

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

WRIT PETITION No.4636 of 2005

ORDER:

This writ petition is filed challenging the proceedings No. AP/WGL/Circle:8/Damages/AP/31162/CA/1332 dt.27.12.2004 and also order in proceedings No.AP/SRO/WL/PD-CELL/KHM/AP/31162/1549 dated 16.02.2005 imposing penalty and interest and to declare the same as illegal, unjust and contrary to law by issuing a writ of mandamus.

2. The petitioner is a cinema theatre and it was constructed in the year 1994 in a village where the population is 7,500. On account of heavy competition petitioner sustained heavy loss. Despite loss the petitioner is carrying on business without any profit. The income earned by the petitioner is not even sufficient to meet the electricity bills and salaries of employees.

3. The 1st respondent passed an exparte order dated 15.11.1999. On an application filed before the 1st respondent to set aside the same, without assigning any reason, the 1st respondent rejected the application by order dated 31.01.2000. Aggrieved by the same, the petitioner filed W.P.No.7199 of 2000 before this Court and this Court by order dated 26.04.2000 set aside the exparte order subject to condition of depositing Rs.25,000/- within six weeks from the date of order. But the petitioner deposited Rs.25,000/- on 16.06.2000 and the 1st respondent received the said amount without any demur. Subsequently, on 17.02.2001 the petitioner paid entire amount of Rs.92,408/-. Despite it, the 1st respondent did not fix any date of hearing for restoring the case before it.

4. As the petitioner did not comply the directions of this Court dated 26.04.2000 within the specified time i.e., six weeks from the date of order, the 1st respondent initiated proceedings under Section 14-B r/w. Section 7-Q of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (for short 'the Act'), and passed the order impugned in this writ petition, without considering the attending circumstances and the said order is illegal, arbitrary and contrary to the principles of law and prayed to set aside the same.

5. The respondents filed counter admitting about passing of order as the petitioner committed default in payment of contribution towards employees provident fund to a tune of Rs.92,408/- and despite notice the petitioner did not attend the enquiry before the 1st respondent. Even after the direction issued by this Court, the petitioner did not comply the same within the specified time, but deposited Rs.25,000/- as directed by this Court on 06.06.2000. The 1st respondent sent a letter dated 19.05.2000 reminding the petitioner for remittance of provident fund arrears. On 16.06.2000 the petitioner remitted only Rs.25,000/- and again reminded the petitioner to remit the total amount vide letter No.962 dated 26.06.2000. But the petitioner failed to comply both the directions of this Court and the legitimate demand made by the 1st respondent, however deposited Rs.92,408/- by 17.02.2001. As the petitioner committed default in payment of Rs.92,408/- as determined by the 1st respondent, the 1st respondent initiated proceedings under Section 14-B of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 vide proceedings No.1332 dated 27.12.2004 and issued notice calling upon the petitioner to appear before it on the specified date. Having acknowledged receipt of the same, the petitioner did not appear before the 1st respondent in the enquiry under Section 14-B of the Act on the specified date. Thereafter the petitioner addressed a letter dated 13.02.2005 seeking fifteen days

time for payment of interest and further requested to waive penal damages. After thorough examination, the 1st respondent issued proceedings informing the petitioner that there is no provision to waive penal damages or interest vide letter No.1549 dated 16.02.2005. The petitioner did not pay penal damages and interest within 15 days as demanded by the 1st respondent. Therefore, the petitioner committed default in payment of amount as determined by the 1st respondent towards employees provident fund due and not even cared to comply the directions issued by this Court. Therefore, he does not deserve any sympathy and prayed to dismiss the writ petition.

6. During the course of hearing learned counsel for the petitioner Sri A.K.Jayaprakash Rao contended that the

1st respondent passed an exparte order and did not even consider the request to set aside the exparte order, and drove the petitioner to approach this Court by filing W.P.No.7199 of 2000 and by order dated 26.4.2000, this Court directed the petitioner to deposit Rs.25,000/-. But due to delay in receiving the copy of the order the petitioner could not comply the directions within six weeks from 26.04.2000 and deposited Rs.25,000/- on 16.06.2000. Even thereafter, no date was fixed for hearing the matter by the

1st respondent though he received Rs.25,000/- without any demur. Thus, the 1st respondent raised no objection regarding delay in deposit of amount as directed by this Court and now the

1st respondent cannot raise such question. It is further contended that the order of imposition of penal damages and interest is casual, without recording any reasons and considering the financial condition of the petitioner. Therefore, the order is illegal and prayed to set aside the same.

