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W.P.No.28490 to 28493 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.07.2023

Pronounced on : 24.07.2023

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

W.P.Nos.28490 to 28493 of 2013 and  
MP.Nos.1,1,1 & 1 of 2013

WP.No.28490 of 2013

Raj Kumar Khemka

... Petitioner

Vs.

1.The Employees Provident Fund Organisation,  
Rep. by its Regional Provident Fund Commissioner  
Sub Regional Office, Ambattur  
R-40A 1, TNHB Shopping-cum-Office Complex,  
Mogappair Road, Mogappair(East),

Chennai 600 037

2.The Recovery Officer,  
Employees Provident Fund Organisation,  
Sub Regional Office, Ambattur  
R-40A 1, TNHB Shopping-cum-Office Complex,  
Mogappair Road, Mogappair(East),  
Chennai 600 037

3.The Enforcement Officer,  
Employees Provident Fund Organisation,  
Sub Regional Office, Ambattur  
R-40A 1, TNHB Shopping-cum-Office Complex,  
Mogappair Road, Mogappair(East),  
Chennai 600 037

... Respondents



W.P.No.28490 to 28493 of 2013

**PRAYER:** Writ Petition is filed under Article 226 of Constitution of India praying to issue Writ of Certiorarified Mandamus calling for the records of the second respondent and quash the order dated 13.09.2013 in reference No.TN/SRO/AMB/26481/RRC-3223/2013 and thereby forbear the respondents from initiating any proceedings for recovery against the petitioner towards alleged arrears payable by M/s.NEPC India Ltd. in respect of Certificate Nos.TN/SAO-AMB/26481/RRC/2002 & 2008 dated 22.04.2002 & 04.04.2008.

For Petitioner : Mr.V.Anil Kumar

For Respondents : Mrs.Sunitha Kumari,  
Standing Counsel

WP.No.28491 of 2013

Raj Kumar Khemka

... Petitioner

Vs.

1.The Employees Provident Fund Organisation,  
Rep. by its Regional Provident Fund Commissioner  
Sub Regional Office, Ambattur  
R-40A 1, TNHB Shopping-cum-Office Complex,  
Mogappair Road, Mogappair(East),  
Chennai 600 037

2.The Recovery Officer,  
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3.The Enforcement Officer,



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Employees Provident Fund Organisation,  
Sub Regional Office, Ambattur  
R-40A 1, TNHB Shopping-cum-Office Complex,  
Mogappair Road, Mogappair(East),  
Chennai 600 037

... Respondents

**PRAYER:** Writ Petition is filed under Article 226 of Constitution of India praying to issue Writ of Certiorarified Mandamus calling for the records of the second respondent and quash the order dated 13.09.2013 in reference No.TN/SRO/AMB/3173/RRC/2013 and thereby forbear the respondents from initiating any proceedings for recovery against the petitioner towards alleged arrears payable by M/s.NEPC Agro Foods Ltd. in respect of Certificate Nos.TN/SAO-AMB/3173/RRC/CC-II(2) dated 15.04.2002.

For Petitioner : Mr.V.Anil Kumar

For Respondents : Mrs.Sunitha Kumari,  
Standing Counsel

WP.No.28492 of 2013

Tirupathi Kumar Khemka

... Petitioner

Vs.

1.The Employees Provident Fund Organisation,  
Rep. by its Regional Provident Fund Commissioner  
Sub Regional Office, Ambattur  
R-40A 1, TNHB Shopping-cum-Office Complex,  
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For Petitioner : Mr.V.Anil Kumar

For Respondents : Mrs.Sunitha Kumari,  
Standing Counsel

WP.No.28493 of 2013

Tirupathi Kumar Khemka

... Petitioner

Vs.



