

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : 12th September 2017

Date of decision : 18th September , 2017

W.P.(C) 8053/2017

+ W.P.(C) 8053/2017

THE ASSISTANT PROVIDENT FUND COMMISSIONER

..... Petitioner

Through Mr. Prem Prakash, Adv.

versus

M/S KANGAN SECURITY SERVICE

..... Respondent

Through Nemo.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

CM APPL. 33154/2017

This is an application seeking exemption from filing certified copies of annexures.

The application is allowed subject to all just exceptions.

CM APPL. 33155/2017

This is an application seeking condonation of 137 days in re-filing the petition. The said application is allowed and delay of 137 days in re-filing the petition is condoned in view of the reasons mentioned in the application.

W.P.(C) 8053/2017

1. The petitioner i.e. the Assistant Provident Fund Commissioner, Delhi (North) {hereinafter referred to as “APFC (N)”} vide the present petition under Article 226/227 of the Constitution of India assails the order dated 04.11.2016 of the Employees Provident Fund Appellate Tribunal (EPFAT) in appeal in ATA No.94(4)2011 vide which the appeal filed by M/s. Kansan Security Service Establishment arrayed as respondent to the present petition challenging the order dated 07.12.2010 of the Assistant Provident Fund Commissioner under Section 14-B and 7Q of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 was allowed and the order dated 07.12.2010 of the APFC in Ref.No.E/DL/8873/Damage/C-I, was set aside whilst imposing 60% of the assessed damages (i.e. as assessed vide order dated 07.12.2010 of the APFC, Delhi along with the entire assessed interest).

2. Vide the order dated 07.12.2010 of the APFC (N) under Section 14-B and 7Q of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the “Act”), the total amount of damages assessed to be payable by the establishment that arrayed as the respondent to the present petition was Rs.7,80,408/- and the total amount of damages assessed to be payable on account of the interest under Section 7Q of the said enactment was assessed to be Rs. 2,87,807/- with the grand total payable by the establishment i.e. respondent herein being Rs.10,68,215/-. Vide the said order dated 07.12.2010 it was observed

to the effect that the establishment i.e. respondent herein had been unable to dislodge the APFC's determination that the establishment i.e. the respondent herein had committed a delay in payment of:

- (i) the provident fund contribution;
- (ii) the employees contribution,
- (iii) the insurance fund contribution, and
- (iv) the administrative charges under the EPF Scheme, 1952 and EDLI Scheme 1976,

as required by law for the period from 09/04 to 01/08 within the prescribed time limit despite notice bearing No. DL/8873/C-II/Damage Cell/Delhi North/3446 dated 08.07.2010 along with annexure thereto on late payments showing the amount of levying damages under Section 14-B and interest under Section 7Q of the Act.

3. As observed vide the said order dated 07.12.2010 of the APFC(N), a summary vide office letter No. DL/8873/C-II/CPM/Damages Cell/4290 dated 20.07.2010 had also been sent to the establishment i.e. the respondent herein who was also accorded an opportunity of personal hearing but the establishment i.e. the respondent to the present petition had miserably failed to provide any supporting document in support of its contention and had nothing to say and had rather agreed to the delay committed in payment of dues and thus there was no alternative but to finalize the case. The nature of damages calculated to be recoverable from the establishment i.e. the respondent herein were detailed as under :

Nature of damages		Amount
Account No.		
P.F. contributions	Rs.3,71,230/-	1
Administrative charges	Rs.43,999/-	2
FPF/EPS contributions	Rs.3,42,384/-	10
EDLI contributions	Rs.22,362/-	21
EDLI administrative charges	Rs. 433/-	22
Total	<u>Rs.7,80,408/-</u>	

on which the interest under section 7Q of the Act on delayed payment of PF dues was held to be payable in addition to the payment of damages under Section 14-B of the Act as per letters dated 03.07.1998 and 09.09.1998 issued by the Central Provident Fund Commissioner on approval by the Government of India.

In ATA No. 94(4)2011, the establishment i.e. the respondent herein contended that it had been abiding with the provisions of the “Act” since the day of allotment of PF code and that the order dated 07.12.2010 of the APFC, Delhi (North) in relation to the belated period of six years from 09/04 to 01/08 was on the higher side placing reliance on the case laws titled as ***Roma Henny Security Services Pvt. Ltd. vs. Central Board of Trustees, EPF Organization through Assistant PF Commissioner, Delhi (North) (2013) 1 LLJ 29 Del.*** which upheld the law laid down by the Division Bench of Hon’ble High Court of Delhi in ***System & Stamping and Anr. Vs. Employees’ Provident Fund Appellate Tribunal and Ors. (2008) 2 LLJ 939*** and sought that the said order dated 07.12.2010 be set aside. It was further contended by the establishment that it had duly deposited the cheque in the bank for remittance of the encashment

due but due to encashment of the cheque belatedly, the dues were not deposited in the account of the APFC, Delhi and that the said circumstances were unintentional and beyond the control of the establishment.

