Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 10788 of 2023

M/s. Gajmukh Vinimay Private Ltd. & Ors.
Versus
The Regional Provident Fund Commissioner & Ors.

For the petitioners	:	Mr. Partha Ranjan Chowdhury, Mr. Soumya Majumder, Mr. Satyendra Kumar Singh, Mr. Ravi Kumar Dubey
For the Provident Fund Authorities.	:	Ms. Aparna Banerjee,
For the Respondent no.3	:	Mr. D. N. Sharma, Ms. U. Chakraborty, Mr. Abhishek Jain
Heard on	:	23rd August, 2023.
Judgment on	:	**23rd August, 2023**.

Raja Basu Chowdhury, J:

1. The present writ application has been filed, *inter alia*, challenging two several notices both dated 20th February, 2023 whereby, the

petitioners have been directed to show-cause why warrant of arrest shall not be issued.

2. The petitioners claim that petitioner no. 1 had entered into a Memorandum of Understanding on 1st July, 2020, to take over one jute mill run under the name and style of Jai Jute and Industries Limited situated at Kanthalpara, P.O. and P.S. Naihati, 24-Parganas (North), Pin. 743165 (hereinafter referred to as the "said establishment").

3. The petitioners claim that Jai Jute and Industries Limited is covered by the provisions of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "said Act"). PF Code has also been allotted to the said establishment being WB 36/WB 47 by the provident fund authorities. It is also the petitioners' contention that when the Memorandum of Understanding was executed, the said establishment and its mill were non-functional. As such the said agreement could not be acted upon. Subsequently, a leave and licence agreement dated 13th November, 2020 had been executed in relation to operation of the said mill, whereupon the mill was restarted and production resumed from 1st April, 2021. The said agreement was renewed from time to time and/or is valid and in force.

4. By referring of the said agreement, it is contended that the petitioners have not taken over the assets of the establishment. Mr.

Chowdhury, learned Advocate representing the petitioners, by drawing attention of this Court to two separate notices both dated 20th February, 2023, being notice to show cause, which are impugned in the present writ application, submits that the aforesaid notices have been issued without the Provident Fund Authorities determining liability of the petitioners under Section 7A of the said Act. No certificate proceeding had been initiated. Despite the aforesaid, the notices have been issued threatening issuance of warrant of arrest.

5. By placing reliance on the provisions of Section 8F and Section 8G of the said Act, it is submitted that the provisions of Second and Third Schedules of the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962, as is in force from time to time, shall apply with necessary modifications, for recovery of arrears mentioned in Section 8 of the said Act. By further drawing attention of this Court to the Second Schedule Part V of the Income Tax Act, 1961, he submits that prior to issuance of a warrant of arrest, the provisions laid down in Rule 73 of the Second Schedule of the Income Tax Act, are required to be strictly complied with. In support of his aforesaid contention, he has placed reliance on two several judgments delivered by Coordinate Bench of this Hon'ble Court, namely, the case of ***Vikram Poddar v. Regional Provident Fund Commissioner & Ors.***, reported in **2001(2) LLN 748**, and

the case of ***Jagadish Roy v. Regional Provident Fund Commissioner, West Bengal & Ors***., reported in **2006 SCC OnLine Cal 140**.

6. According to Mr. Chowdhury, the Recovery Officer had proceeded to issue the aforesaid notices in derogation of the provisions contained in Rule 73, of the Second Schedule of the Income Tax Act, 1961. In any event, it is submitted that in terms of Section 17B of the said Act, the transferee can at best be made liable to the extent of the value of the assets obtained by them, from such transfer. In the facts stated hereinabove, it is submitted that the impugned notices which have been issued in derogation of the Income Tax Act and Rules framed thereunder, and which form the subject-matter of this writ application, should be quashed.

7. Ms. Chakraborty, learned Advocate representing the respondent no. 3, submits that the said establishment had been declared sick under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the "SICA"). Subsequently, a scheme was sanctioned by the Board for Financial and Industrial Reconstruction (BIFR). Although, an appeal was filed by the Provident Fund Authorities before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR), however, subsequently, the Sick Industrial Companies (Special Provisions) Act, 2003 having been repealed by the Sick Industrial

Companies (Special Provisions) Repeal Act, 2013, and the Provident Fund Authorities having failed to apply before the National Company Law Appellate Tribunal (NCLAT), within the time specified in the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code"), the appeal stood abated.

