IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 17.11.2023	PRONOUNCED ON 27. 11. 2023

CORAM:

THE HON'BLE MR.JUSTICE K.KUMARESH BABU

W.P.No.8195 of 2005
and W.P.M.P.No.8865 of 2005

P.Vaidyanathan ... Petitioner

Vs

The Recovery Officer,
Office of the Recovery Officer,
Employees' Provident Fund Organishation,
Regional Office, Tamil Nadu Region,
37 Reyapettah High Road,
Chennai – 600 014. ... Respondents

PRAYER:- Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for he records of the respondent in proceedings No.TN/RECY/40420/2005 and quash its order dated 10.02.2005 and pass such further orders.

For Petitioner : Mr.T.S.Gopalan
for Mr.P.Raghunathan

For Respondents : Mr.K.Venkatesen
Standing counsel.

ORDER

The Writ Petition has been filed challenging the recovery certificate issued by the respondent dated 10.02.2005 in TN/RECY/40420/2005.

2. Heard, Mr.P.Raghunathan learned counsel appearing for the petitioner, and Mr. K.Venkatesan, learned Standing counsel appearing for the respondent.

3. Learned counsel for the petitioner would submit that, he was one of the investor Director in a company called Delta Innovative Enterprises Ltd., and he has no participation in the business affairs of the company. The Managing Director, named Kothandaraman, was the person who used to handle the day to day affairs of the company. The business of the company became unviable, on 18.07.2001. Further the petitioner had submitted his resignation from the Board of Directors on 28.07.2001, the company had forwarded the same to the Registrar of Companies on 05.08.2001.

4. He would submit that through a letter dated .12.02, the PF Inspector/Enforcement issued a show cause notice to the petitioner, stating that why he should not be prosecuted for failing to remit PF dues for the period from August 2001 to July 2002. The petitioner in his reply dated 09.01.2003, had informed the Commissioner, EPF Organisation, that he has tendered his resignation from the said company in August 2001 itself, and he cannot be held responsible for any default in the PF Contribution for subsequent periods. Thereafter, the respondent issued a showcause notice dated 24.08.2004, to the petitioner as to why a warrant of arrest should not be issued against him, for which the petitioner had sent his reply, and also filed a writ petition in W.P.No.29650 of 2004, challenging the impugned notice and has obtained interim stay by an order dated 14.10.2004.

5. He would further submit that, on 10.02.2005, the respondent had sent a notice which was forwarded by the recovery officer of the Employees Provident Funds Organization, claiming that a Certificate, dated 03.08.2004, bearing No.TN/RECY/40420/SDC/Reg1/2004,

claiming recovery of Rs.9,98,556/- under Section 8 B of The Employees Provident Funds and Miscellaneous Provisions Act, the said amount was to be recovered on account of interest and damages for the delayed payment of contributions made by the petitioner during the period 1997-1998 and 1998 to 1999.

6. He would further submit that the petitioner had ceased to be a Director in the year 2001, and that he was holding the post in the said comany as an investor Director, and that he will not become an employer in relation to the establishment of the Company. It is also submitted that the petitioner was not served with any notice prior to the demand notice, either under Section 7A (b) or Section 14B and he was never called upon to pay any contribution. He would also contend that there is no Jurisdiction for the authorized officer to pass an order, that to when the petitioner has no personal liabllity with the company for the payment. When the petitioner did not fall under the category of an employer he cannot seek a reveiw of the order under Section 7 B or prefer an appeal against such order under Section 7 I of The Act.

7. He would further submit that the respondent has also threatened the petitioner stating that his properties would become liable for attachment, but such recovery even if liable can be done only when the assets of the company are insufficient to meet the demand, but no such insufficiency is determined. Therefore, he would pray before this court to quash the impugned recovery certificate issued by the recovery officer dated 10.02.2005, as the same is issued without any jurisdiction.

8. Countering his arguments the learned Standing Counsel appearing for the respondent would submit that the petitioner ought to have challenged the recovery certificate under Sections 14 B and 7 Q of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, without challenging the same the petitioner cannot challenge the recovery certificate and proceedings in respect of the damages and interest in a writ petition.

9. He would submit that an establishment engaging 20 or more persons would deduct Provident Fund from it's employees and a contribution from the employer will be deposited in the worker's account in the EPF office. An employer cannot deny to it's employees their legitimate dues which they have rightfully earned in terms of the provisions of the Act, and if anything is done in contrary to the terms of the Act then the same has to be looked upon with suspicion.

