10.11.2022.
Item No.10
Court No.550
Saswata

W.P.A. 8122 of 2017
with
CAN 1 of 2022
Kusum Products Limited
Versus
Central Board of Trustees & Ors.

Mr. Shuvasish Sengupta
Mr. Soumyajit Mishra
Mr. S.Mitra
...For the petitioner
Mr. S.C.Prasad
...For the P.F.Authorities

The present writ application has been filed, inter alia, challenging a communication dated 10th January 2017, issued by the Additional Central Provident Fund Commissioner (Recovery), whereby the petitioner's claim for waiver of damages for the period from March 2000 till October 2002 was rejected by the Central Board of Trustees, Employees Provident Fund Organization. The petitioner is a company within the meaning of Companies Act, 1956.

Records would reveal that the writ petitioner had made a reference to the Board for Industrial and Financial Reconstruction (hereinafter referred to as the 'Board') established under Section 4 of The Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the 'said Act') for being declared a sick industrial company within the meaning of sub-Section (1)(o) of the Section 3 of the Said Act. The reference made by the petitioner was acknowledged, by the Registrar, Government of India, Ministry of Finance, Department of Economic Affairs by their communication dated 26th November 2001 addressed to the petitioner. Records would reveal that after the petitioner was found to be sick, the Board had sanctioned a scheme on 24th January 2012, for revival and reconstruction of the petitioner (hereinafter referred to as the said scheme).

Mr. Sengupta, learned advocate appearing in support of the instant writ application, while drawing attention to paragraph 13.4.2 of the said scheme, submits that the Board, by the aforesaid scheme had *inter alia,* directed the Provident Fund Commissioner *"to consider to exempt from payment of damages and penalties in accordance with their extant regulations and guidelines for reliefs and concessions to sick industrial companies under the rehabilitation schemes sanctioned by the BIFR."*

Mr. Sengupta further submits that in so far as direction for payment of arrears of the Employers Provident Fund (EPF) dues to the extent of Rs. 69.88 lakhs as on the cut-off is concerned, as is reflected in the said scheme, the petitioner had duly made payment of the same in terms of the said scheme sanctioned by the Board. It is submitted that the petitioner is regularly making payment of the EPF contributions and that there is no default on the part of the petitioner in making payment of the EPF contributions.

While drawing attention of this Court to the order dated 14th October 2014 at page 133 of the writ application, it is submitted that the PF authorities, by ignoring the direction issued by the Board, granted waiver of damages to the petitioner, to the tune of Rs.1,43,328/- for the period from June 2004 to October 2005, thereby disregarding a part of the period when the petitioner was sick.

Since, the aforesaid order was passed by ignoring the scheme sanctioned by the Board, a writ application being WP no. 13918 (W) of 2015 was filed before this Hon'ble Court, challenging the aforesaid decision. On contested hearing, by an order dated 16th July 2015, this Hon'ble Court, while observing that there was no reason to justify as to why exemption was granted to the petitioner for a limited period only, by ignoring the period, when the petitioner was deemed to be sick, set aside the order dated 14th August 2014 and directed the Central Board of Trustees to reconsider the matter and pass a reasoned order, in terms of the observations made therein.

Mr. Sengupta submits that the petitioner was declared to be sick in terms of sub-Section (1)(o) of Section 3 of the said Act with effect from 1st April 2000, consequent upon erosion of the entire net worth of the petitioner at the end of the financial year 2000-2001. As such, the company was deemed to be sick on and from 1st April 2000 and not from 26th November 2001 as observed by this Hon'ble Court by its order dated 16th July 2015. It is for such reason a review application was filed before this Court which was registered as RVW 219 of 2015. By order dated 9th October 2015, the said application was disposed of on contest by clarifying, the period 26th November,2001 till 31st March 2010 meant the period when the company was under the Board.

It was, further inter alia, observed by the Hon'ble Court as follows:-

> *"But the Central Board may not be limited to this period in considering the case under Section 14B, 3rd proviso or in granting relief under the proviso, if it so found and proper. This is so, because the said proviso does not mention any time period and leaves the same to the discretion of the Central Board."*

In terms of the order dated 16th July, 2015 the aforesaid matter was considered by the central board of trustees and by communication in writing dated 8th February 2017, the decision taken by the board of trustees in connection with the application for exemption of damages, was communicated to the petitioner.

Mr. Sengupta, while drawing attention of this Court to paragraph 16 of the minutes of the meeting of the board of trustees, submits that the board of trustees had declined to grant relief to the petitioner for the period from March 2000 to October 2002, by concluding that the petitioner was not a sick company, during the aforesaid period. He submits that the board of trustees had erroneously concluded that the petitioner has been declared sick by the Board with effect from 26th November 2002. According to the petitioner, the entire foundation of the order passed by the board of trustees is incorrect. By order dated 16th July 2015, this Hon'ble Court had specifically directed the board of trustees to take a decision, on the basis of the observations made in the said order. The decisions taken by the board of trustees are in disregard of the aforesaid order, the same cannot be sustained and should be set aside and the petitioner should be allowed 100% waiver of levy of damages. He further submits that specific direction should be issued on the board of trustees to reconsider, the petitioner's case by treating the petitioner to be sick with effect from 1st April 2000 till the cut-off date.

