2024:PHHC:128604

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

262 CWP-202-2011
Date of Decision : 27.09.2024

HARJIT SINGH AND ANR …. PETITIONERS

V/S

REGIONAL PROVIDENT FUND COMMISSIONER, AMRITSAR AND ANR

…. RESPONDENTS

CORAM : HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present :- Mr.R.S.Bajaj, Advocate
Mr. Sidakit Singh Bajaj, Advocate and
Mr. Sachin Kalia, Advocate
for the petitioners.

Mr. Rajesh Hooda, Advocate
for the respondents.

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JAGMOHAN BANSAL, J. (Oral)

1. The petitioners through instant petition under Articles 226/227 of the Constitution of India are seeking setting aside of recovery certificate dated 23.11.2010 (Annexure P-15), show cause notice dated 23.11.2010 (Annexure P-16) and arrest warrants issued against them.

2. Mr.R.S.Bajaj, Advocate, at the outset, submits that petitioner No.2 has passed away, thus, petition qua said petitioner stands abated.

3. The petitioner No.1 (for short 'petitioner') joined a limited company known as M/s Bawa Shoes Pvt. Ltd. (for short 'company') in 1984 as Accounts Clerk. He was promoted to the post of Planning

Assistant in 1986 and thereafter designated as Production Manager in 1988. In 1994-95, the management appointed him as Director of the company. The petitioner was allotted 500 shares out of total 29,910 shares of the company. He was not having any financial or purchasing powers. He was concerned with production. He was also not responsible for day-to-day working of the company. The aforesaid company was a closely-knitted company and all the shareholders and directors were family members. The petitioner was factually an employee of the company, however, he was made Director on account of retiring of three out of the five Directors.

4. The aforesaid company made default of different statutory dues including provident fund. During November' 2001 to February' 2004, there was non-payment of provident fund contribution to the tune of Rs.2.27 crores. The assessing authority initiated proceedings against the company and passed different orders whereby liability of provident fund contribution to the tune of Rs.2.27 crores was assessed besides interest and penalty amounting to Rs.4.16 crores. The company also defaulted on re-payment of loan borrowed from different banks. The respondent in exercise of powers conferred by Section 8B of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short '1952 Act') attached properties of the company. The respondent could not realize its dues despite attachment of properties because banks have also attached same properties under The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short '2002 Act').

5. The respondent in exercise of powers conferred by Sections 14 and 14A of 1952 Act initiated criminal proceedings against the Directors of the company. The respondent filed complaint No.541 dated 20.09.2005 before Additional Chief Judicial Magistrate, Amritsar, (for short 'ACJM') against Directors of the company. The said complaint was filed in terms of Sections 6, 14, 14A and 17B of 1952 Act. Three Directors of the company preferred an application before trial Court seeking their discharge on the ground that during the period in question, they were not Directors, thus, they cannot be held responsible for default, if any, committed by the company. They came to be discharged by learned ACJM and at this stage, respondent filed amended complaint where petitioners herein came to be implicated.

6. The respondent apart from filing aforesaid complaint before ACJM initiated recovery proceedings against the petitioners. The respondent though attached properties of the company yet issued recovery notice dated 23.11.2010 against all the Directors including petitioners. The recovery notice was issued under Section 8-B (1) of 1952 Act. Consequent to recovery notice, show cause notice dated 23.11.2010 was issued which was followed by arrest warrant.

7. Mr. R.S.Bajaj, Advocate submits that respondent initiated recovery proceedings against the company under Section 8-B of 1952 Act and in the said process, all the assets were attached. Despite attaching assets of the company, the respondent initiated recovery proceedings against all the Directors including petitioner. The petitioner was never holding position of 'employer'. He was not incharge of affairs of the

company. He was *de facto* employee of the company which is evident from the fact that he was contributing to provident fund as well as ESI. He was regularly getting salary and working like other employees.