7. Whereas learned counsel for the respondents Smt.Ch.Lakshmi Kumari would contend that since the petitioner did not comply the directions of this Court within the time specified, there is no obligation on the part of the 1st respondent to set aside the exparte order and take up for hearing. Therefore, there is nothing wrong in not fixing the date of hearing as the petitioner failed to adhere to the directions issued by this Court.

8. Apart from that, despite notice, the petitioner did not deposit amount determined by the 1st respondent and deposited the amount on 17.02.2001 only on the demand made by the 1st respondent. Therefore, having no other alternative the 1st respondent initiated proceedings under Section 14-B of the Act, by issuing notice fixing the date for enquiry. Even then the petitioner did not respond to the notice, but addressed a letter dated 13.02.2005 seeking 15 days time for payment of interest and requested to waive penal damages. The conduct of the petitioner itself discloses that he is negligent in complying the directions of this Court, so also payment of contribution towards employees provident fund. In such case, petitioner is not entitled to claim any equitable, discretion any relief under Section 226 of the Constitution of India and prayed to dismiss the writ petition.

9. Admittedly, the 1st respondent initiated proceedings under Section 7-A of the Act and inspite of the notice, the petitioner did not appear before the enquiry authority i.e., 1st respondent, having no other alternative the 1st respondent passed exparte order dated 15.11.1999 determining the amount at Rs.92,408/- towards provident fund dues. The 1st respondent did not dispute filing of W.P.No.7199 of 2000 and passing of order dated 26.04.2000 setting aside the exparte order on condition of depositing Rs.25,000/- within six weeks from the date of passing the order i.e., 26.04.2000 which expired on 06.06.2000. But the petitioner did not comply even the condition within the time fixed by this Court to deposit the amount. Thereupon, the 1st respondent addressed a letter

bearing No.663 dated 19.05.2000 reminding payment of provident fund dues. Thereupon on 16.06.2000 the petitioner remitted an amount of Rs.25,000/-. Thus, there is delay of 10 days in compliance of the directions issued by this Court. Therefore, the proceedings were not restored as the petitioner failed to comply the directions issued by this Court.

10. The explanation offered by the petitioner is that there is delay in obtaining certified copy of the order on account of which the petitioner could not deposit the amount within the time fixed by this Court. No doubt the order was passed in the presence of the Advocate and notice to the Advocate is a notice to the party under Order 3 Rule 4 of Code of Civil Procedure. Therefore, notice to the advocate on record is sufficient about the direction issued by this Court. But the petitioner conveniently avoided to comply the directions even after receipt of a letter from the 1st respondent demanding payment of arrears of provident fund vide letter dated 19.05.2000. Thus, there is nothing wrong on the part of the respondents for not listing the matter for hearing.

11. Therefore, I find no substance in the contention of the learned counsel for the petitioner for the delay in compliance of the order of this Court.

12. As the petitioner failed to deposit the arrears of provident fund contribution, the 1st respondent initiated proceedings by issuing notice to the petitioner. Even in the proceedings under Section 14-B of the Act, the petitioner did not choose to appear, but addressed a letter dated 13.02.2005 seeking 15 days time for payment of interest while making a request to waive the penal damages. Since there is no provision for waiver of penal damages, the 1st respondent refused to waive the penal damages.

13. Admittedly, the 1st respondent initiated proceedings under Section 7-A of the Act for determination of money due from the employer and passed an order determining the amount due from the petitioner as Rs.92,408/- towards provident fund dues. The said order is an exparte order which is in accordance with Section 7-A of the Act. Sub-section (4) of Section 7-A permits the employer to file a petition to set aside the exparte order within three months from the date of communication of such order explaining the reasons that prevented him from appearing before the enquiry officer. Accordingly, he filed an application under Section 7-A of the Act, which ended in dismissal, but approached the Court by filing W.P.No.7199 of 2000 to set aside the same. The said writ petition was disposed of by this Court on 26.04.2000 subject to condition to deposit Rs.25,000/- within six weeks from the date of order, which expired on 06.06.2000. However, the petitioner did not comply the said direction. Therefore, initiation of proceedings under Section 14-B of the Act is in accordance with law since there is delay in compliance of demand issued under Section 7-A of the Act.

14. Section 14-B of the Act does not postulate an elaborate quasi-judicial procedure and it is summary in nature. The intention of the legislature under Section 14-B as amended by the Act 33 of 1988 by introducing the changes in the Provident Fund Scheme, was to curtail the discretionary power of the levying authority. The amendment, thus, affected both substantive right as well as procedural law and hence the levy of damages was to be governed by amended provision of Section 14-B r/w. Para 32-A of Provident Fund Scheme.

15. The second proviso to Section 14-B of the Act does not postulate any elaborate quasi-judicial procedure and the authority has to act within its power to consider the representation on any available material, pass a decision in accordance with the discretion available to it.