10. He would further submit that, the company named M/s. Delta Innovative Enterprises, was covered under the EPF Act, and had paid the EPF dues belatedly for the years 1997-98, 1998-99 to 2000-01. A show cause notice and levy order under Sections 14 B and 7 Q of the Act was issued to the said company on 15.07.2003 for their belated remittance of P.F. dues for the aforesaid periods, but the same was returned undelivered with an endorsement "left". Thereafter, the show cause notice was served on to the establishment through an area Enforcement Officer, and an revenue Recovery Certificate was issued to the Revenue Recovery Cell on 08.04.2004.

11. He would further submit that the Recovery Cell, has issued a Certificate of Proceedings -1, and has started the process of Recovery against the petitioner who was one of the directors of the establishment, as he was looking after the day to day affairs and the administration of the establishment, as such he was aware of the default made by the company and the levy of the interest/damages under Sections 14 B and 7 Q of the EPF Act which pertains to the period 1997-98 to 2000-01, but the resignation of the petitioner is alleged to have been done only on 28.07.2001 which is subsequent to the fact that the business of the company became unviable.

12. He would submit that the notices were sent to the company address by an Enforcement Officer, and the petitioner has attended the office of the organization on 28.08.2004, and he was also informed that he was advised by the Assistant Provident Fund Commissioner of the Inspection Branch Section that the default pertains to the period 1997-2001, and during such period the petitioner was one of the members of

the Board of Directors, and the petitioner has also replied that he would discuss the same with other directors and shall pay the dues. The claim of the petitioner that he is not an employer of the company cannot be taken into consideration as such that the default in dues happened prior to the resignation of the petitioner.

13. He would contend that the Recovery Officer is an authorized person by the Central Government to exercise the powers of the Recovery Officers mentioned under Section 8 of the Act, and it is a statutory duty cast upon the Recovery Officer to take action to recover the dues as and when Recovery Certificate is issued by the Assessing Officer. Further it is submitted that the petitioner cannot question the recovery action, without questioning the order of assessment which has become final. The petitioner herein has failed to dispute the assessment order and now he is only disputing the recovery action which cannot be accorded with. Hence, he would pray before this court to dismiss the writ petition as the same is devoid of merits.

14. I have heard the submissions made by the learned counsels appearing on either side and have perused the materials available on record before this Court.

15. The issue involved in this lis is to the validity of the recovery certificate issued by the respondent

16. The contentions of the petitioner is that when the certificate had been issued against him, the petitioner was not a Director of the Company as he has resigned the position as early as in July 2001 and the second contention, challenging the certificate is under the provisions of the enactment namely the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Such recovery can be only initiated against the Managing Director or Manager in case of a Company.

17. The contention of the respondent was that the recovery that is sought to be made on the strength of the recovery certificate is for the dues prior to the date of resignation of the petitioner as a Director and the petitioner being a whole time Director and having been involved with the

day to day affairs of the Company is liable to be proceeded with and there is no error in the recovery certificate.

18. As regards to the factual contentions, I am convinced that the recovery certificate had been issued for recovery of dues pertaining to periods before the date of resignation of the petitioner as a Director. Therefore, I am of the view that such contention raised by the petitioner cannot stand.

19. As regard to the second contention namely the liability of the petitioner, various provisions of the Enactment would have to be analysed, for better understanding Section 8B provides for issuance of certificate of recovery Officer reads as follows:-

> *"**Section 8-B. Issue of certificate to the Recovery Officer.-(1)** Where any amount is in arrear under section 8, the authorised 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 establishment or, as the case may be, the employer by one or more of the modes mentioned below:-*

(a) attachment and sale of the movable or immovable property of the establishment or, as the case may be, the employer;

(b) arrest of the employer and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the establishment or, as the case may be, the employer:

Provided that the attachment and sale of any property under this section shall first be effected against the properties of the establishment and and where recovering the whole of the amount such attachment and sale is insufficient for of 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.

(2) The authorised officer may issue a certificate under sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

20. Sub Section (1) of Section 8 B as specified under Clause (a) provides for a attachment and sale of moveable and immoveable property of the establishment or as the case may be of the employer. Clause (b) provides for the arrest of the employer and his detention in prison. Clause (c) provides for appointing a receiver for the management of the movable and immovable property of the establishment or as the case may be, the employer.