In support of his contentions, Mr. Bajaj relied upon judgment of Supreme Court in ***Employees' State Insurance Corporation, Chandigarh vs. Gurdial Singh and others, 1991 AIR (SC) 1741*** and this Court in ***Vijay Aggarwal vs. The Recovery Officer, Employees Provident Fund & Misc. Provisions Act, 1952, SCO NO.4-7, Sector 17-D, Chandigarh and another, 2009 (3) SCT 686***

8. Per Contra, Mr. Hooda submits that the petitioner was a Director of the company, thus, he falls within the definition of 'employer' and was responsible for making payment of provident fund contribution. As company defaulted in making payment, the petitioner was equally responsible like the company. The respondent has right to proceed against the company as well as its Directors because Section 8-B of 1952 Act permits to proceed against establishment as well as employer. Every person whose name is disclosed in Form-5A which is filed in terms of Para 36A of the Provident Fund Scheme, 1952 falls within definition of 'employer'.

In support of his contentions, Mr. Hooda relied upon a Division Bench judgment of this Court in ***Vivek Goel vs. Employees' Provident Fund Organisation and anr.*** in ***LPA No.444 of 2022, decided on 31.05.2022***. He also relied upon a Division Bench judgment of this Court in ***Mohan Lal vs. Regional Provident Fund Commissioner, 2002 SCC OnLine P&H 355.*** He specifically pointed out Para No.18 of the said judgment which is reproduced as below:

> "*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 of 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.*"

9. I have heard the arguments of counsel for the parties and perused the record.

10. The entire dispute revolves around reading of Section 8-B of 1952 Act which is reproduced as below :

> "***8B. 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 proportion 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.

(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."

11. From the perusal of above-quoted Section, it is evident that in case of default, recovery certificate may be issued and recovery officer may proceed to recover against establishment as well as employer. He may adopt one or more of the modes mentioned in the said Section. The modes are (i) attachment and sale of properties, (ii) arrest of employer and (iii) appointing a receiver. As per proviso to sub-section (1) of

Section 8-B of 1952 Act, the properties of employer cannot be attached prior to attachment of property of establishment. The authorities are duty bound to first proceed against properties of establishment and thereafter proceed against employer. There is embargo to proceed against employer without proceeding against the establishment, however, there is liberty to invoke any mode specified in the said Section. The modes specified in the Section are not exclusive or sequential in nature. The authorities at the same moment can invoke one or more of the prescribed modes.

12. In the case in hand, concededly, the respondent has proceeded against the establishment. The respondent has already attached properties of the company. The respondent, as per knowledge of Mr. Hooda, is unable to realize its dues because same properties are subject matter of attachment by banks under 2002 Act. The respondent is vehemently claiming that dues of provident fund are having first charge over the assets of the company, thus, they are having prior right over the assets. The respondent is unable to clarify present status of dispute between the provident fund authorities and bank authorities. It is not clear whether banks have sold the properties or not and whether provident fund authorities have further proceeded against the properties of the company or not. Nonetheless, the matter needs to be examined in the light of status of petitioner *vis-à-vis* liability of the company. The petitioner is not an establishment whereas he may fall within the definition of 'employer', thus, it is inevitable to scrutinize definition of 'employer' as provided in Section 2(e) of 1952 Act. The said Section is reproduced as below:

> "*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;*"

13. The company was engaged in the manufacturing of shoes and it was having a factory, thus, it fell within the scope of Section 2(e)(i) of 1952 Act. The defaulter is a private limited company, thus, its shareholders are 'owner' of the company. The Directors cannot be called as 'owner' of the company. Company is owned by its shareholders who carry limited liability.

14. The next expression used in the aforesaid definition is 'occupier' or a 'manager' who has been named under clause (f) of sub-section (1) of Section 7 of Factories Act, 1948 (for short '1948 Act'). The expression 'occupier' has been defined under Section 2(k) of 1952 Act which is reproduced as below:

> "*k) "occupier of a factory" means the person who has ultimate control over the affairs of the factory, and, where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory;*"

From the reading of aforesaid Section, it is evident that a person is 'occupier' of a factory if he has ultimate control over the affairs of the factory and where the affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory. It is not case of the respondent that the petitioner was ever appointed as 'occupier' of the factory or he has control over the affairs of the factory.

