

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE**

BEFORE:

The Hon'ble JUSTICE RAJA BASU CHOWDHURY

WPO 414 of 2023

GA No. 1 of 2023

BESCO Limited (Foundry Division) & Anr.

VERSUS

Regional Provident Fund Commissioner-I & Ors.

For the Petitioners	:	Mr. Soumya Majumder, Advocate Mr. Rajib Mullick, Advocate Ms. Saheli Sen, Advocate Ms. Ayantika Saha, Advocate
For the Respondent Nos. 1 to 4:	:	Mrs. Aparna Banerjee, Advocate
Heard on	:	02.08.2023.
Judgment on	:	18.10.2023.

RAJA BASU CHOWDHURY, J:

1. The petitioner no.1 is engaged in the business of manufacturing wagons and has two separate divisions, namely, Foundry Division and Wagon Division. The petitioner no.1 is covered under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "said Act") and the aforesaid two divisions of the petitioner no.1 have been allotted two separate code numbers by the Provident Fund Authorities.

2. On the basis of the proceedings initiated under Section 7Q and 14B of the said Act, the respondents by an order dated 19th January, 2022 had determined a sum of Rs. 14,70,634/- and Rs. 30,26,547/- towards interests and damages payable by the petitioner no.1 under Section 7Q and 14B of the said Act respectively, for the period from January 2017 to May 2021 aggregating to a sum of Rs. 44,97,181/-. The petitioners claim that by reasons of the pandemic the petitioner no.1 had suffered financial losses and as such the petitioner no.1 had made a representation dated 9th June, 2022 addressed to the Central Provident Fund Commissioner for waiver of interests and damages.
3. By a letter dated 20th June, 2022 the Recovery Officer had called upon the petitioners to make payment of interest of Rs. 14,70,634/- since, according to the Recovery Officer, an application for waiver can only be made in respect of damages. The petitioners say that the Recovery Officer did not stop there, despite being aware of the petitioner no.1's application for waiver, in exercise of the powers conferred on him under Section 8F (3)(i) of the said Act, had called upon the petitioner no.1's banker to pay a sum of Rs. 44,97.181/-. Subsequently, the petitioners were served with a communication dated 21st November, 2022, in the first week of December 2022 issued by the Regional Provident Fund Commissioner-I (Recovery), intimating the petitioner no.1 that its application for waiver of damages was rejected, on the ground that the

establishment was not registered under the BIFR, and no sanctioned rehabilitation scheme was operative.

4. The petitioners claim that in the interregnum they had made payment of the interest amount in instalment, at the rate of Rs. 1,18,136/- per month, month by month and out of a sum of Rs. 14,70,634/- determined, vide an order dated 19th January, 2022 towards interest, had so far paid a sum of Rs. 3,68,136/- and that a sum of Rs. 11,02,498/- only is due and payable.
5. The petitioners say that in the third week of January 2023 the petitioners came across an order dated 13th January, 2023 wherefrom, it would appear that a sum of Rs. 62,09,588/- is sought to be recovered from the petitioner no.1 by way of an attachment order. The petitioners state that despite the petitioners making payment of the interest in installment, the respondents have attempting to recover the entire amount from the petitioner no.1 in one go. Challenging the aforesaid order, including the order dated 13th January, 2023 the present writ application has been filed.
6. Mr. Majumder, learned advocate representing the petitioners, submits that without disposal of the petitioner no.1's application for waiver of damages by the Central Board of Trustees, no recovery proceedings could have been initiated by the respondents. The entire action of attachment and recovery is bad. The purported order of rejection issued by the respondent no.4, is without jurisdiction as he has no competence to adjudicate on the petitioner no.1's application for waiver.

7. When the writ application came up for consideration since, the respondents had sought for an accommodation the matter was adjourned twice, first on 2nd March, 2023 and again on 14th March, 2023. It is during the pendency of the aforesaid proceedings that the respondent no.2 had passed a further attachment order dated 13th March, 2023, thereby, declaring State Bank of India, Overseas Branch, Kolkata, a defaulter and a recovery action in terms of the Income Tax (Certificate Proceedings) Rules, 1962 had been proposed. On the threat of such recovery, the respondents had caused State Bank of India, Overseas Branch, Kolkata to debit and transfer from the petitioner no.1's cash credit account a sum of Rs. 56,05,180/- in favour of the respondents.
8. The petitioners have challenged such action by filing an application which was registered as GA No. 1 of 2023. By an order dated 30th March, 2023, this Court after hearing the rival contentions of the parties and since, the learned advocate appearing for the respondents was ready and willing to secure the aforesaid amount of Rs. 56,05,180/-, had directed the respondent-provident fund authorities to deposit the aforesaid amount with the Registrar Original Side, High Court, Calcutta, with a further direction upon him to invest the same in an interest bearing fixed deposit account and to keep the same renewed until further orders of this Court.

