

Before Ranjit Singh, J.

TAYAL ENERGY LIMITED,—Petitioner

versus

**REGIONAL PROVIDENT FUND COMMISSIONER
EMPLOYEES' PROVIDENT FUND ORGANIZATION,
AMRITSAR AND OTHERS,—Respondents**

C.W.P. No. 15933 of 2009

7th March, 2011

Constitution of India, 1950—Art. 226—Employees Provident Fund and Misc. Provisions Act, 1952—S.17-B—Spinning Mills ordered to be closed down and put to sale by auction—Petitioner purchasing Unit as a composite unit—Terms and conditions—All rights, claims, liabilities etc. upto date of execution of conveyance deed agreed to be that of liquidator of Mill—Provident fund due for period prior to transfer of Unit—Whether petitioner can be fastened with liability of paying provident fund dues being transferee—Held, no—Liability to pay provident fund prior to period of transfer would arise only when transferee is stepping into shoes of employer—Petition allowed.

Held that the different High Courts have consistently viewed that transferee would be liable only if it is voluntary transfer in the manner as given in Section 17-B of the Act. The liability under the E.P.F. Act would not arise when the transfer is by operation of law and is not voluntarily by the earlier employer. It would be safe to conclude that when the transfer is involuntary or on account of operation of law, then the transferee cannot be held liable for the payment, which was due prior to the date of transfer. The liability would arise only when the transferee is stepping into the shoes of employer and in case of transfer by operation of law, the position would be different, for which there are number of precedents by different courts including our own Court.

(Para 22)

Further held, that the liquidator was to contest all the cases pending against the Mill i.e. M/s Goindwal Cooperative Spinning Mills Limited. The liability of the Mill was taken over by the liquidator and was to be set off

according to the priority order as enshrined in the Punjab Cooperative Societies Act. All rights, claims, liabilities etc. upto the date of execution of conveyance deed was to be of the liquidator of the mill. It would sound unfair and strange that claims would be that of the liquidator, whereas liability, though agreed to be taken by the liquidator, could be fastened on to the petitioner. This approach would neither be fair nor legally justified. There is, thus, merit in the writ petition and the same, therefore, deserves to be allowed.

(Para 23)

Vivek Salathia, Advocate, *for the petitioner:*

Kamal Sehgal, Advocate, *for respondent No. 1.*

Puneet Kansal, Advocate, *for respondent No. 2.*

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(1) An interesting question in regard to the liability of the transferee of an Industrial unit to pay provident fund due for the period prior to transfer arises in this case. In the present case, this question arises where the transfer of the Industrial Unit is not a voluntary one on the basis of an agreement between the two concerns, but is an outcome of a sale by an auction where all the liabilities prior to transfer were specifically agreed to be that of the Liquidator. The counsel for the petitioner, therefore, would maintain that the transferee would have no liability of the dues of provident fund payable prior to transfer. The counsel for the Regional Fund Commissioner, however, submits that this liability has been rightly fastened due to the provisions of Section 17-B of the Employees Provident Fund and Misc. Provisions Act, 1952 (for short "the Act"). The extent of liability as created by Section 17-B of the Act, thus, is an issue requiring determination in this case.

First the facts

(2) M/s Goindwal Cooperative Spinning Mills Limited was registered as a society with the Registrar of Cooperative Societies and was allotted a provident fund code under the provisions of the Act. Due to heavy losses suffered by this concern, the Unit was closed down permanently. In fact, Registrar Cooperative Societies had issued an order winding up the Society

and had appointed official liquidator to settle the claim of debtors and creditors. on 11th January, 2006, the official liquidator put this concern to sale by auction. The present petitioner was the highest bidder with the offer of Rs. 536 lacs and purchased this Unit as a composite unit. An agreement to sell was entered into between the petitioner company and the official liquidator. The detailed terms of the agreement have been placed on record as Annexure P-3.

(3) Some of the important conditions of this agreement may need a notice as these would have a bearing on the issue being decided. As per the general terms and conditions, the buyer of the assets was barred from using the name of the Mill as the liquidator had transferred the title of the assets only and not the Mill with liability and its good will. Clause 8 of the general terms in this regard is as under :—

“The buyer of the assets is barred from using the name of the mill after purchase because the Liquidator has transferred the title of the assets only and not the mill with liabilities and its good will.”