The respondent is embroiling the petitioner under Section 8-B of 1952 Act on the ground that he was Director of the company. The respondent is of the opinion that every person is employer whose name has been disclosed in Form 5A filed in terms of paragraph 36A of Employees' Provident Fund Scheme, 1952. Paragraph 36A of the 1952 Scheme reads as :

> "*36A. Employer to furnish particulars of ownership Every employer in relation to a factory or other establishment to which the Act applies on the date of coming into force of the Employees' Provident Funds (Tenth Amendment) Scheme, 1961, or is applied after that date, shall furnish in duplicate to the Regional Commissioner in Form No. 5A annexed hereto, particulars of all the branches and departments, owners, occupiers, directors, partners, manager or any other person or persons who have the ultimate control over the affairs of such factory or establishment and also send intimation of any change in such particulars, within fifteen days of such change, to the Regional Commissioner by registered post and in such other manner as may be*

specified by the Regional Commissioner: Provided that in the case of any employer of a factory or other establishment to which the Act and the Family Pension Scheme, 1971, shall apply the aforesaid Form may be deemed to satisfy the requirements of the Employees' Family Pension Scheme, 1971, for the purpose specified above. Provided further that above mentioned details shall be furnished by the employer in the electronic format also, in such form and manner, as may be specified by the Commissioner."

15. On the asking of the Court, Mr. Rajesh Hooda, Advocate produced copy of Form 5A filed by the company, which is taken on record.

From the perusal of the said Form, it is evident that the petitioner was never disclosed as 'occupier' of the factory. It is important to notice that even name of the petitioner was not disclosed in Form 5A, thus, contention of respondent that every person whose name is disclosed in Form 5A is occupier, does not apply to petitioner because his name was never disclosed in the said Form.

16. From the conjoint reading of Section 2(e) and 2(k) of 1952 Act, it is evident that a managing agent who has been entrusted affairs of the company or a person who is named under Section 7(1)(f) of Factories Act, 1948 is an 'employer'. The respondent does not dispute the fact that the petitioner was neither entrusted affairs of the company in terms of Section 2(k) of 1952 Act nor named in terms of Section 7(1)(f) of 1948 Act.

17. The 1952 Act in case of default creates civil as well as criminal liability. Criminal liability is envisaged under Section 14 and civil liability under Section 8 read with Section 8B of the 1952 Act. In case of a company, the person defined under Section 14A is liable for prosecution. He may be a Director, Manager, Secretary or any other official of the company. Section 14A of 1952 Act is reproduced as below:

> "*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 this 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."*

From the perusal of Section 14A of 1952 Act, it is evident that in case of a company, every person who at the time of commission of offence was in charge of and was responsible to the company for the conduct of business, shall be guilty of the offence and proceeded against. The said Section further provides that if it is proved that offence has been committed with the consent or connivance or is attributable to 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 guilty of the offence. It means for criminal liability, every person who is either in charge of and responsible for the conduct of business of the company or any Director, Manager, Secretary or other officer with whose connivance, consent or negligence offence has been committed shall be guilty and proceeded against. From the comparison of Section 8-B, 2(e), 2(k) with 14A of the 1952 Act, it is evident that parameters qua criminal liability are different from civil liability. A person who is a Director but does not fall within definition of 'employer' cannot be held responsible for recovery of defaulted amount. He should be either 'occupier' in terms of Section 2(e) & 2(k) of 1952 Act or Manager in terms of Section 7(1)(f) of 1948 Act. The petitioner may or may not be subjected to criminal liability in view of complaint filed against him, however, he cannot be held liable for civil liability in the absence of meeting of parameters prescribed under Section 2(e) read with Section 2(k) and Section 8B of 1952 Act. The petitioner in no manner falls within the metes and bounds of aforesaid Sections, thus, he cannot be subjected to proceedings under Section 8B of 1952 Act. The proceedings against petitioner under Section 8B of 1952 Act need to be set aside and accordingly impugned orders are hereby set aside and writ petition is allowed.

(JAGMOHAN BANSAL)
JUDGE

27.09.2024
anju

Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No