4. On behalf of the APFC (N) it had been contended before the EPFAT that the “Act” was meant to provide social and financial security to the downtrodden section of society at the time of retirement, death during service and during his medical treatment and that it is a social welfare legislation which cannot be done away with and that strict adherence to its provisions is mandatory. It was further contended before the EPFAT that the employer was bound to make the provident fund contribution in time and in case of any default the employers were liable to pay damages for the purpose of indemnifying the beneficiaries for the loss that they had suffered and that as per the record of the APFC the establishment had been defaulting in terms of the delayed remittance. Reliance had also been placed before the APFC (N) on the verdict of the Supreme Court in ***Organo Chemical Industries and Anr. Vs. Union of India and Others* 1979 (002) LLJ 0416** to the effect that habitual defaulters like the establishment (i.e. the respondent to the present petition) could not be allowed to claim any benefit of leniency and it was further contended on behalf of the APFC that the appeal before the EPFAT was liable to be dismissed.

5. The learned EPFAT vide the impugned order in appeal No. ATA 94(4)2011 had observed as under:-

“6. In case law titled as ***Roma Henny Security Services Pvt.***

Ltd. vs. Central Board of Trustees, EPF Organization through Assistant PF Commissioner, Delhi (North) (supra), it is held by Hon'ble High Court of Delhi that up to 26.09.2008 the earlier table continue to govern the assessment, which included the element of interest under section 7Q of the Act shall prevail and from 26.09.2008 onwards the damages and interest are segregated. In case in hand, entire period of assessment is before 26.09.2008, so respondent was supposed to assess the dues on the basis of earlier table, which included element of interest under Section 7Q of this Act.

7. Admittedly respondent passed impugned order not on the basis of earlier table continue to govern the assessment. Respondent calculate the dues applying maximum rates of 17%, 22%, 27% and 37%. Further respondent already assessed separately interest under section 7Q of the Act so respondent was duty bound to apply rates applicable 5%, 10%, 15% and 25%. As respondent not carried out the obligation within the declared line so impugned order of respondent is to go. It is noted that respondent not dealt with the mitigating circumstances as alleged by the appellant.

8. Keeping in view all the circumstances of the case, this Tribunal reached at a firm opinion that the interest of justice would be met by imposing of 60% of the assessed damages on the appellant establishment along with the entire assessed interest. In terms of the above, the present appeal is allowed and impugned order is hereby set aside. Any amount deposited by appellant against impugned order shall be adjusted. Copy of the order be sent to the parties as per law.”

6. The submission made through the present petition is to the effect that the EPFAT had grossly erred in reducing the amount of damages to 60% of the assessed damages imposed on the respondent. Reliance was placed on behalf the petitioner on the verdict of the Supreme Court in ***RPFC vs. Shibu Metal Works, 1964-65 (27) FJR***

491 to contend that in construing the material provisions of the Act, if two views were reasonably possible, the Courts' should prefer the view which helps the achievement and furtherance of the object and to similar effect reliance was placed on behalf of the petitioner on the verdict of the High Court of Bombay in *State vs. Girdhari lal Bajaj, 1962 II LLJ (Bom. DB)*, to contend that when there was a doubt in any meaning of words they ought to be understood in a manner in which it best harmonizes the subject of the enactment and the object which the legislature had in view. Reliance was also placed on behalf of the petitioner on the verdict of the Supreme Court in *Chairman, SEBI vs. Shriram Mutual Fund & Anr.* on order dated 23.08.2006 passed in CA Nos. 9523-24/2003 to contend that unless the language of the statute indicated the need to establish the presence of *mens rea*, it was wholly unnecessary to ascertain whether such a violation was intentional or not. It was thus submitted on behalf of the petitioner that once the delay in the remittance of dues under the EPF & MP Act and its Scheme stood established, enquiry under Section 14-B and 7Q had essentially to follow, and *mens rea* was not a pre condition for imposition of penalty for contravention of the provisions of a civil nature. Reliance in relation thereto was placed on behalf of the petitioner on the verdict of the High Court of Bombay in *SEBI vs. Cabot International Capita Corporation (2005) 123 Comp. Cases 841 (Bom.)* to similar effect. *Inter alia*, it was submitted on behalf of the petitioner that a defaulter must be prevented from retaining the known profits of its crime and the principle of Jurisprudence-*Commodum Ex Injuria Sua Non Habere*