Per contra Mr. Prasad, leaned advocate appearing for the PF authorities while drawing the attention of this Court to the scheme sanctioned by the Board, submits that the Board has only directed the board of trustees to consider the exemption of levy of damages under Section 14B of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952.,(herein after referred to as the PF act).

It is submitted that in light of the direction passed by this Court, the case of the petitioner has already been reconsidered. The scheme of the said Act envisages offering various benefits, taking into consideration diverse eventualities. Situations like the ones faced by the petitioner, has also been contemplated and considered in the scheme of the Act. By drawing attention of this Court to paragraph 32-B of the Employees' Provident Funds Scheme, 1952, it is submitted that waiver of damages in only permissible provided an establishment fulfils the conditions as set forth in the said paragraph.

According to Mr. Prasad, the company can be treated to be sick, at best from the date when the petitioner had made a reference to be declared sick, i.e., 16th October 2001. As such, the benefit that the petitioner can be entitled to, can only, be limited to 16th October 2001 and not prior thereto. The central board of trustees has rightly considered the petitioners case in light of the order dated 16th July 2015, save to minor inconsistencies, which should be ignored. No case for interference has been made out.

I have heard the advocates appearing for the respective parties and have considered the materials on record. I find that the petitioner had filed a reference on 16th October 2001, for being declared sick within the meaning of sub-Section (1)(o) of Section 3 of the said Act. Such fact is undisputed. A perusal of the scheme sanctioned by the Board would make it clear that consequent upon erosion of the net worth of the company at the end of the financial year 2001, the petitioner had filed a reference with the Board and the petitioner was declared to be a sick company in the hearing held on 26th November 2002. The said scheme, in fact, records that the unit was lying closed since September 2001. The scheme, however, does not record that the petitioner has been declared to be a sick company with effect from 26th November 2002. In this context, it would be relevant to refer to Section 15 of the said Act. The same provides only when an industrial company has become sick, the Board of Directors of the company within 60 days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board, for determination of the measures which may be adopted with respect to the company.

In this case, admittedly, the reference has been made on 16th October 2001. Obviously, by such time, the petitioner had become sick by reasons of erosion of its entire net worth. This aspect has, however, been completely overlooked by the board of trustees. The board of trustees had, also overlooked the previous order dated 16th July 2015 passed by a coordinate Bench of this Court, while taking a decision. By order dated 16th July 2015, a coordinate Bench of this Court had categorically observed that the scheme framed by the Board, constituted under the said Act, is binding on the central board of trustees. It was, inter alia, further observed in the aforesaid order, that the second proviso of Section 14-B of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 vests powers on the trustees even to exempt payment of damages. The order, however, recorded that the petitioner was deemed to be sick at least from 26th November 2001, which portion, has later been clarified by order dated 9th October 2015.

Even taking note of paragraph 32-B of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952, it would be apparent that the directions issued by the Board is binding on the board of trustees. It is, therefore, apparent that the board of trustees while taking a decision pursuant to the directions passed by this Court, had overstepped its authority, in ignoring the decision contained in said order. Mr. Prasad also could not justify, as to what prompted the board of trustees, to conclude that the petitioner has been declared sick, with effect from 26th November 2002, when the reference itself was on 16th October 2001.

I find that the decision taken by the board of trustees is erroneous and flawed and the same cannot be sustained and is, accordingly set aside.

Therefore, I direct the board of trustees to reconsider its decision with regard to grant of exemption in respect of levy of damages under Section 14-B Employees' Provident Funds & Miscellaneous Provisions Act, 1952, strictly, in light of the observations made herein.

The aforesaid decision must be taken by the board of trustees within a period of 16 weeks from date. Consequentially, demands made by the respondents for recovery of a sum of Rs.9,98,515/- on account of damages for the period from March 2000 to October 2002, is accordingly set aside.

Since, the writ application is allowed, the learned Registrar General of this Court is directed to refund the sum of Rs.9,00,000/- along with accrued interest thereon, deposited by the petitioner with the Learned Registrar General, by prematurely encashing the short term fixed deposit account, if necessary, after deducted the commission, payable, if any.

With the above directions the writ application W.P.A. 8122 of 2017 is allowed. The connected application being CAN 1 of 2022 which has become infructuous is accordingly, disposed of.

There shall be no order as to costs.

All parties shall act on the basis of the server copy of this order duly downloaded from the official website of this Court.

(*Raja Basu Chowdhury, J.*)