21. The term "employer" had been defined under Section 2(e) of the Enactment which reads as follows:-

"2 (e) "employer" means-

(1) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f))of sub-section (1) of section 7 of the Factories Act, 1948, the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or

managing agent;"

22. Sub Clause (i) of Section 2(e) deals with the establishment which is a factory. Sub clause (ii) would imply that a person who is in the ultimate control over affairs of the establishment or where the said affairs of the said establishment are entrusted to a Manager, Managing Director or a Managing Agent then such person will be an employer.

23. The learned counsel for the Department had placed before me the Memorandum of Association a well as the Articles of Association of the Company in which the petitioner was a Director. Clause 154(1) provides that the Managing Director or whole time Director or a Executive Director subject to the supervision of the control of the Board of Directors shall have the management of all affairs and business of the Company and all of its assets. Therefore, it is clear that the company in which the petitioner was a Director had a Managing Director who had been in control over the affairs of the said establishment. It is not the case of the respondent that the petitioner was a Managing Director of the Company. A bald averment had also been made in the counter that the

petitioner being a Director was in incharge of the day to day administration of the Company. This averment is contrary to the Articles of Association produced before me by the respondent. Even as per inspection report of the Enforcement Officer, It could be seen that the petitioner had been shown as a Chairman and not as a Managing Director and only one Kothandaraman is shown as a Managing Director, which would mean that the petitioner was not in control and the management of the affairs of the Company as per the Articles of Association of the Company.

24. As already indicated Section 8 B provides only an action based on the recovery certificate to be initiated against the employer. In the present case, the Company in which the petitioner was a Director had a Managing Director as evidenced by the inspection report produced before this Court. From the definition of a employer as envisaged under Section 2(e), the employer would mean a person who was holding the post of a Manager or a Managing Director or a Managing Agent of an

establishment in a company. Since I have found factually that the petitioner was not a Managing Director and only one Kothandaraman was the Managing Director at that relevant point of time. Any proceedings under Section 8B based on the Recovery certificate can be made only against the Managing Director as he is the employer.

25. The learned counsel for the respondent had also relied upon a judgment rendered in ***Harish F.Shah Vs Employees Provident Fund Organization*** reported in ***MANU/GJ/1522/2011*** of the Division Bench of the Gujarat High Court to support his contention. A reading of the said judgment would show that the appellant therein was found to be in control over the affairs and the Management of the Company and therefore, the recovery certificate issued against him had been held to be valid. A further reading of the said judgment would also suggest that the recovery Officer would have to first exercise its power vested under a Clause namely to initiate action against the properties of the establishment and take proceedings against the properties of the employer for recovery of whole or any part of the arrears only where the sale of

properties of establishment is insufficient for recovery of the whole amount specified in the certificate, and only thereafter against the employer. The relevant paragraph of the aforesaid judgment is extracted hereunder

> *"18. We are further of the view that the modes of recovery specified in clauses (a), (b) and (c) of Section 8-B(1) of the Act are alternative modes and not exclusive of each other and it is open to the Recovery Officer to resort to one or more of the modes. The use of the expression "by one or more of the modes mentioned below" in the substantive part of Section 8-B(1) makes it clear that the legislature has, with a view to ensure that the dues payable under the Act are recovered, empowered the Recovery Officer to resort to one or all the modes for recovery of the arrears. The only rider placed on the exercise of power by the Recovery Officer is that in the case of attachment and sale of any property, he must first do so qua the properties of the establishment and take proceedings against the properties of the employer for recovery of the whole or any part of the arrears only where the attachment and sale of properties of the establishment is insufficient for recovery of the whole amount specified in the certificate.*

However, there is nothing in Section 8-B(1) and other provisions of the Act from which it can be inferred that the Recovery Officer cannot adopt the mode specified in Clause (b) of Section 8-B(1) before exhausting other modes of recovery.

