



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
16.10.2019	07.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE R.THARANI

W.A. (MD) No.1555 of 2018
and
C.M.P. (MD) No.11067 of 2018

Assistant Provident Fund Commissioner
Employees Provident Fund Organization
Sub Regional Office
66, Water Tank Road
Nagercoil-629 001

... Appellant

-vs-

1.M.Girilal
2.R.Ratheesh Kumar
3.Prince, K.L.

... Respondents

Writ Appeal filed under Clause 15 of Letters Patent to set aside the order, dated 08.02.2018, passed in W.P.(MD) No.20803 of 2017, on the file of this Court.

Prayer in WP(MD). 20803/ 2017 :

To issue a writ of Certiorari to call for the records on the file of the 1st respondent, the assistant provident Fund commissioner, Nagercoil, in Order No.TN/NGL/55083/7Q/173/PDC/2017, dated 27.07.2017.

For Appellant : Mr.K.Gurunathan
For Respondents : Mr.M.Azeem for R1
No appearance for R2 & R3

J U D G M E N T

T.S.SIVAGNANAM, J.,

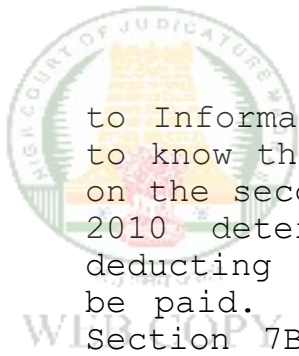
This writ appeal by the Employees Provident Fund Organization, represented by its Assistant Provident Fund



Commissioner, is directed against the order, dated 08.02.2018, passed in W.P.(MD) No.20803 of 2017.

2. The first respondent filed the writ petition challenging the order, dated 27.07.2017, passed by the appellant, under Section 14B of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (in short, "the Act").

3. The case of the first respondent / writ petitioner is that he is the proprietor of a cashew nuts factory, namely, M/s.Usha Cashews and had leased out the factory to the second respondent on 01.04.2006 and the lease was extended upto 31.08.2011. Thereafter, the factory was leased out to the third respondent and during 2016, it has been leased out to one Mr.Ullas. Referring to the lease agreement entered into between the first respondent and the respondents 2 and 3, it is submitted that the physical possession of the factory was handed over to the lessees and they undertook to pay the Employees Provident Fund dues and the Employees State Insurance contributions to their workers. It is stated that when the lease was in vogue, the appellant Organization did not issue any notice to the first respondent determining the contribution payable under Section 7A(1)(b) of the Act and no certificate of recovery was issued under Section 8B of the Act. Despite the disputed period being from July, 2008 to December, 2015, for the first time, during January, 2017, summons were issued to the first respondent by the Regional Provident Fund Commissioner, Nagercoil, directing to appear for enquiry, under Sections 14B and 7Q of the Act. The notice stated that the employer of M/s.Aswin Cashew Company / third respondent was summoned to appear for the enquiry and the the proprietor of M/s.Usha Cashews, namely, the first respondent was also summoned to appear for enquiry. The first respondent is stated to have responded to the summons and appeared and mentioned to the Authorities that he has let out the factory during the relevant period and not liable to pay any damages or interest. Further, it was contended that no notice has been served on the first respondent and it is false to state that notice was served. It is further submitted that the notice directing to appear for enquiry on 15.03.2017 was received and since the first respondent was indisposed, he sent a letter requesting adjournment. It is further submitted that on 21.03.2017, the Regional Provident Fund Commissioner issued another summons to the first respondent for enquiry on 20.04.2017 and on which date, the first respondent appeared and submitted documentary evidence to prove that the factory was leased out to the second respondent initially and thereafter, to the third respondent and subsequently, to one Mr.Ullas. Subsequently, on 28.04.2017, the first respondent received summons from the appellant to appear for enquiry on 11.05.2017, for which he sent a representation on 10.05.2017 reiterating his earlier stand and that no liability can be fastened on him. Subsequently, the first respondent applied under the Right

