Section 93-A is applicable when the employer transfers the establishment in whole or part by sale, gift, lease or licence or in any other manner. In the present case, Section 93-A is not applicable to the petitioners and they cannot be fastened with the liability to pay dues claimed, as they have not at all accepted the liability to pay the dues of M/s.Bio-Vaccines Private Limited at the time of purchase of property.

13. A perusal of the material on record shows that the defaulter is M/s.Bio Vaccines Private Limited which fell in arrears in payment of the contribution to the ESI and the principal and interest put together was quantified at Rs.22,12,488/- by the date when the attachment was issued namely 10.08.2007. It is also borne out from the record that the vacant land abutting M/s.Bio Vaccines Private Limited was originally purchased by Mr.C.S.Ravi representing M/s.Bio Vaccines Private Limited on 28.03.1988. On 17.03.2004 the said land was purchased by one Reena Sadana and from the said Reena Sadana the petitioners purchased the land on 30.05.2005. More than two years thereafter, the respondent/Corporation has issued the impugned order prohibiting the sale of the said land by the petitioners.

14. The main contention of the petitioners is that on the date when they purchased the properties, there was neither any attachment nor any demand towards arrears to the respondent/Corporation. That apart, it is submitted that the land that is purchased by the petitioners is not the property of the defaulter - M/s.Bio Vaccines Private Limited. The sketch that is part of the record shows that M/s.Bio Vaccines Private Limited is separate from the land that is attached. The panchanama that is conducted shows that the land was also attached along with the building of the M/s.Bio Vaccines Private Limited. They have also attached the generator room, boiler room, maintenance

room, canteen, store room, animal house, plant and machinery, situated in the building. Therefore, the learned Counsel submits that the respondent/Corporation ought not to have issued the attachment order for the lands which were purchased by the petitioners more than two years prior to the impugned proceedings of August, 2007. That apart, it is submitted that without issuing any prior notice, the impugned order of attachment was straight away issued treating the purchases made by the petitioners as void *ab initio,* null and void, under Rule 16 of the Second Schedule of the Income Tax Act, 1961 and prohibited the petitioners from transferring or createing any change on the said properties.

15. Since the prohibition is issued under the provisions of Rule 16 of the Second Schedule of the Income Tax Act, what is required to be seen is as to whether the said procedure was followed.

16. The Second Schedule lays down the procedure for recovery of the tax and Rules 3 and 4 require service of notice on a defaulter requiring him to pay the amount within fifteen days of service of notice and intimating that in default, steps would be taken to realize the amount. Rule 3 specifically provides that no step in execution of a certificate shall be taken until the period of fifteen days has elapsed since the date of service of the notice required by Rule 2. The only exemption is that if the Recovery Officer is satisfied that the defaulter is likely to conceal, remove or dispose of the whole or any part of his movable property as would be liable to attachment in execution of a decree of a civil Court and that the realization of the amount of the certificate would in consequence be delayed or obstructed, he may at any time direct, for reasons to be recorded in writing, an attachment of the whole or any part of such property.

17. If the above provisions are perused, it is manifest that before proceeding to attach the property of a defaulter, it is obligatory on the part of

the revenue to firstly issue a notice calling upon the defaulter to pay the amounts within fifteen days and it also prohibits the authorities from proceeding with the issuance of attachment warrant till the expiry of fifteen days period.

18. In the instant case, nothing is placed on record to show that the respondent/Corporation has followed the said procedure, even though the impugned order of attachment clearly refers to the provisions of Rule 16 of the Second Schedule of the Income Tax Act.

19. Rule 16 stipulates that where a notice has been served on a defaulter under Rule 2, the defaulter or his representative in interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the permission of the recovery Officer. Sub-Rule (2) of Rule 16 further provides that where an attachment has been made under this Schedule, any private transfer or delivery of the property attached shall be void as against all claims enforceable under the attachment.

20. What is apparent from the record is that the respondent/Corporation has straight away resorted to invoke the provisions of Rule 16 without following the procedure prescribed under Rule 2 which is essential for invoking Rule 16.

21. The other ground of challenge by the petitioners is that the respondent/Corporation is relying upon the provisions of Section 93-A of the Act. As per the said Section, where a defaulter transfers the factory or establishment in whole or in part, the defaulter and the person to whom the factory or establishment is so transferred shall be jointly and severally liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods up to the date of such transfer. In the instant case, as stated above, the defaulting company namely M/s.Bio Vaccines Private Limited did not sell or transfer its factory or

establishment. The property that is attached is the land adjacent to the factory and the establishment of the M/s.Bio Vaccines Private Limited which was purchased by the petitioners more than two years prior to the impugned proceedings. Therefore, the respondent/Corporation is not justified in invoking the provisions of Section 93-A of the Act and contend that since the petitioners are purchasers of the property of the defaulter, they are also jointly and severally liable to pay the amount due in respect of the contribution and interest of the defaulting employer.

22. The action of the respondent/Corporation also falls foul of the provisions of Section 45(C) of the Act which requires the procedure to be followed for issue of certificate to the Recovery Officer who in turn is required to take steps for realizing the amount due from a defaulter. Section 45 (C) provides that where any amount is in arrears under this Act, the authorized 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 factory or establishment, as the case may be, from the principal of the immediate employer by attachment and sale of movable and immovable property of the factory or establishment or as the case may be, or the principal or the immediate employer. The proviso also provides that the attachment and sale of any property under this Section shall first be effected against the properties of the factory or establishment and where such attachment and sale is insufficient for recovering the whole of the amount or 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.

23. As stated above, the amount that is recoverable by the respondent/Corporation has been quantified at Rs.22,12,488/- which includes

the cost of recovery and further interest. As per the panchanama, the property that is attached is the building and several rooms, plant and machinery etc., of M/s.Bio Vaccines Private Limited. Even without placing on record, that the sale of the said property of M/s.Bio Vaccines Private Limited will not satisfy the claim of the Corporation, attachment was also effected for the land adjacent to the factory, which as already stated, was sold away long prior to issuance of said proceedings. It may be recalled that one C.S.Ravi representing the factory originally purchased the said property on 28.03.1988 which was sold by the said C.S.Ravi to one Reena Sadana in March, 2004. More than three years after the said land was sold by Mr.C.S.Ravi, who was representing M/s.Bio Vaccines Private Limited, the present attachment came to be issued.

24. The material on record clearly shows that the property of the petitioners that is attached cannot be said to be in accordance with the provisions of either the Income Tax Act or the ESI Act and the sale made firstly by C.S.Ravi in favour of Reena Sadana and secondly Reena Sadana selling the lands to the petitioners cannot be said to be with an intention of depriving the Corporation of its claim against the defaulting company. As already stated, by the date when the certificate as contemplated was issued in August, 2007, the transaction took place in the years 2004 and 2005.

25. In view of the foregoing discussion, I have no hesitation in holding that the impugned order of attachment issued by the Recovery Officer of the respondent/Corporation is not in accordance with the provisions of law and therefore the same cannot be sustained. The order of attachment is liable to be set aside.

26. In the result, the writ petitions are allowed. However it is open to the respondent/Corporation to proceed to recover the amount due from the defaulting company namely M/s.Bio Vaccines Private Limited by proceeding

against the property that is attached other than the lands of the petitioners. No order as to costs.

Miscellaneous petitions, if any, pending in these writ petitions shall stand closed.

M.S.K.Jaiswal, J

Date: 2nd February, 2018
Dsr/smr