(4) Clause 10 of the general terms was to the effect that on execution of the conveyance deed, all the legal cases pending against the Mill shall continue to be contested by the liquidator and that the liabilities of the Mill shall also be taken over by the liquidator and will be set off according to the priority order as enshrined in the Punjab Cooperative Societies Act, 1961. As a matter of clarification, it was further specified that all rights, claims, liabilities etc. up to the date of execution of conveyance deed shall be that of the liquidator of the Mill. The liquidator had the right to relax or modify any term and condition governing the auction sale, agreement to sell etc. with prior approval from RCS, Punjab provided there existed reasons for doing so.

(5) On 25th April, 2006, official liquidator issued a certificate to the effect that any dues, claims and liabilities prior to the handing over the possession of the Mill shall be the liability of the liquidator and the liquidator undertook to make all outgoing payments to any Government or local authority with respect to the said property prior to the period of handing over of the possession.

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(6) The petitioner company applied for fresh electricity connection and commenced its trial production with effect from 1st September, 2007. The petitioner company did not employ any of the earlier employees working with M/s Goindwal Cooperative Spinning Mills and made all fresh appointments. The petitioner company claims to have made investment of approximately Rs. three crores and is manufacturing altogether a different product than the one which was being manufactured by the previous concern. The petitioner company filed an application before the Regional Provident Fund Commissioner for allotment of new P.F. Code. Initially, the request was refused but on a fresh application being made, the new P.F. Code No. 34385 was issued to the petitioner company on 14th January, 2009. The petitioner company, thus, received the order with shock whereby statutory liability of Rs. 35,78,931 was fastened on the petitioner company by invoking the provisions of Section 17-B of the Act. Concededly, this liability to pay the provident fund was that of M/s Goindwal Cooperative Spinning Mills and, thus, the petitioner has filed the present petition to impugn this order by pleading that petitioner concern cannot be held liable to pay provident fund liability even under Section 17-B of the Act.

(7) Regional Provident Fund Commissioner in its reply would term this writ petition to be totally misconceived. Besides stating that appeal would be maintainable for challenging the order under Section 14-B of the Act, it is urged that this amount is due from the transferrer. It is then pointed out that M/s Goindwal Cooperative Spinning Mills was covered by the provisions of the Employees Provident Fund and Misc. Provisions Act and had not deposited the provident fund dues from January, 2002 to March, 2002 and had further not deposited the provident fund dues for different periods during 2002-2003. Assessment orders under Section 17-B for recovery of amount of Rs. 9,71,483 and a sum of Rs. 26,42,281 besides another sum of Rs. 5,92,207 were adjudicated against the concern. It is pointed out that M/s Goindwal Cooperative Spinning Mills was ordered to be closed down under Section 25(O) of the Industrial Disputes Act on 13th July, 2003. The Liquidator thereafter had sold this concern to the petitioner for Rs. 5.36 crores on 13th April, 2006. Liquidator had deposited an amount of Rs. 45,38,808 assessed under Section 7-A of the Act with the Regional Provident Fund Commissioner. Since the amount recoverable under Section 7-A was not deposited, a show cause notice was issued to

the liquidator on 20th September, 2006 for imposing damages under Section 14-B of the Act. Liquidator filed reply and the competent authority then passed an order dated 27th March, 2007 under Section 14-B and 7Q of the Act for recovery of Rs. 35,78,931 and Rs. 13,42,314 respectively under the respective Sections. Amount recoverable under Section 7Q was deposited by the Liquidator but out of the remaining amount recoverable under section 14-B, sum of Rs. 2,50,683 alone could be recovered from the liquidator. It is accordingly stated that this amount would be recoverable from the petitioner under Section 17-B of the Act as the establishment has been transferred to the petitioner. This amount has so been recovered on 16th October, 2009.

(8) In view of the respective stand, as noticed above, it is to be examined if the petitioner concern can be fastened with the liability of paying the provident fund dues being the transferee under Section 17-B of the Act or not. Section 17-B reads as under :—

“17-B Liability in case of transfer of establishment.—Where an employer, in relation to an establishment transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or [the Pension Scheme or the Insurance Scheme, as the case may be, in respect of the period up to the date of such transfer :

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.]”

(9) Plain and simple reading of the provision would show that an employer if transfers any establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, then he alongwith the person to whom the establishment is so transferred can be jointly and severally held liable to pay contribution and other sums due from the employer under the provisions of the Act. As per the proviso, the liability of the transferee is limited to the value of the assets obtained by him by such transfer.

