IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

NOTICE OF MOTION NO. 1 OF 2010
WITH
NOTICE OF MOTION NO. 1256 OF 2013
IN
COMMERCIAL SUIT NO. 18 OF 2010

ICICI Bank Limited Provident Fund
& 22 Ors. .. Plaintiffs
Vs.
Vipul Desai & 8 Ors. .. Defendants

WITH
NOTICE OF MOTION NO. 167 OF 2016
IN
COMMERCIAL SUIT NO. 18 OF 2010

Vipul Desai .. Applicant
(Orig. Defendant No.1)

<u>In the matter between :</u>

ICICI Bank Limited Provident Fund
& 22 Ors. .. Plaintiffs
Vs.
Vipul Desai & 8 Ors. .. Defendants

Dr.Birendra Saraf, Senior Advocate a/w. Mr.Firoz Bharucha, Mr. Mayur Bhojwani and Mr.Hassan F. i/b Manilal Kher Ambalal and Co. for plaintiffs in in NMCD/1/2010 and NMCD/167/2016.

Mr.Karl Shroff a/w. Ms. Sheetal Prakash i/b Ajay Rao for defendant No.1 in NMCD/1/2010.

Mr.Karl Shroff a/w. Ms.Sheetal Prakash i/b Ajay K. Rao for defendant Nos.1, and 4 for applicant in NMCD/167/2016.

Mr.Ritesh Jain i/b M/s. MJ Juris for defendant No.3 in NMCD/1/2010.

Mr.S.B. Gore, AGP for State in NMCD/1256/2013.

Mr.Vishal Kanade a/w. Adv. Monil Punjabi, Ms. Nikita Abhyankar i/b Gravitas Legal for defendant Nos. 5 to 9.

CORAM : N.J. JAMADAR, J.

DATE : 18TH FEBRUARY 2020

P.C.

NOTICE OF MOTION NO. 167 OF 2016

1. This notice of motion, though not listed today, with the consent of the learned counsels for the parties, taken up for hearing.

2. This notice of motion is taken out by the applicant/defendant No.1 for the following reliefs :

> *"(a) That, this Hon'ble Court be pleased to direct and order ; That this Hon'ble Court's order dated 29th October, 2010 does not operate in respect of the Defendant No.1's property described in Exhibit '~~O~~-1' pertaining to Provident Fund amount standing the credit of the 1st Defendant.*
>
> *(b) that this Hon'ble Court be pleased to clarify that the amounts standing to the credit of Defendant No.1's Employees Provident Fund are not subject to attachment under any decree or proceeding."*

3. The plaintiff No.1, who is the employer of defendant No.1-applicant, has instituted the suit along with other plaintiffs for a monetary decree in the sum of Rs.15.70 crores, for a sum of Rs.84

lakhs in favour of plaintiff No.10, for a sum of RS.1.45 crores in favour of plaintiff No.12, for a sum of Rs. 93 lakhs in favour of plaintiff No.15 along with interest @ 12 % per annum. The plaintiffs assert that defendant Nos. 1 to 9 have illegally and fraudulently siphoned away a huge sum of Rs.18.92 crores from the provident fund of the employees of plaintiff No.1, maintained by the plaintiffs.

4. The plaintiffs had taken out a Notice of Motion (Lodging) (Unnumbered) in Suit (Lodg.) No. 3124 of 2010 seeking injunctive reliefs against the defendants. By an order dated 29th October 2010, the Court had noted that the investigation was then being carried out by the investigating agency in pursuance of a prosecution initiated against the defendants. The Court was persuaded to pass an ad-interim injunction in terms of prayer clause (b) of the Notice of Motion in respect of the properties shown in Exhibits G, H, O-1 & O-2 of the plaint. The relevant part of the order dated 29th October 2010 reads as under :

> *"3 At present the assets which are known to the Plaintiffs are required to be protected. Disclosure of further assets is required to be made in the affidavit-in-reply filed by the Defendants. There shall be ad-interim injunction in terms of prayer (b) of the Notice of Motion in respect of properties shown in Exhibits G, H, O-1 & O-2 and the Plaint. The Defendants shall file the required affidavits disclosing their properties,*

if any which shall be considered in the Notion of Motion."