9. Since then, upon exchange of affidavits, the present writ application has come up for final hearing.
10. Mr. Majumder, by referring to the application for waiver filed by the petitioner no.1 and by placing reliance on Section 14B of the said Act and paragraph 32B of the Employees' Provident Fund Scheme, 1952 (hereinafter referred to as the "said Scheme"), submits that both the Act as also said Scheme contemplate waiver of damages. The petitioners were within its authority to apply for such waiver. He, however, submits that the application for waiver could only have been considered by the Central Board of Trustees and by no other authority. By referring to paragraph 32B of the said Scheme, it is submitted that the said Scheme does not contemplate or restrict applicability for claiming waiver of damages, only to an entity which is sick, or has been referred to the Board for Financial and Industrial Reconstruction (BIFR).
11. In any event, the decision to grant or to reject, waiver of damages under Section 14B of the said Act, can only be taken by the Central Board of Trustees and by no other authority. The respondent no.4 could not have decided upon the petitioner no.1's application for waiver. The respondent no.4 did not have the power or competence to consider the same. By drawing attention of this Court to the affidavit-in-opposition filed by the respondents, he submits that although, the respondents in order to justify their action have relied on a meeting of the Central Board of Trustees of the Employees' Provident Fund, dated 7th November, 2006,

to contend that the Central Board of Trustees had delegated its authority in favour of Central Provident Fund Commissioner, to consider the grant or refusal of waiver. Such a decision cannot be sustained since, the Act does not recognise such delegation of authority. He submits that till such time, the Central Board of Trustees decides on the petitioner no.1's application for waiver, no recovery proceedings can be initiated against the petitioner no.1, at least insofar as recovery of damages is concerned in respect whereof, a waiver application is still pending. He submits that independent of the above, the petitioner no.1's cash credit account could not have been attached for realisation of any dues, *inter alia*, including any statutory dues, for the simple reason, the money in the cash credit account does not belong to the petitioner no.1 and as such was not subject to attachment. In the facts, he submits that the amount realised from the petitioner no.1's cash credit account, which has now been deposited with the learned Registrar, Original Side, High Court, should be released in favour of the petitioner no.1.

12. *Per contra*, Ms. Banerjee, learned advocate appearing on behalf of the respondents, submits that the petitioner no.1 is otherwise not eligible for waiver, in terms of the provisions contained in the said Act. By drawing attention of this Court to Section 14B of the said Act and paragraph 32B of the said Scheme, it is submitted that waiver of damages can only be made provided, the petitioner no.1 had become sick, within the meaning of Sick Industrial Companies (Special Provisions) Act, 1985 (in short

SICA) and a rehabilitation scheme had been sanctioned by the Board for Industrial and Financial Reconstruction established under Section 4 of the SICA. It is submitted that it is not the case of the petitioners that the petitioner no.1 had either become sick, within the meaning of Section 3(O) of SICA or any scheme had been sanctioned by the BIFR. She submits that the petitioner no.1 even otherwise, do not qualify for waiver of damages.

13. The Central Board of Trustees has already decided to delegate the screening process, concerning waiver applications to the Central Provident Fund Commissioner. Since, the petitioner no.1's case was found to be ineligible, the respondent no.4 by communication in writing dated 21st November, 2022 had intimated that the petitioner no.1's case does not merit consideration and as such had called upon the petitioners to make payment. The petitioners have no reason to be aggrieved by the same. On the issue of recovery, she submits that since, the petitioner no.1 had defaulted, the aforesaid amount had been recovered from the petitioner no.1's bank account. There is no irregularity in causing recovery of the aforesaid sum from a defaulter.
14. Heard the learned advocate appearing for the respective parties and considered the materials on record.
15. The primary contention of the petitioners appears to be that when the statute recognises the power to waive damages, and such power has been conferred upon a particular authority, no other authority apart

from such authority is authorised to decide on the issue of waiver of damages. As noted earlier, it has been strenuously argued by the petitioners that since, the petitioner no.1 had applied for waiver of damages which is recognised by the statute, before the authority who is empowered to grant such waiver, no other authority apart from such authority is authorised to grant or reject the petitioner no.1's application. Since, no rejection order has been issued by the Central Board of Trustees it can be presumed that the petitioner no.1's application, is still pending consideration and when such application is pending consideration, no action for recovery, at least in respect of damages can be initiated. In order to appropriately appreciate the aforesaid contention of the petitioners, it is necessary to analyse the provisions of Section 14B of the said Act and paragraph 32B of the said Scheme which are reproduced herein below.