26. The Division Bench had analysed the provisions of Section 2(e) and Section 8B and had come to a factual conclusion that the petitioner in that case was in control of the affairs of the establishment and firm of the Company and therefore he would fall within the definition of the employer. The relevant paragraph is 12, 17,18

"12. An analysis of Section 2(e) shows that where the establishment is a factory, its owner or occupier including the agent of such owner or occupier, legal representative of the deceased owner or occupier falls within the definition of employer. In relation to any other establishment, the person or Authority having ultimate control over the affairs of the establishment falls within the definition of the employer. Where the affairs of the establishment are entrusted to a Manager, Managing Director, Managing Agent falls within the definition of employer. Section 8 provides for recovery of money dues

from the employer as arrears of land revenue. Section 8-B(1) lays down the modes of recovery. It empowers the Recovery Officer to effect the recovery from the establishment or the employer by attachment or sale of movable or immovable property of the establishment or the employer, arrest of the employer and his detention in prison or by appointing a Receiver for the management of the movable or immovable properties of the establishment or employer. Proviso to Section 8-B(1) lays down that if the Recovery Officer intends to resort to the mode of attachment and sale of property, then it should be first qua the properties of the establishment and the properties of the employer shall be touched only if the amount collected from the sale of properties of the establishment is not sufficient for recovering the whole of the arrears.

17. In our opinion, the ratio of these decisions cannot be applied to the case in hand because the definition of the employer contained in Section 2(e) of the Act in relation to an establishment other than a factory is totally different and the issue relating to the liability of the manager, managing director etc.. would depend on the finding as to whether he is in the control of the affairs of the establishment. In the present case, we have found that the *petitioner was in the control of the affairs of the establishment of the Firm and the Company and, therefore, he falls within the definition of the employer. Therefore, he cannot escape the liability to pay the arrears. ”*

27. From a reading of the aforesaid judgment, it could be seen that an action against an employer cannot be interfered with. However in the present case, since I have found that the petitioner is not an employer falling within the definition of Section 2(e), I am of the considered view that action cannot be initiated against him. Further, the learned counsel for the petitioner had relied upon a judgment of this Court of a learned Single judge in ***W.P.(MD).No.11546 of 2010*** where this Court had set aside the action initiated under Section 8B of the Enactment. A reading of the said judgment would show that the learned Single Judge had analysed Section 8B and Section 2(e) in extenso. After analysing the said provisions, the learned Single Judge had held as follows:-

“11. Shri Karnik, learned Counsel for respondent no.1, on the other hand, has relied on the judgment of the Apex Court in the case of the Srikanta Datta Narasimharaja

Wodiyar vs. Enforcement Officer, Mysore (supra) wherein the Apex Court was pleased to consider the provisions of Section 14-A and Section 2(e) & (k) and Section 14(1-a) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. It was submitted that the Apex Court in the said case had held that so far as the criminal liability is concerned, the person who is incharge of management of the company would also be liable. There cannot be any doubt regarding the ratio of the Apex Court in the said case. The Apex Court in the said case was considering the criminal liability of the employees of the company though the principal employer and company refers to Section 14A of the said Act which relate to offence by the company. The Apex Court held that the expression 'was incharge of and was responsible to the Company for the conduct of the business' are very wide in their import and therefore, it could not be confined to employer only. The submissions made by Shri Karnik that therefore, even the occupier would also be liable personally to pay the arrears of Provident Fund contribution, cannot be accepted. In this context, therefore, it would be relevant to have a look at the relevant provision viz. Section 14A of the said Act. Section 14A reads as under :- 14A. Offences by companies.- (1) If the person committing an offence under this Act, the Scheme or the Pension Scheme or the Insurance Scheme is a company, *every person, who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.*

(2) Notwithstanding anything contained in sub-section (1), where an offence under the Act, the Scheme or the Pension Scheme or the Insurance Scheme has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.- For the purposes of this section,- (a) "company" means any body corporate and includes a firm and other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm." and also Section 8 of the Provident Funds Act."

28. The aforesaid judgment fortifies my conclusion in arriving at a factual finding that the petitioner being a Director who is not in Management of the affairs of the Company.

29. Therefore, I am of the view that the recovery certificate had been issued against a person who was not in management of the affairs of the Company and therefore such recovery certificate is liable to be interfered with. In fine, this Writ Petition is allowed and the impugned recovery certificate is set aside. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

27.11.2023

gba
Index : Yes/No
Speaking order : Yes/No
Neutral Citations : Yes/No

K.KUMARESH BABU,J.

Gba

To

The Recovery Officer,
Office of the Recovery Officer,
Employees' Provident Fund Organishation,
Regional Office, Tamil Nadu Region,
37 Reyapettah High Road,
Chennai – 600 014.

A Pre-delivery order made in
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