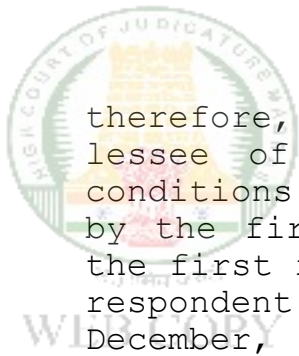


to Information Act and sought for information, from which, he came to know that the order under Section 7A(1)(b) of the Act was passed on the second respondent for the period from September, 2009 to May, 2010 determining the contribution at Rs.32,28,200/- and after deducting the amount paid, a sum of Rs.32,43,749/- was directed to be paid. Subsequently, the appellant passed a review order under Section 7B of the Act and redetermined the contribution for the period from September, 2004 to May 2010 at Rs.5,53,019/-. Subsequently, the appellant passed another order determining the contribution for the period from June, 2010 to August, 2011. It is further submitted that the appellant also issued a show-cause notice to the third respondent proposing to determine the damages and interest for the period from July, 2008 to August, 2011 and from April, 2012 to December, 2015. Simultaneously, the appellant relieved the third respondent from the liability stating that he has paid the dues during the period of his lease, when the factory was in his possession. It is further submitted that the appellant has ordered the damages and interest to be paid by the respondents 1 and 2 jointly and severally. Thus, the first respondent contended that no liability can be fastened on him in the light of the lease deeds and all the orders, under Section 7A of the Act, were passed only against the second respondent apart from notice having been not served on him.

4. The writ petition was filed during November, 2017 and has been disposed of by order, dated 08.02.2018, impugned in this writ appeal.

5. The learned counsel appearing for the appellant submitted that the appellant sought for time to file counter affidavit, nevertheless the learned Writ Court allowed the writ petition by referring to the decision of the Division Bench of this Court in the case of **Neyveli Lignite Corporation Limited vs. Regional Provident Fund Commissioner, Madras and another**, reported in **1998-II-LLJ-977** and the said decision is not applicable to the case on hand of the first respondent. Therefore, it is submitted that this Court may permit the appellant to canvass the factual and legal issues before this Court.

6. Mr.K.Gurunathan, learned counsel appearing for the appellant, contended that the Act is a beneficial legislation enacted to protect the interest of the workmen. The decision in the case of **Neyveli Lignite Corporation Limited** (supra) can have no application to the case of the first respondent as the lease deeds stated to have been entered with the respondents 2 and 3 and one Mr.Ullas are all unregistered documents. Even as per the said documents, all rates, dues, benefits to the workmen as well as EPF dues and ESI subscription shall be paid by the lessee and challan be submitted to the lessor. Thus, the duties and responsibilities of the first respondent / lessor have not been taken away and

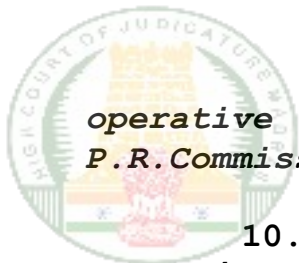


therefore, the first respondent is liable to pay the dues. If the lessee of the first respondent has failed to comply with the conditions in the lease deed, then action should have been initiated by the first respondent against the lessee or in the alternative, the first respondent should have paid the EPF dues. Thus, the first respondent is a defaulter for the period from July, 2008 to December, 2015. Further, the copy of the lease deeds filed in the typed set of papers were executed, on 01.04.2006 and 11.12.2010, in favour of the second respondent and the period is from 01.04.2006 to 30.06.2008 and from 01.04.2011 to 31.08.2011. That apart, the employees are one and the same and the so-called lessees are also using the same EPF Code No.TN/55083. Therefore, the first respondent is a wilful defaulter.