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(10) The counsel for the petitioner has raised more than one ground to attack the impugned order, which, according to him can neither be sustained in law nor in equity. The order dated 3rd August, 2009 addressed to the petitioner talks of recovery of statutory dues in respect of M/s Goindwal Cooperative Spinning Mills and after reproducing the provisions of Section 17-B of the Act, reads as under :—

“The possession of the M/s Goindwal Co-op Spinning Mills Ltd., Goindwal Sahib, Tarn Taran has been handed over to M/s Tayal Energy Limited. M/s Tayal Energy Ltd., had been the highest bidder and the sale deed of the assets and property of the M/s Goindwal Co-op Spinning Mills had been executed in favour of M/s Tayal Energy Ltd.

In view of section 17-B of the Employees Provident Funds and Misc. Provisions Act, 1952, it is required that Rs. 35,78,931 may be remitted to Regional Provident Fund Commissioner, Amritsar immediately.”

(11) It may require notice here that it is not a case of voluntary transfer by way of a sale, gift, lease or licence, but a sale of the concern by way of an auction not by the original owner, but by a liquidator. Certainly, it is not a voluntary transfer of assets, which would be covered under the sale, gift, lease or licence as a mode of transfer by an employer. This transfer is by an operation of law. The liability to pay the provident fund once the Unit was under liquidation and liquidator had been appointed may have to be seen really to understand the liability of the petitioner concern.

(12) Suppose if this Unit had not been put to auction, the provident fund could have been recovered only as per the priority which was required to be assigned in terms of the legal position. The liquidator while auctioning this concern entered into certain express terms of agreement, whereby the liability to clear due claims prior to handing over was that of the liquidator. It was also clearly agreed between the petitioner and the liquidator that the liability of the Mill were to be taken over by the liquidator and were to be set according to the priority order as enshrined in the Punjab Cooperative Societies Act. Besides, it is worth noticing that present concern has none of the earlier employees on its roll. It is a new manufacturing unit, has obtained a new provident fund code and has taken a new electric connection. No good will of the previous concern has been inherited or taken over by the petitioner.

(13) Would it be then fair to fasten the petitioner with the liability to pay provident fund dues by invoking the provisions of Section 17-B of the Act is a question arising in this case ?

(14) In support, the counsel for the petitioner has invited my attention to a recent decision of this court in **M/s Driplex Water Engineering International Pvt. Ltd., Faridabad versus The Regional Provident Fund Commissioner, Haryana, (1)** where it is observed that when a new establishment comes into existence with entirely different identity and product and no staff of the wound up establishment is taken over or transferred to the new establishment under any contract or arrangement, the establishment of the new industrial unit would have no liability whatsoever to pay any amount on account of PF contribution and other charges for the period prior to its coming into existence. It is not a matter of much dispute that the petitioner concern has not continued with any activity of the erstwhile unit. It has not only changed the name but has started entirely different and new manufacturing activity and has employed its own work force. None of the earlier worker has been employed by the petitioner.

(15) Reference here can be made to the case of **The Provident Fund Inspector, Trivandrum versus The Secretary, N.S.S. Co-operative Society, Changanacherry, (2)** to show that the burden of providing proof that old establishment had continued and the new establishment was not set up would be on the authority assessing the same i.e. Provident Fund Inspector in this case as it had filed a criminal case for prosecution of the respondent in the above noted case. Since this aspect clearly comes out from the pleadings and has not been seriously refuted by the respondent-Regional Fund Commissioner, it can safely be taken that the petitioner is a new concern and has no connection with the earlier concern, which had the liability to pay this amount.

(16) Counsel for the petitioner then makes reference to **Suburban Ply and Panels (P) Ltd. And Regional Provident Fund Commissioner and Others, (3)** where Orissa High Court has taken a view that Section

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- (1) 2009 (2) S.C.T. 742
(2) AIR 1971 S.C. 82
(3) 2004-II L.L.J. 1069

17-B of the Act does not apply to transfer by way of operation of law. The relevant observations in this regard are as under :—

1. “The transfer by the employer of the establishment contemplated under Section 17-B is an act by the employer. Here is a case where the transfer has not been made by the employer but after seizure of the unit/establishment, the same was transferred by the OSFC to the present petitioner. There is no indication that Section 17-B contemplated transfers otherwise than by an employer as defined in the EPF Act, in relation to an establishment. By a Court sale or otherwise a transfer takes place by operation of law and not by any transaction *inter vivos*. In that sense, it is an involuntary sale against the wishes of the person whose property is sold. That can hardly be called a transfer, as ordinarily understood, which connotes a voluntary transaction entered into between two parties. In this connection it has also to be remembered that the provisions of the Transfer of Property Act generally dealing kinds of transfer do not affect transfer by operation of law, or by or in execution of a decree or order of a Court of competent jurisdiction under Section 2(d) of the Transfer of Property Act (See *Angappa Spinning Mills Madurai v. Regional Commissioner, Employees Provident Fund Madras 1986 Lab. IC 458 (Madras)*.”