8. By referring to the sanctioned scheme, it is submitted that the said establishment is entitled to waiver of penal damages under Section 14B and chargeable interest under Section 7Q, charged for delayed payment and/or non-payment of Provident Fund. By referring to the Eighth Schedule of the Code, and the third proviso thereof, it is submitted that the sanctioned scheme under implementation, in terms of the provisions contained in SICA, shall be deemed to be an approved plan under Sub-Section (1) of Section 31 of the Code, and the same shall be dealt with in accordance with provisions of part II of the Code. Since, a protection has been afforded to the said establishment under the aforesaid scheme, the Provident Fund Authorities cannot choose to ignore the said Scheme.

9. She, however, denies that any certificate or any order under Section 7A of the said Act has been served on the respondent no. 3.

10. *Per contra*, Ms. Banerjee, learned advocate representing the Provident Fund Authorities, submits that a sum of Rs.60,25,96,347/- is recoverable from the establishment having PF Code WB 36 and 47. By placing reliance on the letter dated 9th

December, 2022, she submits that not only the respondent no. 3 but all its Directors were all along aware with regard to the factum of passing of the order under Section 7A of the said Act, including the certificate proceedings. Notices have been issued from time to time calling upon the said establishment and/or its Directors to make payment. Notwithstanding the aforesaid, no payment has been made.

11. By referring paragraph 14.1 of the scheme sanctioned by the BIFR, she submits that although, the respondent no. 3 was obliged in terms of the said Scheme to make payment of unpaid Provident Fund contribution to the extent of 26.29 lakhs in 28 equal quarterly installments, commencing from 1st quarter of 2008, the said direction has not been complied with. In the light of the aforesaid, it does not lie in the mouth of the respondent no. 3 to contend that there has been no determination under Section 7A of the said Act, as the amount has already been quantified and a portion thereof, as recorded in the scheme relied on by the respondent no.3 was directed to be paid in installments. Insofar as the petitioners are concerned, she submits that from time to time notices have been issued on the petitioners calling upon them to make payment of the amount of Rs.60,25,96,347/-. In support of her contention she has placed reliance on the letter dated 25th November, 2022. It is submitted that the petitioners were all along aware with regard to

the demand of the provident fund authorities. The petitioners are jointly and severely liable along with the said establishment and/or its Directors. The petitioners have not even bothered to respond to the notices issued by the Recovery Officer.

12. In the facts stated hereinabove, she prays for dismissal of the writ application. Copies of the letters relied on by the learned advocate for the Provident Fund Authorities are taken on record.

13. Heard learned Counsel for the respective parties and considered the materials-on-record. In this case I find that although, a scheme had been sanctioned by the BIFR, the respondent no. 3 has not even bother to comply with the same. No payment in terms of the scheme had been made to the Provident Fund Authorities. Whatever may be the internal arrangement between the establishment and the petitioners, the fact remains that the Provident Fund dues to the extent of Rs. 60 crores approximately, remains unpaid.

14. From the records it would reveal that the petitioners have not only entered into a Memorandum of Understanding with the respondent no. 3 on 1st July, 2023, but had also entered into a lease agreement. I have been informed by the learned Advocate for the petitioners that the monthly turnover of the petitioners is around 10 crores, although, no document in support thereof had been produced. I have also been able to ascertain that the

petitioners are further making payment of the current Provident Fund dues, under the same Code allotted to the said establishment.

15. From the submissions of Ms. Banerjee, it would appear that an order of attachment of immovable property concerning the establishment has also been served both on the petitioners and the respondent no. 3 on 17th January, 2023.

16. In the conspectus of facts and without going into the question, whether the petitioners can be made liable in respect of the provident fund dues, by taking into consideration that only show cause notices have been issued, as to why warrant of arrest shall not be issued both on the petitioners as also on the Directors of the said establishment, and since, the Recovery Officer is yet to decide the matter, no interference in my opinion is called for.

17. I find that the judgment relied on by Mr. Chowdhury are distinguishable on facts. Both the aforesaid judgment takes into consideration the procedures to be followed by the Tax Recovery Officer or the Recovery Officer, as the case may be, while issuing the warrant of arrest. In this case admittedly no warrant of arrest has been issued and as such the apprehension of the petitioners that the provisions of the Rule 73 or 74 of the Second Schedule of Income Tax Act, 1961, shall not be complied with, is misconceived and without any basis.

18. Having regard to the aforesaid, no further order is required to be passed and no inference is called for.

19. Since, no affidavit in opposition has been called for, the allegations made in the writ application are deemed not to have been admitted by the respondents.

20. The writ application fails, the same accordingly stands dismissed without any order as to costs.

21. Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)