W.P.No.28490 to 28493 of 2013

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For Petitioner : Mr.V.Anil Kumar

For Respondents : Mrs.Sunitha Kumari,  
Standing Counsel



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**COMMON ORDER**

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The writ petition in WP.No.28490 of 2013 is filed to issue Writ of Certiorarified Mandamus calling for the records of the second respondent and quash the order dated 13.09.2013 in reference No.TN/SRO/AMB/26481/RRC-3223/2013 and thereby forbear the respondents from initiating any proceedings for recovery against the petitioner towards alleged arrears payable by M/s.NEPC India Ltd. in respect of Certificate Nos.TN/SAO-AMB/26481/RRC/2002 & 2008 dated 22.04.2002 & 04.04.2008. The writ petition in WP.No.28491 of 2023 is filed to issue Writ of Certiorarified Mandamus calling for the records of the second respondent and quash the order dated 13.09.2013 in reference No.TN/SRO/AMB/3173/RRC/2013 and thereby forbear the respondents from initiating any proceedings for recovery against the petitioner towards alleged arrears payable by M/s.NEPC Agro Foods Ltd. in respect of Certificate Nos.TN/SAO-AMB/3173/RRC/CC-II(2) dated 15.04.2002. The writ petition in WP.No.28492 of 2013 is filed to issue Writ of Certiorarified Mandamus calling for the records of the second respondent and quash the order dated 13.09.2013 in reference



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No.TN/SRO/AMB/26481/RRC-3223/2013 and thereby forbear the respondents from initiating any proceedings for recovery against the petitioner towards alleged arrears payable by M/s.NEPC India Ltd. in respect of Certificate Nos.TN/SAO-AMB/26481/RRC/2002 & 2008 dated 22.04.2002 & 04.04.2008. The writ petition in WP.No.28493 of 2013 is filed to issue Writ of Certiorarified Mandamus calling for the records of the second respondent and quash the order dated 13.09.2013 in reference No.TN/SRO/AMB/3173/RRC/2013 and thereby forbear the respondents from initiating any proceedings for recovery against the petitioner towards alleged arrears payable by M/s.NEPC Agro Foods Ltd. in respect of Certificate Nos.TN/SAO-AMB/3173/RRC/CC-II(2) dated 15.04.2002.

2. These writ petitions have been filed challenging the certificate issued for attachment of immovable properties. The petitioners are one of the directors of the Company M/s.NEPC India Limited and M/s.NEPC Agro Food Ltd. It is covered under the provisions of Employees Provident Fund Act. It was facing a temporary financial crisis during the year 2000 and as such there was liability by the company.



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While being so, the first respondent has forwarded the certificate to recover the money due from the company and thereafter the second respondent issued communication thereby attached the immovable property under Rule 48 of Second Schedule to the Income Tax Act, 1961 in respect of the property situated at V101 Anna Nagar, Madras and V11, 12<sup>th</sup> street, Anna Nagar, Chennai thereby restrained the company from transferring or charging the said properties and all persons from taking any benefit.

3. The learned counsel for the petitioners would submit that the properties neither belong to the petitioners nor the company. The impugned notices were pasted in the said properties in the presence of Ms.Lakshmi who is in charge of the building. He further submitted that the properties which were attached by the second respondent do not belong to the petitioners. The petitioners are not the employer as defined under Section 2(e) of Employees' Provident Funds and Miscellaneous Provisions Act (hereinafter called as 'EPF and MP Act'). In any event, as Directors, the petitioners cannot be made personally liable in respect of



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the dues of the company, that too without affording any opportunity to the petitioners. Due of the Company shall be first effected against the properties of the establishments i.e. M/s.NEPC India Limited and M/s.NEPC Agro Food Ltd. as per the proviso to Section 8-B of EPF and MP Act. The petitioners are being the Directors, they cannot be made personally liable to the dues of the company, that too when the company is very much in existence. Therefore, the order of attachment is in violation of Section 8-B of EPF and MP Act. He also submitted that the properties which are under attachment are completely different from the property owned by the petitioners. In support of his contention, he relied upon the judgment of this Court in the case of ***R.Balachandran and another Vs. The Regional Provident Fund Commissioner, Madurai and others*** rendered in WP.(MD)No.11546 of 2010, wherein it is held as follows:

*10. Though the issue involved in the said case was whether the directors of the company could be made liable for the offence punishable under [Section 405](#) for Criminal Breach of Trust, while considering the said issue, the Apex Court had an occasion to deal with and consider the relevant provision under [Section](#)*



