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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

W.P.A. No. 8515 of 2023

Md. Salim & Ors.
Vs.
Securities and Exchange
Board of India.

Mr. Jaydip Kar,
Mr. Tarique Quasiduddin,
Ms. Sanchita Chaudhuri
...for the petitioners

Mr. Syamantak Banerjee
...for the SEBI

The present challenge has been preferred with regard to two orders of recovery by way of attachment of personal bank accounts of the petitioners, who were the erstwhile directors of the alleged defaulting company. The said recovery proceeding was initiated under Section 28-A of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "SEBI Act).

Learned senior counsel appearing for the petitioners argues that in view of a decree having been passed in a title suit between the erstwhile directors and the present incumbents, whereby the liabilities, if any, of the erstwhile directors/present petitioners were assigned to the other incoming directors, the respondent-authorities have acted beyond jurisdiction in taking out recovery proceedings with regard to the company against the personal accounts of the erstwhile directors, that is, the present petitioners.

It is contended, by placing reliance on a final order passed by the Securities and Exchange Board of India (SEBI), vide WTM/MPB/EFD-1-IV/128/2018, that in the said order, the SEBI itself clearly observed that the SEBI has to take necessary steps including filing of an appropriate application (which may include an application for modification of decree passed in the said suit or declaration to the extent that statutory liability of directors to repay the NCD holders as crystallized in the order) and the same shall be in addition to and independent of the liability of the judgment debtors in Title Suit No. 166 of 2015 in the appropriate court.

It was further observed in paragraph 51 of the said order of the SEBI that on disposal of such application, SEBI can independently initiate recovery against the directors who are liable to repay, as determined in the order of the SEBI, in case of their failure to repay the investors as per the order when it takes effect. A similar proposition was reiterated in paragraph 70 of the said order of the SEBI.

It is argued that, instead of complying with the directions passed in the said order, the SEBI proceeded to attach the accounts of the present petitioners, even without having filed any such application in the concerned suit with regard to modification of the decree. As such, the said action of the SEBI itself was patently without jurisdiction and ought to have been struck down.

It is further argued that in view of the liabilities of the present petitioners having already been assigned and the same having been approved by the sanction of a competent civil court in a suit, the individual accounts of the present petitioners, being the erstwhile directors of the alleged defaulting company, could not be attached at all.

Learned counsel appearing for the respondent-authorities controverts such submission. Learned counsel seeks to interpret paragraph nos. 51 and 70 to have observed that on disposal of an application for modification, if filed in respect of the decree passed in the civil suit, the SEBI can independently initiate recovery against the directors who are further liable to repay, as appears in the order of the SEBI, in case of their failure to repay the investors.

It is also argued that the order of the SEBI under reference specifically clarified that the modification sought by the SEBI would be that the liability of the directors, as crystallized in the order of the SEBI, shall be "in addition to and independent of the liability of the judgment debtors in Title Suit 166/2015".

It is further argued that the liability of the present writ petitioners in terms of the award passed under section 11 of the SEBI Act, read in conjunction with Section 73(2) of the Companies Act, 1956, is entirely independent and irrespective of the outcome of a civil suit between the directors themselves, which cannot, in any event, fetter the hands of the SEBI in executing the order passed against the defaulting company and its directors.

A careful perusal of Section 73(2) of the Companies Act, 1956 clearly indicates that the liability under the said provision arises not only in respect of the defaulting company but the directors of the said company as well. The language specifically used in sub-section (2) of Section 73 of the 1956 Act is "the company and every director of the company who is an officer in default". The same, coupled with the provisions of Section 11 of the SEBI Act, clearly indicates that the liability arising under Section 73(2) of the 1956 Act is restricted to the company and all the directors of the company, who were officers in default at the relevant juncture, when the default took place. It is noteworthy that in the present case, the action taken by the SEBI was initiated in the year 2014, on the premise of the liability of the concerned directors (including the present petitioners) as well the defaulting company itself, under Section 73(2) of the

1956 Act. The title suit itself was initiated in the year 2015, that is, after the accrual of such liability of the present petitioners within the contemplation of Section 73(2) of the 1956 Act.

That apart, it is well-settled that the decree passed in an ordinary civil suit for declaration of right, title and interest operates in *personam* between the parties thereto and not in *rem*. As such, the decree obtained in the particular suit between the directors of the defaulting company, including the present petitioners, that too, subsequent to the accrual of liability under Section 73(2) of the 1956 Act, cannot, in any manner, absolve the liability of the directors vis-à-vis the enforcement authorities/SEBI insofar as violation within the contemplation of the SEBI Act is concerned.

Hence, it is doubtful as to whether even the SEBI itself, even if joined as a party to the civil suit, could relinquish its statutory right, accrued independently under Section 73(2) of the 1956 Act, in a separate civil suit between the parties.

Hence, in any event, the non-adherence of the direction of the SEBI itself to file an appropriate modification application in connection with the decree passed in the civil suit cannot have any bearing whatsoever on the outcome to the recovery proceeding taken out by the SEBI.

That apart, learned counsel for the SEBI is justified in interpreting the stipulations in paragraphs 51 and 70 of the order of the SEBI in the particular light which has been sought to be portrayed by the SEBI. Rightly so, it has been contended, the modification envisaged by the SEBI, within the contemplation of paragraphs 51 and 70 , were to be in respect of repayment of NCD holders, with regard to the liabilities as crystallized in the particular order of the SEBI, "in addition to and independent of the liability of the judgment-debtors in Title Suit No. 166/2015".

It was observed further in the SEBI order that on disposal of such application, it independently has to initiate recovery against the directors "who are liable to repay" as determined in the order of the SEBI in case of their failure to repay investors as per the order "when it takes effect".

It is clear that the said language of the paragraphs-in-question does not create any impediment in the route of the SEBI implementing the orders passed against the defaulting company and its directors for default within the ambit of Section 73(2) of the 1956 Act read with the provisions of the SEBI Act. Hence, there is nothing in the judgment and order impugned herein passed by the SEBI within the purview of Section 28-A of the SEBI Act, which can be called in question in the present writ petition.

In any event, if the petitioners had any grievance against the said proceeding, the petitioner had to challenge the parent order, which is being sought to be implemented now, before the appropriate authority in a properly constituted challenge. Having not done so, it does not lie in the mouth of the petitioners now to file a subsequent representation, since the respondent-authorities, in any event, do not have the charter under any statutory provision to review or reopen their order of attachment, as made in the present case.

In such view of the matter, any direction for consideration of the representation of the petitioners, if passed herein, would be a merely futile exercise and wastage of time for all concerned.

Hence, there is no scope of interference in the present writ petition.

Accordingly, W.P.A. No. 8565 of 2023 is dismissed on contest without, however, any order as to costs.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)