Debet ought to have been implemented so that no person can take advantage of his own wrong and no one derives advantage from one's own injurious behavior and no one ought to benefit from one's own tort. *Inter alia*, it was submitted through the petition that the EPFAT had also failed to appreciate that in terms of Section 7O of the EPF and MP Act, no appeal of the employer could be entertained by the Tribunal unless the employer establishment had deposited with it 75% of the amount due from it as determined under Section 7A of the Act and reliance was placed on behalf of the petitioner on the verdict of the High Court of Kerala in ***Muthoot Pappachan C.& M Services V. EPFO 2009 LLR 298 (KER HC)*** to the effect that deposit of 75% of the amount due was a pre condition under the EPF and MP Act, 1952 for an appeal to be maintained which in the instant case had not been complied with by the establishment. *Inter alia*, it was stated vide grounds D and E of the petition to the effect:

“D.Because the Hon’ble EPFAT miserably failed to explain the cogent reason and basis of calculation for imposing 60% of the assessed damages.

E. Because the order passed by the Assessing Officer dated 07.12.2010 is after proper application of mind and in consonance with the provisions of the Act. It is stated that the basis of calculation and cogent reasons for imposing the damages have been provided in 14B order. The said order of the Assessing Officer was based on a report made by the Enforcement Officer.”

and further it was, *inter alia*, stated through the petition that damages levied as per the order of Assessing Officer under Section 14B had been levied upon the establishment in consonance with the

Act and that the EPFAT had failed to appreciate the evidence placed on record by the APFC (N). The petitioner thus contended that the following questions of law to the effect:

“1. Whether the Hon’ble EPFAT was correct in imposing just 60% of the assessed damages on the Respondents herein vide its order dated 04.11.2016 and thereby contravening the provisions of the Employee Provident Fund Act.

2. Whether the Hon’ble EPFAT was correct in contravening the provisions of the EPF Act, which provides for levying of damages and interest thereon,”

arose for determination.

7. Initial submissions were made on behalf of the petitioner by the learned counsel for the petitioner reiterating the submissions that have been made in the petition.

8. At the outset it is essential to observe that the delay in submission of the

(i) the provident fund contribution;

(ii) the employees contribution,

(iii) the insurance fund contribution, and

(iv) the administrative charges under the EPF Scheme, 1952 and EDLI Scheme 1976,

during the period from September 2004 to January 2008 is apparently admitted even in the appeal before the EPFAT in ATA No.94(4)2011. Thus in terms of the present status of the EPF and MP Act, 1952 w.e.f. 26.09.2008, both damages under Section 14 B and interest under Section 7Q of the said enactment read with para

32A of the EPF Scheme 1952 would be payable. However, as rightly observed by the learned EPFAT for the period September 2004 to January 2008 the entire period of assessment is before the date 26.09.2008, till which date the mechanism to charge interest separately under Section 7Q of the EPF and MP Act, 1952 was not in force in as much as though Section 7Q of the EPF and MP Act, 1952 was in force w.e.f. 01.07.1997, and though the interest on delayed contribution of provident fund became payable separately, the table of para 32A of the Employees Provident Fund Scheme which operated till the date 26.09.2008 was as follows:

Period of Delay	Revised	Interest chargeable	Total	Existing
	rates of	under Section 7Q		rate of
	damages			damages
(i) 2 months or less	5	12	17	25
(ii) Over 2 months but Less than 4 months	10	12	22	25
(iii) over 4 months but less than 6 months	15	12	27	25
(iv) Over 6 months	25	12	37	25

and the present rates of damages as per the revised table which were made effective from 26.09.2008 are as under:

Sl.No.	Period of default	Rate of damages (effective 26.09.2008)
1.	Less than two months (upto 50 days)	5%
2.	Two months and above but less than four months (upto 119 days)	10%
3.	Four months and above but less than six months (upto 179 days)	15%
4.	Six months and above (180 days and above)	25%