16. A bare look at 2nd proviso of Section 14-B it is clear that power to waive the damages levied under Section 14-B is conferred on the 1st respondent only in relation to establishment which

is a sick industrial company in respect of which Scheme for Rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction (BIFR) established under Section 41 of the Sick Industrial Companies (Special Provisions) Act, 1985. Thus, it is clear that the discretion to reduce or waive the penalty of penal damages can be exercised only in relation to sick industrial companies to which the scheme of rehabilitation has been sanctioned by BIFR. But on the other hand, the discretion to waive penalty conferred on the 1st respondent under second proviso to Section 14-B of the Act cannot be exercised in the petitioner's case, since, it is not a sick industrial company and no scheme was sanctioned by BIFR.

17. It is the contention of the learned counsel for the petitioner that the petitioner is not earning any amount towards profit, the earning of the petitioner is not sufficient even to meet the electricity bill. Therefore, the petitioner is a sick industry and the second proviso of Section 14-B can be applied. The said power cannot be extended to any sick industry where, no scheme for rehabilitation has been sanctioned by BIFR. Therefore, the contention of the learned counsel for the petitioner is without any substance. Learned counsel for the petitioner has also drawn the attention of this Court to a Judgment of Gauhati High Court reported in ***Supreme Tyres Pvt. Ltd., Vs Union of India***^[1], wherein the learned Single Judge, while discussing in Para No.7.1, is of the view that in view of the pendency of the writ petition the employer did not pay the dues. Therefore, there is no reason to conclude that the employer committed persistent and continuous default and waived penalty limiting it to Rs.25,000/- by setting aside the penalty of Rs.2,82,392/-.

18. The reason for waiver of penalty in the facts of the above judgment is pendency of the writ petition. In the present case, the writ petition was disposed of and despite the directions of this Court to deposit Rs.25,000/- within six weeks from the date of order, which expired on 06.06.2000, the petitioner did not deposit.

19. On the other hand the 1st respondent addressed letter dated 19.05.2000. Only on receipt of the said notice deposited Rs.25,000/- on 16.06.2000 with a delay of ten days and again addressed another letter dated 26.06.2000 to deposit Rs.92,408/- by 17.02.2001. Therefore, non-payment of provident fund due determined under Section 7-A of the Act, despite letters and directions by this Court directly amounts to persistent and continuous default by the employer-petitioner herein.

20. In the facts of the above judgment the High Court of Gauhati did not discuss anything about the discretion conferred on this Court under second proviso of Section 14-B and limits to exercise such discretion in waiving penalty or reducing penalty. All the more the writ petition was pending through out and on account of pendency of the writ petition the employer did not deposit the arrears as demanded by the authority under Section 7-A of the Act. Therefore the facts on hand are distinguishable from the facts referred supra. The petitioner's counsel also placed reliance on ***Presidency Kid Leathers (P) Ltd., Vs Regional Provident Fund Commissioner***^[2], Madras High Court while considering the delay in initiating proceedings under Section 14-B of the Act reduced penal damages, however, no law was declared by Division Bench of High Court of Madras. Therefore, both the decisions have no persuasive value and this Court need not follow the same. Hence, the judgment of Gauhati and Madras High Courts are not applicable, since they are not a binding precedents. Moreover in the said judgments the Court did not consider various conditions prescribed under Section 14-B to exercise discretion to waive penalty or reduce penalty. On the other hand, the petitioner is not a sick industry to which the scheme was sanctioned by BIFR to exercise discretion under second proviso to Section 14-B of the

Act. Therefore, I am unable to agree with the contention of the learned counsel for the petitioner to waive or reduce penal damages, since, the penalty and penal damages that can be levied under Section 14-B shall not exceed the amount of arrears and therefore, imposed penal damages not exceeding the amount of arrears. Hence, the power exercised by the 1st respondent in imposing penal damages is not in transgression of the power conferred on it under Section 14-B of the Act. Consequently, I find no ground warranting interference of this Court that the order passed by the 1st respondent to declare the same as illegal and arbitrary. Hence, the writ petition deserves to be dismissed.

In the result, the writ petition is dismissed confirming the orders in proceedings No.AP/WGL/Circle:8/Damages/AP/ 31162/ CA/1332 dated 27.12.2004 and also order in proceedings No.AP/ SRO/WL/PD-CELL/KHM/AP/31162/1549 dated 16.02.2005. No costs.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

M. SATYANARAYANA MURTHY, J

15th July, 2016.
Rds

[\[1\]](#) 2007 Law Suit(Gau) 371
[\[2\]](#) Laws (Mad)-1997-6-43