7. It is further submitted that the first respondent was given due opportunity by issuing summons before passing orders, under Sections 7Q and 14B of the Act. Summons for enquiry under Section 7A of the Act, dated 22.07.2009, 10.08.2009, 15.09.2009 and 30.09.2009, were issued and in spite of that, the first respondent did not appear and order was passed under Section 7A(1)(b) of the Act, on 22.10.2009, for the period from July, 2008 to September, 2009. Similarly, an order was passed on 18.04.2011 for the period from September, 2009 to May, 2010 upon review petition filed by the second respondent. Admittedly, during the said period, there was no valid lease executed nor furnished by the first respondent.

8. It is further submitted that the first respondent had full knowledge of the orders passed under Section 7A of the Act against him as well as the lessees making them jointly and severally liable. Further, it is submitted that a proper notice generated by the system, dated 09.05.2016, was issued detailing the period of default, due date of payment, actual date of payment, amount remitted accountwise, amount of penal damage, interest proposed to be levied etc. Though the notice was addressed to the third respondent as he was running the factory, the first respondent is liable for the same as the workers' and employees' code are one and the same, apart from being liable by the terms and conditions of the lease deed. On these grounds, the learned counsel appearing for the appellant prays for setting aside of the order passed by the learned Single Judge.

9. The learned counsel appearing for the appellant, in support of his contentions, placed reliance upon the decision of the Honourable Supreme Court in the case of ***McLeod Russel India Limited vs. Regional Provident Fund Commissioner***, reported in (2014) 15 SCC 263; decision of the High Court of Calcutta in the case of ***Regional Provident Fund Commissioner, Jalpaiguri vs. Eveready Industries (India) Ltd., and others***, reported in 2009-II-LLJ-678 (Cal) and the decision of the High Court of Bombay in the case of ***Goa State Co-***



operative Milk Producer's Union Limited vs. Regional P.R.Commissioner, reported in **2017-IV-LLJ-410 (Bom)**.

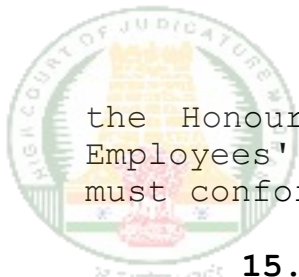
10. Mr.M.Azeem, learned counsel appearing for the first respondent, submitted that the learned Single Bench was fully right in allowing the writ petition by following the decision in the case of **Neyveli Lignite Corporation Limited** (supra) and there is no error and no liability can be fastened on the first respondent as all orders, under Section 7A of the Act, were passed against the second respondent; the review petition was filed by the second respondent and at his instance, a review order, dated 18.04.2011, was passed in the name of the second respondent. Further, notices were issued to the third respondent and all these issues were clearly pointed by the first respondent in his representation, dated 10.05.2017, which was not considered by the appellant. Further, it is submitted that the liability, after transfer of the factory by way of lease, cannot be fastened on the first respondent.

11. To support the factual contentions advanced, the learned counsel appearing for the first respondent referred to the lease deeds, dated 01.04.2006, 04.04.2008, 17.04.2009, 11.12.2010 as well as the notices issued and the orders passed under Section 7A(1)(b) of the Act with a view to demonstrate that all proceedings were initiated only against the second respondent / third respondent and therefore, no liability can be fastened on the first respondent. On these grounds, the learned counsel for the first respondent seeks to sustain the order passed by the learned Writ Court.

12. We have elaborately heard the learned counsel for the parties and carefully perused the materials placed on record.

13. Before we venture to examine the correctness of the orders passed in the writ petition, we take note of the decision in the case of **McLeod Russel India Limited** (supra), wherein the Honourable Supreme Court rejected the argument that damages, as postulated in Section 14B of the Act, would not be transferable under Section 17B of the Act. It was pointed out that Section 17B of the Act specifically speaks of the contributions and other sums due from the employer under any provision of the Act or the Scheme; the proviso to Section 17B of the Act clarifies the position inasmuch as it restricts and / or limits the liability of the transferee upto the date of the transfer to the value of the assets obtained by him through such transfer. It was further argued that the damages, under Section 14B of the Act, are not jointly and severally recoverable from the erstwhile and the present management under Section 17B of the Act. This argument was also rejected by the Honourable Supreme Court.