“14B. Power to recover damages.—Where an employer makes default in the payment of any contribution to the Fund [, the [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this

behalf] may recover [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:]

[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:]

[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]”

“[32-B. Terms and conditions for reduction or waiver of damages.—*The Central Board may reduce or waive the damages levied under Section 14-B of the Act in relation to an establishment specified in the second proviso to Section 14-B, subject to the following terms and conditions, namely,—*

(a) in case of a change of management including transfer of the undertaking to workers’ cooperative and in case of merger or amalgamation of the sick industrial company with any other industrial company, complete waiver of damages may be allowed.

(b) in case, where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its scheme, in this behalf

recommends, waiver of damages up to 100 per cent may be allowed.

(c) in other case, depending on merits, reduction of damages up to 50 per cent may be allowed.]”

16. Having regard to the aforesaid and after examining the provisions of the statute, it would appear that for an establishment to qualify for waiver within the meaning of Section 14B of the said Act, the said establishment would necessarily be required to be declared a sick company within the meaning of SICA. The provisions of paragraph 32B of the said Scheme cannot be read independently but has to be read along with Section 14B of the said Act, since, the Scheme has no overriding effect. It is not the case of the petitioners that the petitioner no.1 is a sick company within the meaning SICA, or any rehabilitation scheme issued by the BIFR is under implementation. Since, the petitioner no.1 does not *prima facie* qualify for being entitled to waiver, the issue whether the Central Board of Trustees could have delegated its power becomes academic. Thus, the action of the respondents to take steps to seek recovery of the determination made under Section 14B of the said Act, cannot be said to be irregular. However, the recovery effected by the respondents from the petitioner no.1's banker, by issuing an order dated 13th March, 2023, by treating the petitioner no.1's banker as a deemed defaulter cannot be sustained.

17. It may be noticed that although, challenging an order of attachment dated 13th January, 2023, the writ application was filed and when such

matter was pending consideration the respondents in hot haste had proceeded to issue the order dated 13th March, 2023 and had by declaring the State Bank of India, Overseas Branch, Kolkata as defaulter, had initiated recovery action as per the provisions of the said Act and the Income Tax (Certificate Proceedings) Rules, 1962. It is also noticed that on the strength of the aforesaid order, the respondents have recovered a sum of Rs.56,05,180/- only from the petitioner no.1's banker, notwithstanding, the aforesaid account being a cash credit account. It is well settled that in a cash credit account no money of the constituent is kept. The money is of the bank, which is lent in favour of the constituent. Ordinarily, therefore, such accounts are not subject to attachment, for the simple reason that the aforesaid money does not belong to the constituent, in this case being the petitioner no.1.

18. It appears that by an order dated 30th March, 2023, this Court had directed the Provident Fund Authorities to secure the aforesaid sum of Rs. 56,05,180/- realised from the petitioner no.1's banker by way of deposit with the learned Registrar, Original Side, High Court. The respondents have since, deposited the aforesaid amount.
19. Having regard to the aforesaid, I am of the view that since, the aforesaid recovery is not sustainable on the ground the money does not belong to the petitioner no.1, the entire amount along with accrued interest thereon, be released in favour of the petitioner no.1's aforesaid banker by the learned Registrar, Original Side. The learned Registrar,

Original Side is, therefore, directed to refund the aforesaid sum of Rs. 56,05,180/- along with accrued interest thereon, by premature encashment of the fixed deposit if necessary, after retaining commission, if any. The order of attachment dated 13.03.2023 attaching the petitioner no.1's cash credit account maintained with SBI Overseas Branch, Kolkata bearing No. 30058744064, which cannot be sustained, is accordingly set aside and quashed.

20. With the aforesaid directions and/or observations, the writ application and the connected application being GA No.1 of 2023 stands disposed of.

21. There shall be no order as to costs.

22. Urgent Photostat certified copy of this order, if applied for, be made available to the parties on priority basis upon compliance of all formalities.

(RAJA BASU CHOWDHURY, J.)

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