5. Item 'O-1' to the plaint contains the liquidated assets which the defendant No.1 then possessed. One of the item is provident fund balance which then stood at Rs.13 lakhs. The defendant No.1 was, thus, restrained from withdrawing the amount which stood to the credit of his provident fund account.

6. The defendant No.1 has now taken out this notice of motion asserting that the amount, which stood to the credit of the provident fund account of defendant No.1, is exempt from attachment under the provisions of section 60 of the Code of Civil Procedure, 1908 ('the Code') and the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('the Act').

7. Even the Employees' Provident Fund Organization has made an effort to persuade the plaintiff No.1, the employer, to revoke the restraint on the withdrawal of the said amount. However, the plaintiff No.1 has taken a position that since the ad-interim injunction order passed by this Court restrains the defendant No.1 from withdrawing the said amount, the plaintiff No.1 is not in breach of the statutory provisions. Hence, this application.

8. The plaintiff No.1 has filed an affidavit in reply and resisted the prayer. The conduct of applicant No.1/defendant No.1 in swindling away the huge amount from the provident fund account of plaintiff No.1 was pressed into service in justification of the alleged disentitlement of the defendant No.1 to access the said amount.

9. Heard the learned counsel for the defendant No.1-applicant and the learned senior counsel for the plaintiff No.1.

10. The learned counsel for the defendant No.1/applicant invited attention of the Court to the provisions contained in clause 'k' of section 60(1) of the Code, which read as under :

> *"(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, [1925] (19 of 1925), for the time being applies, in so far as they are declared by the said Act not to be liable to attachment;"*

11. It was submitted that there is a specific bar in the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('the Act') which governs the plaintiff No.1 and insulates the amount standing to the credit of any member of the fund from attachment. In view of the said restraint, the order of injunction which prevents the applicant/defendant No.1 from accessing the said amount could not have been passed, urged the learned counsel for the defendant No.1.

12. Section 10 of the Act reads as under :-

> *"10. Protection against attachment.-*
> *(1) The amount standing to the credit of any member in the Fund [or of any exempted employee in a provident fund] shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Court in respect of any debt or liability incurred by the member [or the exempted employee], and neither the officer assignee appointed under the Presidency Towns Insolvency Act, 1909 (3 of 1909) nor any receiver appointed under the Provincial Insolvency Act, 1920 (5 of 1920), shall be entitled to or have any claim on, any such amount.*
>
> *[(2) Any amount standing to the credit of a member in the fund or of an exempted employee in a provident fund at the time of his death and payable to his nominee under the Scheme or the rules of the provident fund shall, subject to any deduction authorised by the said Scheme or rules, vest in the nominee and shall be free from any debt or other liability incurred by the deceased or the nominee before the death of the member or of exempted employee [and shall also not be liable to attachment under any decree or order of any Court].*
>
> *[(3) The provisions of sub-section (1) and sub-section (2) shall, so far as may be, apply in relation to the [Pension] or any other amount payable under the [Pension] Scheme [and also in relation to any amount payable under the Insurance Scheme] as they apply in relation to any amount payable out of the Fund.]"*

13. The learned counsel for plaintiff No.1, without disputing the aforesaid statutory prescription, urged that the plaintiff No.1 has framed Rules titled 'Rules of ICICI Bank Limited Provident Fund'. Rule

12 of the said Rules empowers the employer to recover the amount from the employee to the extent of the employer's contribution and the interest accrued thereon. Rule 12 of the said Rules of reads as under :