(17) Accordingly, it was held that the provisions of Section 17-B of the Act cannot be applied in a case where it is not a transfer by an employer but it is an involuntary transfer by way of operation of law.

(18) Similar is the view expressed by the Karnataka High Court in the case of **Regional Provident Fund Commissioner, Mangalore and Karnataka Forest Plantations Corporation Limited, Bangalore, (4)**. While interpreting Section 17-B of the Act, it is observed that section could not be interpreted to mean that the transferee employer would be liable also to pay penalty for a default committed by the previous employer during the period anterior to the transfer, which was the situation in the said case. In this case, respondent establishment was covered under the provisions of Act and was under the control of the State Government prior to 30th June, 1981. Thereafter, a separate corporation was constituted, which was entrusted with the affairs of the respondent-establishment. There was default

in payment of contribution from 1978 to October 1987. The Provident Fund Commissioner passed an order under Section 14-B of the Act, which order was challenged before the High Court. Single Judge allowed the writ petition, which was appealed against and the Division Bench has taken a view as noted above. Similar was the argument raised in this case by counsel appearing for the Provident Fund Commissioner, who urged that transferee establishment was jointly and severally liable along with the transferor to pay dues under Section 14-B by virtue of Section 17-B of the Act irrespective of the fact whether the scheme of taking over provides for taking over of the liability under Section 14-B of the Act or not. The Division Bench, after distinguishing the ratio of law laid down in **Vitro Pharma Products Company Limited versus R.P.F. Commissioner, (5) and R.N.T. Estates Limited versus Union of India and others, (6)** upheld the view of the Single Judge by observing as under :—

“The learned Single Judge was perfectly justified in holding that the concept of penalty would arise only when there is a guilt. While it can be said, on interpretation of Section 17-B, that the transferee employer is liable to pay the contribution for the period preceding the transfer, Section 17-B cannot be interpreted to mean that the transferee employer would be liable also to pay penalty for the default committed by the previous employer during the period anterior to the transfer. The penalty as correctly interpreted by the learned single Judge cannot be treated as either ‘contribution’ or as ‘other sums due from the employer’. Such an interpretation would be opposed to the principles of natural justice. Penalty cannot be saddled on somebody who is not guilty.”

(19) Counsel for the respondent-Provident Fund Commissioner has placed heavy reliance on Full Bench decision of Calcutta High Court in the case of **Dulgaon Agro Industries Ltd. (now known as Tasati Tea Limited), versus Union of India and others, (7)**. No doubt, the Full Bench has held that transferee would be jointly and severally liable even in respect of sum due prior to the transfer, which sum includes damages as contemplated under Section 14-B of the Act but our own High Court and some other High Courts have taken a contrary view in this regard.

(5) 1986-I L.L.N. 971

(6) 1989 Lab. I.C. NOC 177

(7) 2005-III L.L.J. 356

Apparently, what had prompted the Full Bench of Calcutta High Court to take this view was the object and purpose of the statute, which was to give benefits to the employees. It was accordingly observed that the Court has to construe the same in a manner to advance the interest of the employees. The employees are employed in the establishment and they are concerned with the employer of the establishment for the time being. They cannot be made to run after the transferor employer. Accordingly, the transferees were held liable. In the present case, however, neither the employees are the same nor is it the same establishment. The consideration which weighed with the Full Bench, thus, would not strictly apply in the present case.

(20) In fact, in **Darjeeling Dooars Plantation Limited and another versus Regional Provident Fund Commissioner, West Bengal and others, (8)**, a Division Bench of Calcutta High Court had made some observation in this regard while dealing with the liability of a transferee unit in the context of the provisions of Section 14-B, 15(2) and 17(5)(b) of the Act. It is noticed that these Sections contemplate a period and/or stage prior to transfer of establishment. Section 17-B on the other hand contemplated stage post transfer. This aspect has been highlighted by noticing the words and expressions used in the Section, reading "the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay contribution and other sum due from the employer." It is accordingly noticed that the employer and the other person to whom the establishment is transferred clearly indicates that the transferee does not come within the meaning of employer as in Section 2(e) of the Act. Under Section 17-B of the Act, transferee is "the other person". Accordingly, it is noticed that there is a distinction between 'employer' and 'the other person'. The other person comes only after transfer of establishment either in whole or in part. The absence of expression 'the other person' in Section 14-B of the Act clearly shows that it is a stage prior to the transfer of the establishment. Section 14-B contemplates notice upon the employer and not upon other person. Thus, hearing, as is contemplated under Section 14-B, is to be given to the employer and not to 'the person' to whom the establishment is so transferred. The Division Bench has accordingly noticed that transferee cannot be served a notice under Section 14-B of the Act.

