IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.09.2023

CORAM :

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

W.P.No.4707 of 2018
& WMP.No.5812 of 2018

M/s.Lakshana Cotton Spinning Mills Ltd., rep.by its Managing Director Mr.J.Madhusudan Rao ...Petitioner

Vs

The Assistant Provident Fund Commissioner/Recovery Officer, EPF Organization, Regional Office, Dr.Balasundaram Road, Coimbatore-18. ...Respondent

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorari to call for the records of the respondent in Ref.No.TN/RO/CBE/RECOVERY/21038/CP-25/2018 dated 23.02.2018 and quash the same.

For Petitioner : Mr.A.L.Somayaji, SC for
Mr.S.Gunalan

For Respondent : Mr.C.Kulanthaivel, St.Counsel

ORDER

This is petition filed by the petitioner - establishment seeking to quash the show cause notice dated 23.02.2018 issued by the respondent.

2. The facts leading to filing of this case are as follows :

(i) The establishment was registered under the Companies Act. But, it was declared as a sick unit vide proceedings of the Board for Industrial and Financial Reconstruction on 13.6.2001. The establishment was not able to remit the regular contribution towards employees' provident fund for the period from November 2002 to May 2008. The respondent issued a certificate dated 10.11.2008 to defaulter authorizing to mortgage, lease or sell the property for the dues to the tune of Rs.1,05,16,991/-.

(ii) Thereafter, the establishment sold a part of the machinery and remitted a sum of Rs.1,03,97,978/-, pursuant to which, vide proceedings dated 18.12.2008, the respondent stated that there was a balance of

Rs.13,07,753/- for realization of the outstanding dues and attached the machinery worth Rs.19,75,000/-. Subsequent to that, the establishment sold the machinery and remitted a sum of Rs.26,84,198/-, by which, the excess amount was adjusted towards further damages and interest levied by the respondent. The respondent also, vide proceedings dated 18.2.2009, stated that the establishment cleared the dues towards provident fund payable upto May 2008 and that the attached machinery were released with instructions that the establishment was free to transfer the machinery released to M/s.Martin Spinning Mills (P) Ltd., Coimbatore.

(iii) After a period of nine years, the respondent issued the impugned notice demanding a sum of Rs.1,32,66,982/- towards penal damages, interest and charges contrary to what was recorded vide proceedings dated 18.2.2009. Before ever the impugned notice was issued, the establishment was not served with any intimation. The Managing Director of the establishment could not be fastened with any liability, as one of the creditors of the establishment already filed C.P. No.299 of 1997 before this Court, got an order of winding up on 04.11.2009 and the Official Liquidator was appointed as the Liquidator to take charge of the assets of the establishment. Once the winding up proceedings started, the respondent has remedy only before the Company Court and the establishment had no role to pay. Hence, the establishment is before this Court.

3. Learned counsel appearing for the petitioner establishment would submit that the petitioner' Company was closed even in the year 2009 and that the petitioner had settled the entire due amounts to the respondent. However, before issuing the impugned show cause notice, the respondent has failed to note that once the winding up proceedings started, the Provident Fund Authority has remedy only before the Company Court and not before the employer/Managing Director. Further, the respondent has not issued any summons to the petitioner before assessing the said dues and had failed to implead the official liquidator as a party to the enquiry. Thus, the respondent has exceeded his jurisdiction in issuing the show cause notice. Accordingly, he prayed for allowing the Writ Petition.

4. The respondent filed a counter affidavit wherein it has been stated as follows :

(i) The petitioner remitted the monthly contributions belatedly during the period from June 1996 to October 2008. Therefore, the respondent issued a notice dated 19.1.2010 to the petitioner so as to quantify the damages under Section 14B and interest under Section 7Q of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (for short, the Act) giving an opportunity of personal hearing. However, the summons were returned with the endorsement 'addressee left'. The employer had not informed the respondent about the change of address nor updated the same in Form 5 though it was the duty of the employer to furnish the change of address.

(ii) When the Enforcement Officer of the respondent visited the personal address of the employer for service of summons, the Managing Director of the establishment refused to receive the same on the ground that the establishment was taken over by the Official Liquidator of High Court, Madras. Though the entire papers were sent to the Official Liquidator, no reply was received. Therefore, the inquiry was concluded ex-parte and the respondent passed an order dated 28.6.2010 confirming the penal damages to the tune of Rs.85,84,006/- and interest to the tune of Rs.44,09,464/- and this was intimated to the establishment. In this writ petition, the establishment had challenged only the show cause notice. The validity of the order/ assessment under Sections 14B and 7Q of the Act could not be gone into by the Recovery Officer and it should be tested before the Appellate Tribunal. Despite that, the establishment failed to challenge the same before the Appellate Tribunal. Hence, the writ petition is not maintainable.

(iii) The letter dated 18.2.2009 stated only about the dues towards the dues of provident fund contribution and it never mentioned about the damages under Section 14B and the interest under Section 7Q of the Act. The recovery proceedings were initiated only in accordance with law and the show cause notice was issued pursuant to the assessment dated 28.6.2010. The Official Liquidator, vide letter dated 03.1.2013 intimated that the establishment did not hold any movable or immovable property as on the date of liquidation and that due to insufficient funds, he was not in a position to entertain the claim towards employees' provident fund dues. Without securing the interest of the poor employees, the mismanagement of the Board of the establishment resulted in default of remittances, which attracted damages and interest leviable under the provisions of the Act.

(iv) The establishment paid the dues only for the period upto May 2008. The respondent issued the certificate stating that the dues assessed for the period upto May 2008 was paid. Under the provisions of the Act, the establishment is liable to pay the corresponding damages/interest under Section 14B/7Q of the Act. The dues mentioned under the recovery certificate dated 01.4.2011 and the impugned show cause notice were legal. Ultimately, he sought to vacate the interim order and to dismiss the writ petition.

5. When the matter came up for admission on 02.3.2018, this Court granted an order of interim stay.

6. On the above contention, this Court heard the learned counsel appearing for the 4th respondent and perused the materials available on record.

7. It is evident from the entire materials available on record that earlier in the Company Petition No.299 of 1997, this Court vide order dated 04.11.2009 had appointed an Official Liquidator of this Court to take charge of the Assets of the Company. It is the case of the petitioner company that the Company was closed even in the year 2009. It is seen that the present impugned show cause notice has been issued claiming recovery of arrears and interest payable under Section 7Q of the Employees Provident Funds and Miscellaneous Provisions Act, 1952.

8. However, citing the fact that already an official liquidator has been appointed by the Court to the petitioner company vide order dated 04.11.2009 and that the winding up proceedings have been initiated, this Court is of the view that once the winding up proceedings are initiated, if there are any dues to be settled by the Company for which the liability cannot be fastened against the employer of the Company. If at all the respondent authority has any grievance with regard to the outstanding dues, the proper course open for the respondent would be to issue a showcause

notice to the Official Liquidator, instead of which, fastening liability against the petitioner/Managing Director of the petitioner company is not sustainable. For the said reasons, this Court is inclined to set aside the impugned order and accordingly, the impugned order of the respondent is set aside.

9. Accordingly, this Writ Petition is allowed in the above terms. There shall be no order as to costs. Consequently, the connected miscellaneous Petition stands closed.

11.09.2023

Index : Yes (or) No
Neutral Citation : Yes (or) No
Speaking Order : Yes (or) No

NHS

To
The Assistant Provident Fund
Commissioner/Recovery Officer,
EPF Organization, Regional
Office, Dr.Balasundaram Road,
Coimbatore-18.

M.DHANDAPANI, J

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