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*2(17) which defines the term "principal employer". It is an admitted position that the definition of "principal employer" as defined under Section 2(17) of the ESI Act is paramateria with the provisions of [Section 2\(e\)](#) of the Provident Funds Act. In this view of the matter, therefore, in view of the decision of the Apex Court, it is apparent that the word "owner" or "occupier" has to be used disjunctively and in cases where the owner of factory is a company, it is the company which is the principal employer and not a director. Similarly, the learned Judge of this Court in the case of Mansingh L. Bhakta (supra) has also taken a similar view holding that the Managing Director of a company cannot be personally liable towards arrears of provident fund contribution by the company. Similar view has been taken by the learned Single Judge of this Court in the case of [Employees State Insurance Corporation & Anr. vs. G.N. Mathur & Ors.](#) (supra). (supra) That being the settled position, it was not open for the respondent no.1 to attach the personal property of the Managing Director.*

*11.....*

*12.....*

*13. The contention of the learned counsel that in*



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*view of Form 5A, the first petitioner will be an occupier of the Factory, thus liable for payment of provident fund, again, deserves to be noticed to be rejected, for the simple reason, that the liability under [Section 7-A](#) of the Act, is that of the employer, and as already mentioned, in case of a Registered Company, it is the Company, which is the employer. An occupier can not be held responsible under [Section 8-B](#) of the Act, though action against Occupier can be taken under [Section 14-A](#) of the Act.*

Therefore, the petitioners are not liable under Section 8-B of the EPF and MP Act.

3.1 He also relied upon the judgment of the Hon'ble High Court of Punjab and Haryana in the case of ***Vijay Aggarwal Vs. The Recovery Officer, Employees Provident Fund & Misc. Provisions Act, 1952 and another*** reported in ***2009 SCC Online P&H 7274***, wherein it is held as follows:

*[Section 7](#) of the Factories Act requires the Occupier of the factory to send the Chief Inspector a written notice containing several details that include*



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*under [Section 7](#) (i) (b) the name and address of the occupier and the name and address of the owner of the premises or building. The attempt of the learned counsel was to show that the employer who could be further a owner or occupier must be shown to be a person notified within Chief Inspector describing the person in such capacity. According to him, if the employer was a Company it should only be the Company that could be shown as either the owner or the occupier. Managing Director of the Company cannot be treated as either the owner or the occupier. If any liability is to be cast on a Director or Managing Director, he should have been shown in the register to the Chief Inspector of factories that such a Director was either the owner or the occupier.....*

*The provisions that allow for imposition of penalties and the mode of inflicting punishment for the offences committed by the Companies provided under [Section 14](#) and [14-A](#) of the Provident Fund Act contain distinct provisions relating to criminal prosecution that would extend CWP No. 18294 of 2007 punishment with imprisonment. It must be noticed that the impugned proceedings are not taken under [Section 14-A](#) by pinning down the Director as a person*



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*responsible to the Company in the conduct of the business of the Company. The recovery proceedings should be issued only against the employer which in this case cannot be said to be a Director or the Managing Director.....*

*I have already pointed out that this is not a case where any criminal prosecution by imposing the penalty provided under [Section 14](#) or 14-A are invoked. The impugned notices are at the stage of recovery. The certificate cannot be issued against the Director of the Company nor could there be an action personally against any Director of CWP No. 18294 of 2007 the Company. Such an action would be clearly outside the scope for powers available with Recovery Officer under [Section 8-B](#) of the Act. The notices are illegal and liable to be quashed.*

4. The respondents filed counter and Mrs.Sunitha Kumari, Standing counsel appearing on behalf of the respondents submitted that the Company M/s.NEPC India Limited and M/s.NEPC Agro Food Ltd. had committed default in payment of EPF contribution and other charges as required under para 38 of EPF Scheme, 1952 for the period January



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2000 to February 2001 and for another period September 2005 and August 2006 to May 2007. Therefore, the respondents had issued so many notices to the Company where the petitioners are Directors who are responsible to remit the provident fund dues in respect of the employees of the establishment. Despite the issuance of such notices, they failed to remit the dues. Therefore, the respondents decided to conduct enquiry as contemplated under Section 7A of EPF and MP Act to determine the dues payable by company under Section 7A(1)(b) of the Act. Thereafter, two orders have been passed and even though the petitioners failed to pay any dues within the financial year. Therefore, the respondents forwarded the recovery certificates in order to recover the arrears due from the establishment / employer as stipulated under Section 8B to 8G of EPF and MP Act. On receipt of recovery certificate, the Recovery Officer issued an intimation to the establishment under certificate proceedings dated 01.12.2009. Even after receipt of the same, the establishment failed to remit the dues to the tune of Rs.17,89,580.90/- Thereafter, establishment remitted a sum of Rs.2,25,000/-. After deducting the same, the balance amount payable by the establishment is computed at



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Rs.15,64,580.90/-. Therefore, the Recovery Officer issued a certificate of attachment of immovable property as contemplated under Section 8B of EPF and MP Act.