It has categorically been laid down by the Division Bench of this Court in ***M/s System and Stampings and Anr. Vs. Employees' Provident Fund Appellate Tribunal and Ors.*** 2008 LLR 485 against which the SLP was dismissed in limine by the Supreme Court vide order dated 16.07.2009 and vide the judgment dated 12.09.2012 in W.P.(C)831/2012 in ***Roma Henny Security Services Pvt. Ltd. (supra)*** the larger Bench of this Court constituted in view of the Division Bench judgment in ***M/s System and Stampings (supra)*** also, has categorically laid down that for the period prior to 26.09.2008 the verdict of the Division Bench of this Court in ***M/s System and Stampings (supra)*** took the correct view that damages under Section 14-B of the “Act” were inclusive of interest chargeable under Section 7-Q of the “Act”. As the present case covers that very assessment i.e. prior to the dated 26.09.2008 period, the respondent had no right to charge the interest under Section 7-Q of the “Act” additionally when it already stood payable in the order passed under Section 14-B of the “Act”. Significantly, the period covered in ***Roma Henny Security Services Pvt. Ltd. (supra)*** for which the damages had been levied was from June 1999 to October 2008 i.e. for the period prior to 26.09.2008. In the instant case also as per the order dated 07.12.2010 of the APFC (N) the period for which there is delayed contribution of payments as detailed hereinabove in relation to :

- (i) the provident fund contribution;

- (ii) the employees contribution,
- (iii) the insurance fund contribution, and
- (iv) the administrative charges under the EPF Scheme, 1952 and EDLI Scheme 1976,

were for the period from September 2004 to January 2008 i.e. prior to the date 26.09.2008 for which period the assessment had to be made on the basis of the earlier rates table payable under para 32A of the EPF Scheme and not in terms of the scheme which was implemented w.e.f. 26.09.2008. The earlier table under the EPF scheme which was in force till 26.09.2008 included within it the interest chargeable under Section 7Q of the EPF and MP Act, 1952 and thus the assessment made by the APFC (N) of interest under Section 7Q to the tune of Rs.2,87,807/- was apparently erroneous in terms of the settled law as laid down by the larger Bench of this Court as also upheld by the Supreme Court in the SLP in the case of *M/s System and Stampings (supra)*.

The learned EPFAT has also observed vide the impugned order to the effect that the APFC (N) had not dealt with the mitigating circumstances that had been put forth by the establishment and that in the instant case the interest of justice would be met by imposing 60% of the assessed damages on the establishment along with the entire assessed amount observing to the effect that the APFC(N) had applied the maximum rates of damages.

In the circumstances, thus it is held that there is no infirmity in the impugned order dated 04.11.2016 of the EPFAT in ATA No.

94(4)2011 in imposing 60% of the assessed damages on the employer establishment i.e. respondent herein along with the entire assessed interest.

9. Another contention was raised on behalf of the petitioner that the mandatory provision of Section 7(O) of the EPF and MP Act, 1952 which provides to the effect:

“7-O. Deposit of amount due, on filing appeal.—No appeal by the employer shall be entertained by a Tribunal unless he has deposited with it seventy-five per cent. of the amount due from him as determined by an officer referred to in section 7A:

Provided that the Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.”

had not been complied with and that the EPFAT apart from having directed the employer establishment to deposit the 60% of the amount due as determined under Section 7A of the EPF and MP Act, 1952, vide order dated 07.12.2010 of the APFC(N) had also not recorded any reasons in writing as to why the requisite pre-deposit of 75% amount (to be deposited) due from the employer establishment had been waived and thereafter reduced.

Undoubtedly, the EPFAT vide its impugned order dated 04.11.2016 makes no mention of having permitted waiver or reduction of 75% of the pre-deposit in terms of Section 7O of the EPF and MP Act, 1952 qua the assessed amount in terms of Section 7A of the Act. However, taking into account the factum that the order dated 07.12.2010 of the APFC (N) Ref.No.E/DL/8873/

Damage/C-I was apparently erroneous in relation to the aspect of inclusion of interest amount coupled with the assessment having been made on the basis of the table under para 32A of the EPF Scheme 1952 which was under implementation w.e.f. 26.09.2008 though the period of which the assessment was made was prior to the said date, i.e. from September 2004 to January 2008, the waiver of the pre-deposit in terms of Section 70 in the specific facts and circumstances of the instant case does not suffice to dislodge the order dated 04.11.2016 of the EPFAT in appeal in ATA No. 94(4)2011.

The authorities under the EPF and MP Act, 1952 shall however take into account that in the event of there being circumstances spelling out exercise of discretion of reduction or waiver of the 75% of the pre-deposit amount for hearing an appeal under Section 70 of the EPF and MP Act, 1952, it would be appropriate and essential for the said authorities to expressly observe the reasons therefor.

10. With these observations, it is not considered appropriate to issue any notice of the petition, which is thus hereby dismissed.

ANU MALHOTRA, J

SEPTEMBER 18, 2017

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