

(2016) 01 BOM CK 0069

In the Bombay High Court

Case No : Company Application No. 239 of 2014 in Company Petition No. 518 of 2005

Regional Provident Fund Commissioner, Thane

APPELLANT

Vs

Official Liquidator, High Court, Mumbai of M/s. Zodana Electronic Ltd.

RESPONDENT

Date of Decision : 06-01-2016

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 46(1)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4
Transfer of Property Act, 1882 — Section 6(e)

Citation : (2016) 3 AIRBomR 583 : (2016) 1 ALLMR 923 : (2016) 2 BCR 110 : (2016) 2 CLR 17 : (2017) 201 CompCas 485 : (2016) 148 FLR 896 : (2016) LabLR 193 : (2016) LabLR 1153 : (2016) LIC 3361 : (2016) 2 MhLJ 439 : (2016) 2 SCT 261

Hon'ble Judges : S.C. Gupte, J.

Bench : Single Bench

Advocate : Suresh Kumar, for the Appellant; J.P. Sen, Sr. Advocate and Pratibha Ramaswamy, Asst. OL, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Gupte, J.—1. The Company Application taken out by the Applicant - Regional Provident Fund Commissioner - challenges an adjudication order of the Official Liquidator, by which a claim filed by the Applicant in respect of PF dues was rejected. The controversy in the matter mainly pertains to damages and interest payable by the employer - Zadona Electronics Ltd. (in liquidation) - respectively under Sections 14B and 7Q of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("PF Act") on delayed payments of PF dues.

2. Zadona Electronics Ltd. (in Liqn.) ("Company") was wound up by an order passed by this Court on 20 June 2007. The Applicant lodged a claim before the Liquidator of the Company for payment of PF dues of employees of the Company in the aggregate sum of Rs. 22,35,38,083/-. These dues included employer's

contribution (12% of wages), employees' contribution (12%), administrative charges and insurance charges as well as damages and interest towards delay in payment of PF dues. By his order dated 6 August 2013, the Official Liquidator admitted an amount of Rs. 8,34,90,485/- towards the dues of 423 employees of the Company (417 workmen and 6 supervisors or officers). This amount included employer's contribution worked out at 12% (i.e. 3.67% + 8.33%) on PF wages and interest on total contribution for 169 months. The Official Liquidator did not admit any amount towards employees' contribution since it was not deducted from arrears of salary. So also, neither were damages admitted under Section 14B (since no such damages were levied prior to the event of winding up) nor interest beyond the date of winding up (since there was no surplus). Rejection of this part of the claim, aggregating to Rs. 14,00,47,598/-, is challenged by the Applicant.

3. It is submitted by learned Counsel for the Applicant that in addition to the employer's contribution and interest admitted by the OL, the OL must be directed to pay to the Applicant not only the employees' contribution, but also damages under Section 14B of the PF Act occasioned by default of the Company in payment of contribution to the Fund, and interest at the lending rate of interest charged by Scheduled banks from the date the amount was due till the date of actual payment, under Section 7Q of the PF Act.

4. It is now a settled position of law, as held by the Supreme Court in *Employees Provident Fund Commissioner Vs. Official Liquidator of Esskay Pharmaceuticals Ltd.*, (2011) 2 Comp LJ 465 (SC) that by virtue of Section 11(2) of the PF Act, provident fund dues have priority over all other dues including the dues of secured creditors. So also, it is not in dispute that such priority needs to be accorded not only to provident fund dues computed under Section 7C, but also, to interest due under Section 7Q and damages adjudicated under Section 14B. (See *Maharashtra State Co-operative Bank Ltd. Vs. Asst. P.F. Commissioner*1.) The question is whether any of these other amounts claimed are actually due as of the date of the winding up order or at the time of payment of the PF dues.

5. Since the salaries payable to the employees for the relevant period have been paid in full, i.e. without deducting any employees' contributions to the Fund, there is no question of paying the Applicant the component of employees' contribution on behalf of the employees. These amounts have been directly received by the employees in winding up, and are not claimable separately by the Applicant.

6. Section 14B of the PF Act provides as follows:

Section 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 condition as may be specified in the Scheme.