4.1 She further submitted that even before the issuance of the certificate, the respondents tried to effect recovery of dues by issuing order to pay the dues under Section 8F of EPF and MP Act to the banker of the establishment and issued orders. However no amount was paid and as such, the order of attachment of immovable property of the petitioners was issued and also pasted attachment order on the property.

4.2 The petitioners are one of the directors of the establishment M/s.NEPC India Limited. As per the definition of 'employer' under Section 2(e) of EPF and MP Act, the directors are solely responsible for the affairs of the establishment and they have legal responsibility to pay wages to the employees and deduct the PF contribution from such paid wages and remit into EPF account. As per the provision, the properties of the directors who are also the employers of the establishment were



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attached by the respondents. In fact, both the petitioners have admitted that they are the directors of the establishment and as per definition for employer under Section 2(e) of EPF and MP Act, they are responsible for the affairs of the establishment and ultimate control on it. The petitioners are being the Directors of the establishments they are responsible for the affairs of the establishment and are construed as employer as per Section 2(e) of EPF and MP Act. The act of Recovery Officer who issued notice of attachment is legally valid and it has to exercise the power under Section 8B of EPF and MP Act to recover the dues. It empowers the Recovery Officer to attach and sell the movable and immovable properties of the establishment / employer or as the case may be. In support of her contention, she relied upon the judgment of the Hon'ble High Court of Gujarat rendered in the case of **Harish F Shah Vs. Employees Provident Fund Organization** reported in **2011 SCC Online Guj 4849**, wherein the Hon'ble Division Bench of the Gujarat High Court held that 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



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of recovery. Therefore, it cannot be said that the order of attachment against the properties owned by directors is illegal, arbitrary and unjustified.

5. Heard, Mr.V.Anil Kumar, the learned counsel for the petitioners and Mrs.Sunitha Kumari, Standing Counsel appearing for the respondents.

6. Admittedly the petitioners are Directors of the company M/s.NEPC India Limited and M/s.NEPC Agro Food Ltd.(hereinafter called as establishment). They are only Directors of the establishment. They are in charge of day to day affairs of the company. They are responsible for all liabilities of the establishment. The establishment failed to remit its dues. Therefore, the respondents had conducted enquiry to determine the dues payable by the establishment as contemplated under Section 7A(1)(b) of EPF and MP Act. After enquiry, order was passed for default dated 31.08.2007 to the tune of Rs.1,46,935.50/- for the default period September 2005. Another order was passed for sum of Rs.16,42,645.40/- for the default period from January 2000 to February



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2001. The total PF contribution and other charges payable by the establishment was Rs.17,89,580.90/-. Therefore the Authorised Officer forwarded the recovery certificates for the said sum to Recovery Section. On receipt of the same, the Recovery Officer issued notice to the establishment to remit the dues. Even after receipt of the same, the establishment failed to remit the dues and finally they have remitted only Rs.2,25,000. The balance amount payable by the establishment was to the tune of Rs.15,64,580.90/- under the certificates dated 22.04.2002 and 04.04.2008. A sum of Rs.3,62,764/- under certificate dated 15.04.2002. Both the certificates were forwarded by the authorised officer together with interest payable under Section 7Q of EPF and MP Act for the period commencing i.e. after the said date. Thereafter, the Recovery Officer issued certificate of attachment of immovable property to establishment and the petitioners who are being the Directors.

7. The only point for consideration in this writ petition is that



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whether arrears of provident fund and other amounts payable by the establishment under EPF and MP Act can be recovered from its Directors? For the purpose of deciding this issue, it is relevant to extract the provision under Section 2(e) of EPF and MP Act hereunder:

**2(e) "employer" means -**

*(i) 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 (63 of 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;*

8. Section 2(e)(ii) is applicable to these cases. Thus, it is clear



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that any person or authority having ultimate control over the affairs of the establishment that falls within the definition of the employer and where the affairs of the establishment are entrusted to a Manager, Managing Director, Managing Agents falls within the definition of employer. In respect of recovery, Section 8 provides for recovery of money dues from the employer as arrears of land revenue. It is relevant to extract the provision under Section 8-B of EPF and MP Act.