(21) Though this distinction did not find approval of the Full Bench in **Dulgaon Agro Industries Ltd.'s case (supra)** and it is observed by the Full Bench that expression other person also connote transferee who

is stepping in the shoes of employer. The Court has observed that as soon as the transferee steps in the shoes of employer, the continuity of the liability is not effected by the transfer and both transferor and transferee as employer passed and present remain liable jointly and severally.

(22) The point of consideration here in this context would also be if the petitioner could be taken to have stepped into the shoes of the employer. As already noticed, the petitioner is altogether a new establishment. It is having a new E.P.F. Number. It has not employed any of the earlier employees. Can it then be said that it has stepped into the shoes of the earlier concern i.e. M/s Goindwal Cooperative Spinning Mills Limited? Here the observations of this Court in **M/s Driplex Water Engineering International Pvt. Ltd.'s case** (*supra*), as noted above, would be relevant. This is not an isolated view expressed by this Court but has been even so held by Orissa High Court in **M/s M.J. Foods Industries Pvt. Ltd. versus Regional Provident Fund Commissioner and Ors.**, (9). The Court in this case has held that auction of assets of defaulter industry unit to the petitioners therein by State Financial Corporation where there was no direct transfer from previous owner to the petitioner and where the petitioner did not took up any liability of previous owner towards provident fund, then the petitioner was held not liable to pay arrears of provident fund dues of previous owner of the said unit. In **Employees Provident Fund Organization versus Jai Corporation Limited**, (10) auction sale of the establishment effected by reconstruction was not held transfer by employer as envisaged by Section 17-B of the Act. This was a case where reconstruction company acting under and as per the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, was not held to be an employer for the purpose of Section 17-B. It is further observed that Section 17-B can be invoked when voluntary transfer of establishment is made by an employer in default. Auction sale/purchase is not to be held pulled to bring it in the influence zone of Section 17-B. For the same view, reference can be made to **M/s Suburban Ply & Panels (P) Ltd. versus Regional Provident Fund Commissioner and others**, (11) **Vitthal Sahakari Sakhar Karkhana and Anr. versus Assistant Provident Fund Commissioner, Aurangabad and Ors.**, (12)

(9) 2005 Lab. I.C. 3985

(10) 2009 Lab. I.C. 670

(11) 2004 Lab. I.C. 1190

(12) 2008 Lab. I.C. (NOC) 683 (Bom.)

and **Regional Provident Fund Commissioner, Mangalore versus M/s Karnataka Forest Plantations Corporation Ltd., Bangalore, (13)**. It is viewed that Section 17-B of the Act cannot be interpreted to mean that transferee employer would be liable also to pay penalty for default committed by previous employer during the period anterior to the transfer. The different High Courts have consistently viewed that transferee would be liable only if it is voluntary transfer in the manner as given in Section 17-B of the Act. The liability under the E.P.F. Act would not arise when the transfer is by operation of law and is not voluntarily by the earlier employer. It would be safe to conclude that when the transfer is involuntary or on account of operation of law, then the transferee cannot be held liable for the payment, which was due prior to the date of transfer. I have deeply considered the view expressed by the Full Bench of Calcutta High Court. I am of the considered opinion that the liability would arise only when the transferee is stepping into the shoes of employer and in case of transfer by operation of law, the position would be different, for which there are number of precedents by different courts including our own court.

(23) In the present case, the liquidator was to contest all the cases pending against the Mill i.e. M/s Goindwal Cooperative Spinning Mills Limited. The liability of the Mill was taken over by the liquidator and was to be set off according to the priority order as enshrined in the Punjab Cooperative Societies Act. All rights, claims, liabilities etc. upto the date of execution of conveyance deed was to be of the liquidator of the mill. It would sound unfair and strange that claims would be that of the liquidator, whereas liability, though agreed to be taken by the liquidator, could be fastened on to the petitioner. This approach would neither be fair nor legally justified. There is, thus, merit in the writ petition and the same, therefore, deserves to be allowed.

(24) The writ petition is accordingly allowed and the impugned orders, dated 3rd August, 2009 and 4th September, 2009, Annexure P-2 and Annexure P-6, are hereby quashed qua the petitioner. This would not be a bar for the respondent-Provident Fund Commissioner to recover this amount due from the liquidator or M/s Goindwal Cooperative Spinning Mills Limited in accordance with law. The parties are left to bear their respective costs.

R.N.R.