14. Further, we take note of the decision in the case of **ESI Corporation vs. HMT Limited**, reported in **(2008) 3 SCC 35**, wherein



the Honourable Supreme Court noted the beneficial nature of the Employees' State Insurance Act, 1948 that subordinate legislation must conform to the provisions of the parent Act.

15. In *McLeod Russel India Limited* (supra), the Honourable Supreme Court quoted approval of the Judgment passed by the Special Bench of the High Court of Calcutta in *Dalgaon Agro Industries Ltd. vs. Union of India*, reported in (2006) 1 Cal LT 32, wherein it was held as follows:

"(a) the transferor and the transferee managements remain jointly and severally liable under Sections 14-B and 17-B of the Act for all sums due including damages;

(b) the transferor's indebtedness comes to a halt on the date of the transfer but includes the sums computed under both these sections till the date of transfer;

(c) the transfer does not bind either the employees or the Fund;

(d) the transferee stands cautioned by virtue of Sections 1(3) and 17-B that the erstwhile as well as the current employer remain responsible for the liabilities under both the sections as a consequence of liability being that of the establishment in question of which employers are merely fictional representatives to facilitate recovery of dues;

(e) recovery of any amount due is protected under Section 11(2) of the Act, which grants priority to the amount so due over all other debts under any other statute as being the first charge on the assets of the establishment;

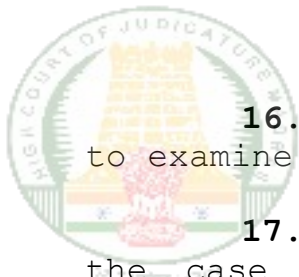
(f) the Act has innovated radical and effective modes of recovery as evident from Sections 8-B and 8-F, which further reinforces the fact that liability to pay dues is of the establishment recoverable through the employer;

(g) liability under Section 14-B admits no waiver except as provided;

(h) damages could be recovered regardless of any reasonable period of prescription;

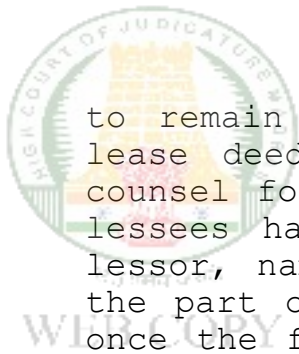
(i) the covenants in the transfer deed are irrelevant for determination and recovery of dues and damages; and

(j) criminal liability would be attracted only in the event the outstandings are not completely recovered."



16. Bearing the above legal principles in mind, we propose to examine the correctness of the order passed in the writ petition.

17. The writ petition was allowed by applying the decision the case of **Neyveli Lignite Corporation Limited** (supra). The question, which fell for consideration in the said case before the learned Single Bench of this Court, was whether the liability for contribution under the Provident Fund Act imposed by the respondent organization on Neyveli Lignite Corporation in respect of the employees in a Guest House, which was leased out, is sustainable. After noting the facts of the said case, the Court held that the respondent organization has to proceed only against the second respondent therein, namely, transferee and the demand raised on Neyveli Lignite Corporation is not sustainable. To arrive at such a finding, the factual position was noted and the correspondence between the Neyveli Lignite Corporation and the respondent organization was taken note of, wherein there was a material to show that the catering and house-keeping of the Guest House was taken out from October 1, 1983 and none of the employees of the previous establishment continued after September 30, 1983 and the catering and house-keeping of the Guest House was run with a fresh set of employees. In spite of this, the respondent organization issued notice to Neyveli Lignite Corporation stating they are the principal employer, for which a reply was sent by the petitioner to the transferee requesting him to implement the provisions of the Employees' Provident Fund and Family Pension Scheme. The transferee addressed the respondent organization that they have taken over the management from October 1, 1983 and as a new establishment, it is entitled for infancy protection under Section 16(i)(b) of the Act. The respondent organization relied on the decision in the case of **R.L.Sahni and Company vs. Union of India and another**, reported in **1964-II-LLJ-169**, wherein it was held that where an establishment such as a factory has been set up and the owner of the factory does not run the business on his own, but chooses to lease the factory from time to time it has been held that every fresh lease cannot give rise to the setting up of the factory afresh. The Court noted that after the said decision, the Act has been amended and new Section 17B was introduced, which deals with liability in case of transfer of establishment. Thus, when the facts are not disputed that the workers of Neyveli Lignite Corporation were no longer workers in the Guest-House, the Court granted relief to the transferrer and held the transferee liable. The decision in the case of **Neyveli Lignite Corporation Limited** (supra) can have no application to the case of the first respondent, because the employees of the factory continued to remain the same and the so-called lessees have been using the same EPF Code number allotted to the first respondent. Therefore, unless and until the lease was registered, intimated to the Department in advance and recognized by the Department and a fresh code is allotted in favour of the lessees, the first respondent as the owner of the factory continues