> ***"Rule 12 : BAR TO RECOVERIES BY EMPLOYER :***
>
> *The employer shall not be entitled to recover any sum whatsoever from the Fund, save in cases where the Employee is dismissed for misconduct or voluntary leaves his employment otherwise than on account of ill-health or other unavoidable causes before the expiration of the term of service specified in this behalf in the regulations of the Fund.*
> *PROVIDED that in such cases the recoveries made by the employer shall be limited to the contributions made by him to the individual account of the Employee, and to interest credited in respect of such contributions in accordance with the regulations of the Fund and the accumulations thereof."*

14. Thus, according to the learned Senior Counsel for the plaintiffs, at best, the applicant will be entitled to withdraw the amount to the extent of employee's contribution and the interest accrued thereon. It was further submitted that since there is no challenge to the aforesaid Rule, the defendant No.1 cannot contest the said position.

15. I am afraid to accede to this submission. Section (2)(c) of the Act defines "contribution" to mean a contribution payable in respect of a member under a scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies. The "Scheme", in turn, is defined under clause (l) of section 5 of the Act;

> *"5. (l) Scheme means the Employees' Provident Fund Scheme framed under section 5."*

16. If the aforesaid provisions are considered in juxtaposition with the provisions contained in clause (k) of section 60(1) of the Code, extracted above, the embargo from attachment of the amount standing to the credit of an employee appears complete. Clause (k) provides that all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act applies, shall not be liable to attachment. Thus, the submission on behalf of the plaintiff No.1 that Rule 12 empowers the plaintiff No.1 to withhold its contribution and interest accrued thereon, does not merit acceptance.

17. Alternatively, a submission was sought to be canvassed on behalf of the plaintiff No.1 that the interdict contained in section 10 of the Act is applicable only to the extent the amount standing to the credit of an employee retains the character of a Provident Fund. Once the said amount is withdrawn by a member of the fund, the bar ceases. Consequently, there would be no impediment in attaching the said amount or restrain defendant No.1 from dealing with the said amount, the moment it comes into the hands of the defendant No.1.

18. On the aforesaid premise, having regard to the allegations against the defendant No.1, it was submitted by the learned counsel for the plaintiff No.1 that in the event the amount is allowed to be withdrawn, the defendant No.1 be directed to deposit the said amount in Court.

19. In order to lend support to the aforesaid submission, the learned Senior Counsel for the plaintiff No.1 placed reliance on a judgment of the Division Bench of this Court in the Case of ***Pearly Andrew Franz Vs. Official Assignee*** [1].

20. The learned counsel for the defendant No.1 stoutly submitted that the said course cannot be resorted to for, as of today, the amount retains the character of the provident fund. To adopt the course suggested by the learned Senior Counsel for the plaintiff No.1 would amount to bringing about the same result in an indirect manner which cannot be done directly.

21. I find substance in submission on behalf defendant No.1. As of today, the amount which stands to the credit of the provident fund account of defendant No.1 retains the character of the provident fund.

1 AIR 1966 Bom. 121

There are communications emanating from the Employees Provident Fund Organization calling upon the plaintiff No.1 to take action in conformity with the statutory provisions and remove the embargo on the withdrawal of the said amount. Thus, the alternative submission on behalf of plaintiff No.1 also does not merit acceptance.

22. To sum up, this Court could not have passed the order which had the effect of restraining the defendant No.1 from withdrawing the amount from the provident fund account, in view of the clear statutory bar contained in the provisions of section 60 of the Code and section 10 of the Act.

23. Hence, the Notice of Motion deserves to be allowed.

It is clarified that the order dated 29th October 2010 shall not be construed as a restraint upon the defendant No.1 from withdrawing the amount standing to the credit of the provident fund account, as shown in Exh.'O-1'. Neither the plaintiff No.1 nor any other authority, in whose custody the provident fund amount stands, is restrained from releasing the said amount along with interest accrued thereon, in accordance Rules.

The order dated 29th October 2010, thus, stands modified to the aforesaid extent.

24. The Notice of Motion No.167 of 2016 accordingly stands disposed of.

25. The matter be listed along with Notice of Motion No. 1 of 2010 on 17th March 2020.

[N.J. JAMADAR, J.]