IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7632 OF 2014

Kisanveer Satara Sahakari Sakhar Kharkhana Ltd ... Petitioner

Vs

Regional Provident Fund Commissioner-II .. Respondent

Mr. Saurabh Pakale i/b Mr. Avinash R. Belge, Advocate for Petitioner.

Mr. Suresh Kumar, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 03/03/2015

PC:

1. Heard Mr. Saurabh Pakale, learned counsel for the petitioner and Mr. Suresh Kumar, learned counsel for respondent at length.

2. By this Petition under Articles 226 and 227 of the Constitution of India, the petitioner has challenged demand notice dated 31.12.2007 as also orders dated 14.1.2010 and 18.6.2014 passed by the Regional Provident Fund Commissioner-II, Sub Regional Office, Kolhapur and Employees Provident Fund Appellate Tribunal, New Delhi (for short, “Tribunal”) respectively. By notice dated 31.12.2007 the respondent informed the petitioner about belated payments attracting interest under section 7Q and damages under section 14B of the Employees Provident Funds and Miscellaneous Provision Act,1952 (for short,

"Act"). The respondent informed that in respect of A/c 1, 2, 10, 21, 22, interest payable under section 7Q is Rs.1074249/- and damages payable under section 14B are to the tune of Rs.2386255. The respondent requested the petitioner to make immediate payment and also in case the amount is already paid, intimate them by return of Post the details of date of remittance, amount, SBI Branch etc so that accounts can be reconciled properly. By order dated 14.1.2010, the Regional PF Commissioner-II, Sub Regional Office, Kolhapur, (for short, "Commissioner") levied damages of Rs.23,86,255/- for the belated payment for the period of October 2000 to October, 2005. Aggrieved by that decision, the petitioner preferred Appeal before the Tribunal. By order dated 18.6.2014 the Tribunal dismissed the Appeal.

3. In support of this petition, Mr Pakale raised two-fold contentions.

(i) The respondent issued demand notice dated 31.12.2007 and levied damages under section 14B as also interest under section 7Q. This demand notice was issued calling upon the petitioner to pay interest under section 7Q and damages under section 14B without first issuing show cause notice as contemplated by the first proviso to section 14B of the Act. He, therefore, submitted that the action of levying of damages and interest is vitiated for noncompliance of the first proviso to

Section 14B of the Act.

(ii) The order dated 14.1.2010 passed by the Commissioner is not a speaking order . On this Ground also the impugned orders are vitiated. In support of his submissions, he relied upon the following decisions:

1. Madras-Bangalore Transport Company Vs. Regional Provident Fund Commissioner, 1969(2) LLJ 136 to contend that before levying damages opportunity of hearing has to be given as damages are in the nature of penalty.

2. Popular Transport (Registered) Vs.Regional Provident Fund Commissioner, 1970 (1) LLJ 619 to contend that levy of damages is illegal as the petitioner was not given an opportunity.

3. Jost Engineering Ltd Bombay Vs. Union of India, 1982 The Bombay Law Reporter Vol.LXXXV 12 to contend that the authority assessing the damages is obliged to pass speaking order setting out the reasons.

4. On the other hand, Mr Suresh Kumar submitted that the notice dated 31.12.2007 is not a demand notice. It's a computer generated notice calling upon the parties to make payment and if payments are not made the parties are informed that action under sections 8 and 14B would be initiated. He submitted that in fact on 19.2.2008 the show cause notice was issued to the petitioner indicating monthwise delay in remitting the provident fund dues and also the damages to be levied. The petitioner was

required to attend hearing on 27.2.2008. On behalf of the petitioner nobody appeared on that date and, therefore, notice dated 10.12.2008 was sent to them fixing date 29.12.2008. Vide letter dated 29.12.2008 the petitioner had accepted receipt of notice dated 10.12.2008 and also admitted that they had not made payments of damages for belated remittances due to their financial position. He further submitted that the petitioners are contending that on account of financial difficulties between October 2000 and April 2005 they could not remit the provident fund dues. The petitioner also contends that the sugar factory suffered heavy losses and, in fact, some other sugar factories also retrenched employees. He submitted that the financial difficulties would be no ground for belated remittances of provident fund. In support of his submission, he relied upon the decision of the Apex Court in the case of M/s Hindustan Times Limited Vs.Union of India, AIR 1998 SC 688 and in particular paragraph 28.

5. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. The case of the petitioner is that without first issuing show cause notice under first proviso to section 14B, the respondent straightway issued demand notice levying damages under section 14B and interest under section 7Q of the Act. It is not possible to accept this submission. Perusal of the

notice dated 31.12.2007 shows that the respondent after scrutiny of records of the petitioner maintained by its office, informed that certain payments of PF dues made by the petitioner were after the respective dates. The details of such belated payments were detailed in the Annexure. It was further informed that the belated payments attract simple interest under section 7Q and damages under section 14 of the Act. The total amount of interest and damages payable in respect of belated payments was also indicated therein. A request was made for immediate payment of the amounts and in case the payment of interest/damages is already made, the petitioner was requested to intimate by return of post the details of date of remittance, amount, SBI Branch etc. It was further made clear that in case no response is given within a week, it will be presumed that the record maintained by the respondent is correct and further compliance action under sections 8 and 14B of the Act would be initiated.

6. In my opinion, the communication dated 31.12.2007 cannot be called as a demand notice. In fact, perusal of the notice dated 19.2.2008 annexed along with affidavit shows that the respondent had issued show cause notice to the petitioner for determining the damages due from them. Along with that show cause notice, the statement of belated remittances for the period October 2000 to October 2005 was also enclosed. It is also

evident from the record that the matter was fixed for hearing on 26.2.2008. However, none appeared on behalf of the petitioner. By notice dated 10.12.2008, hearing was fixed on 29.12.2008. Perusal of communication dated 29.12.2008 addressed by the Labour Officer of the petitioner shows that receipt of notice dated 10.12.2008 was admitted. It was also set out therein that the payment of damages for the belated remittances was not made due to financial position. It is only thereafter by order dated 14.1.2010, the PF Commissioner levied damages under section 14B of the Act. Perusal of that order also shows that the show cause notice dated 19.2.2008 enclosing a statement of delayed payments, affording the establishment an opportunity to represent its case either in person or through an authorised representative on 27.2.2008, was given. The matter was thereafter fixed on various dates. The order also recorded that Mr A.T. Shingate, Labour officer, appeared on behalf of the petitioner. He informed that there is no discrepancy in the statement enclosed with the notice regarding levy of damages. He also accepted the fact of delay in remittance of PF dues for the period October 2000 to October 2005. After considering the object of the Act as also the successful working of the Social Security Schemes, he had levied the damages at the notified rates as envisaged in paragraph 32A of Employees' Provident Fund Scheme, 1952.

7. The Appeal preferred by the petitioner was also dismissed by the Tribunal. The contention as regards financial difficulties was considered in paragraph 6 of that order. After considering the decision of Gujarat High Court in the case of Arvind Mills Ltd Vs. R. M. Gandhi, 1982 LIC 344, the Tribunal came to the conclusion that there was no infirmity in the order dated 14.1.2010 and accordingly dismissed the Appeal. In the case of M/s Hindustan Times Ltd Vs. Union of India, AIR 1998 Supreme Court 688, and in particular paragraph 28, the Apex Court observed thus:

> “28. From the aforesaid decisions, the following principles can be summarised: The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; **default on the part of the employer based on plea of power cut, financial problems relating to other indebtedness or the delay in realisations of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability**; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under section 14-B. The fact that proceedings are initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under section 14-B would be taken; mere delay in initiating action under section 14-B cannot amount to prejudice inasmuch as the delay on the part of the department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest. However, the employer can claim

> prejudice if there is proof that between the period of default and the date of initiation of action under section 14-B, he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an "irretrievable" nature; he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to "irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defence in the reply to the show cause notice and must satisfy the concerned authority with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect."

Perusal of paragraph 28, extracted herein above, shows that financial difficulties cannot be a ground for not levying the damages.

8. Mr.Pakale submitted that in the present case the respondent did not give an opportunity for showing defaults and that even no finding is recorded about the defaults committed by the petitioner. Perusal of the reply dated 29.12.2008 given by the petitioner clearly shows that the petitioner had not made payment of damages for the belated remittances due to financial position. In other words, the belated payment was admitted by the petitioner and belated remittances were due to financial position. Perusal of the impugned order also shows that the Commissioner as also the Tribunal by recording reasons have

passed the impugned orders. In view thereof, I do not find merit in any of the submissions advanced by Mr Pakale. Reliance placed on the decisions in the cases of (1) Madras-Bangalore Transport Company (supra), (2) Popular Transport (Registered) (supra) and (3) Jost Engineering Ltd Bombay (supra), does not advance the case of the petitioner as on merits I have found that the show cause notice as contemplated by the first proviso of Section 14B was issued and that the authorities below have given reasons in the impugned order. Hence, the Petition fails and the same is dismissed.

(R.G.KETKAR, J.)