The section provides for an adjudication of damages after hearing the employer in the matter. The order passed under Section 14B is subject to an appeal to the Employees' Provident Funds Appellate Tribunal. The Tribunal has the power to pass any order confirming, modifying or annulling the order appealed against or referring the matter back to the authority for a fresh adjudication. It is only after the order of adjudication of damages becomes final that the question of recovery arises. In the present case, there is no adjudication by the authority under Section 14B. (There is not even an inquiry proposed by the authority in the matter of determining damages under Section 14B.) In the absence of an adjudication, there is no provable debt as of the date of the winding up order in relation to the purported damages which could be estimated in value under Rule 154 of the Companies (Court) Rules. It is not possible to accept the submission of learned Counsel for the Applicant that adjudication under Section 14B is merely a matter of calculation. It is actually like a decree or order of damages arrived at after hearing the parties and subject to a statutory appeal. As provided in Section 529(1), the same rules as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent apply with regard to debts provable in winding up of insolvent companies. It is an established rule of the law of insolvency (see Section 46(1) of the Presidency Towns Insolvency Act) that demands in the nature of unliquidated damages arising otherwise than by reason of breach of contract or breach of trust shall not be provable in insolvency. The liability here is said to arise under a provision of law and is subject to the conditions provided in law. But even if we were to proceed on the footing that the scheme framed by the Company for provident fund forms a contract between itself and its employees and there is a breach of contract on the part of the Company by defaulting in payment of its contributions, there is no debt until the liability on account of such breach is adjudicated and damages are assessed by the adjudicating authority. There is no question of the Official Liquidator himself adjudicating these damages. That jurisdiction rests exclusively with the authorities under the PF Act. Till such

adjudication is made, there is no debt provable before the Official Liquidator. The following observations of the Supreme Court in relation to the nature of a claim for unliquidated damages for breach of contract, in the case of Union of India Vs. Raman Iron Foundry , AIR 1974 SC 1265, are instructive in this behalf :

" Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in Jones v. Thompson, (1858) 27 LJQB 234. "Ex parte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed". It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in O'Driscoll V. Manchester Insurance Committee. (1915) 3 KB 499. Swinfen Eady, L. J., said in reference to cases where the claim was for unliquidated damages "..... in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given. The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, Javed Sheikh V. Taher Mallik, , 45 Cal WN 519 : (AIR 1941 Cal 639); S. Milkha Singh V. M/s. N.K. Gopala Krishna Mudaliar, , AIR 1956 Punj 174 and Iron and Hardware (India) Co. v. Firm Shamlal and Eros, , AIR 1954 Bom 423, Chagla, C.J., in the last mentioned case, stated the law in these terms:

"In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary

liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant."

This statement in our view represents the correct legal position and has our full concurrence."

7. In sum, there is no case for the Official Liquidator awarding any sum towards damages under Section 14B.

8. For claiming interest on PF dues between the date of the winding up order and the date of actual payment, the Applicant relies on Section 7Q of the PF Act. Section 7Q provides as follows:

"7Q. Interest payable by the employer:- The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment.

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank."

There is no difficulty about payability of such interest under Section 7Q; the question is whether such interest is provable in winding up of an insolvent company. Rule 179 of the Companies (Court) Rules contains the only provision for payment of interest after the date of the winding up order. In the first place, such interest is paid only in the event of there being a surplus after payment in full of all claims admitted to proof and secondly, it cannot exceed 4 per cent per annum on the admitted amount of the claim. As held by our Court in IDBI Ltd. Vs. Official Liquidator, High Court of Bombay, Nagpur Bench , 2011 (4) ALL MR 770 and in Re Pal Peugeot Ltd., 2 creditors of a company (who would include even workmen to the extent of their dues) cannot claim in winding up interest for the period subsequent to the winding up if there is no surplus and even in the event of surplus, interest of more than 4 per cent per annum. Secured Creditors may pursue their remedy outside winding up. Likewise, workmen can enforce their charge over the property outside winding up to recover their dues. In such a case, the condition of interest being payable only in certain event and subject to a certain extent, may not apply. But if secured creditors or workmen approach the Company Court in its winding up jurisdiction for recovery of their dues, only those claims which are consistent with the provisions of the Companies Act and Companies (Court) Rules can be granted by the Company Court.

9. There is, thus, no merit in the challenge to the adjudication of the Official Liquidator. The Company Application is, accordingly, dismissed. There shall be no order as to costs.

1Supreme Court judgment in Civil Appeal No.6893 of 2009 dt. 8.10.2009
2Company Petition No. 110 of 2000 dated 22/09/2011.