to remain liable. The terms and conditions of the unregistered lease deeds, which have been referred to by Mr.M.Azeem, learned counsel for the first respondent, are identical and state that the lessees have to pay the contribution and produce receipt to the lessor, namely, the first respondent. Therefore, the liability on the part of the first respondent does not cease and continues and once the first respondent does not receive the payment receipt by his so-called lessees, then liability falls on the first respondent and is liable to pay the dues and in default, liable to pay interest and damages. Thus, we have no hesitation to hold that the first respondent cannot escape from his liability and the appellant organization has rightly made the first respondent jointly and severally liable.

18. The next issue to be considered is whether there has been any violation of principles of natural justice and whether the first respondent was afforded reasonable opportunity to put forth his case.

19. The earliest order passed by the appellant under Section 7A(1)(b) of the Act, dated 22.10.2009, is addressed to the first respondent, wherein the appellant has specifically recorded that the proceedings were adjourned to 21.07.2009, 07.08.2009, 19.08.2009, 07.09.2009, 29.09.2009, 13.10.2009 and finally 22.10.2009. The appellant has also specifically recorded that summons have been served on the employer and despite the ample opportunity, they did not appear and therefore, proceeded *ex parte*. The subsequent order, under Section 7A(1)(b) of the Act, dated 28.09.2010, has been passed in the name of the second respondent. The order passed under Section 7B of the Act, dated 18.04.2011, determines the dues payable by the first respondent to the appellant organization for the period from September, 2009 to May, 2010 and a copy of the order was communicated to the second respondent. The order, dated 13.12.2012, under Section 7A(1)(b) of the Act, determines the dues payable by the first respondent to the appellant organization for the period from September, 2012 to October, 2012 and a copy of the order was communicated to the third respondent. Subsequent orders and notices were sent to the respondents 2 and 3. Proceedings were initiated for determination of interest and levy of damages and proceedings in this regard were communicated to all the three respondents and the first respondent has received such communication. The order of adjudication of damages under Section 14B of the Act was passed making all the three respondents liable to pay the dues. In such factual situation, the first respondent cannot shirk his liability and state that he has got nothing to do with the dues payable to the appellant organization. As we are convinced that the lease deeds do not absolve the liability of the first respondent and the decision in the case of **Neyveli Lignite Corporation Limited** (supra) could not have been applied to the facts of the first respondent, we are of



the view that no relief can be granted to the first respondent in the writ petition.

20. For all the above reasons, the writ appeal is allowed and the order dated 08.02.2018, passed in W.P.(MD) No.20803 of 2017 is set aside. Consequently, the writ petition in W.P.(MD) No.20803 of 2017 is hereby dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)

krk

+1 CC to Mr.K.GURUNATHAN, Advocate (SR-96605[F] dated 07/11/2019)
+1 CC to Mr.A.AZEEM, Advocate (SR-96799[F] dated 07/11/2019)
+1 CC to Mr.R.J.KARTHICK, Advocate (SR-97168[F] dated 08/11/2019)

JUDGMENT IN
W.A. (MD) No.1555 of 2018
and
C.M.P. (MD) No.11067 of 2018
07.11.2019

_MK (19.11.2019) 9P 4C