***8-B.Issue of certificate to the Recovery Officer -***

*(i) 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;*



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*(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 where such attachment and sale is insufficient for recovering the whole of the amount 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.*

*(ii) 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."*

9. The proviso lays down that if the recovery officer intends to resort to the mode of attachment and sale of property, then it should be first effected against the properties of the establishment and the properties of the employer shall be attached only if the amount collected from the sale of properties of the establishment is not sufficient for recovering the entire arrears. In this regard, the learned counsel for the petitioners relied upon the judgment of this Court in the case of ***R.Balachandran and***



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*another Vs. The Regional Provident Fund Commissioner, Madurai and others* rendered in WP.(MD)No.11546 of 2010, in which this Court held on relying upon the judgment of the Hon'ble Supreme Court of India in the case of *Employees' State Insurance Company Vs. SK.Aggarwal and Others* reported in *AIR 1998 SC 2676*, that the words 'owner or occupier' which is found in Section 2(e) of ESI Act, have been used disjunctively and therefore in a case where owner is public limited company, in that case while construing the definition of 'owner', it would not be necessary to refer the word 'occupier'. Therefore, the liability under Section 7-A of EPF and MP Act is that of the employer. In case of a registered company, it is the company, which is the employer. An occupier cannot be held responsible under Section 8-B of EPF and MP Act though action against occupier can be taken under Section 14-A of the Act.

10. He also relied upon the judgment of the Hon'ble High Court of Punjab and Haryana in the case of *Vijay Aggarwal Vs. The Recovery Officer, Employees Provident Fund & Misc. Provisions Act, 1952 and*



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*another* reported in **2009 SCC Online P&H 7274**, in which also the learned Single Judge held that the impugned proceedings are not the provision that allow for imposition of penalties and the mode of inflicting punishment for offences committed by the companies provided under Section 14 and 14-A of the Provident Fund Act contain distinct provisions relating to criminal prosecution that would extend punishment with imprisonment. It must be noticed that the impugned proceedings are not taken under Section 14-A by pinning down the Director as a person responsible to the company in the conduct of the business of the company. The recovery proceedings should be issued only against the employer which in this case cannot be said to be a Director or the Managing Director.

11. In the case of ***Harish F Shah Vs. Employees Provident Fund Organization*** reported in **2011 SCC Online Guj 4849**, the Hon'ble Division Bench of the High Court of Gujarat, relying upon the judgment of the Hon'ble Division Bench of the Punjab and Haryana High Court rendered in the case of ***Mohan Vs. Regional Provident Fund***



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**Commissioner** reported in **2002-III-LLJ 779**, in which also the cases referred by the learned Single Judge of this Court and the Hon'ble Punjab and Haryana High Court, held that the ratio of those decisions cannot be applied to the case in hand, because the definition of the employer contained in Section 2(e) of EPF and MP 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. Therefore, the definition of 'employer' under ESI Act is not applicable to the decision under EPF and MP Act. Further held 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



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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." Therefore, the petitioners are being the Directors of the establishment held liable for the attachment of their properties.

12. Insofar as the schedule of properties is concerned, the respondents produced the encumbrance certificate of the properties stands in the name of the petitioners and one, Sambadevi. In the encumbrance certificate, it is mentioned as plot No.Y202 whereas in the order of attachment says that Door No.V101, Anna Nagar, Chennai and door No.V11, 12<sup>th</sup> Street, Anna Nagar, Chennai. According to the respondents, both are same. Both the petitioners stated in their affidavit



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that the attached property do not belong to them. Whereas the order of attachment were affixed in the very same property. Therefore, this Court find no infirmity or illegality in the order of attachment issued by the second respondent and the writ petitions lack of merits.

13. Accordingly, all the writ petitions are dismissed. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

24.07.2023

Internet: Yes  
Index: Yes/No  
Speaking/Non-speaking order  
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To

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Rep. by its Regional Provident Fund Commissioner  
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4. The Public Prosecutor,  
High Court, Madras.



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**G.K.ILANTHIRAIYAN, J.**  
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