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***IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ W.P.(C) 4436/2017

Date of Decision: 23.05.2017

M/S KEE PHARMA LIMITED Petitioner
Through: Mr.Rajnish Ranjan, Mr.Pranab
Prakash and Mr.Aditya Raina,
Advocates

versus

ASSISTANT PROVIDENT FUND COMMISSIONER
..... Respondent
Through: Mr.R.C.Chawla, Ms. Inderjeet
Sidhu and Mr.Pradeep Chandra
Sati, Advocates

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT(ORAL)
CM Nos. 19375/2017 (for exemption)

Exemption allowed, subject to just exceptions.

CM No. 19376/2017 (for condonation of delay)

For the reasons stated in the application the application is
allowed.

W.P.(C) No. 4436/2017 and CM No.19374/2017

1. Vide this petition, the petitioner assails the impugned order dated 28th February, 2017 in an appeal bearing ATA No.886(4)2016 before the Employees Provident Fund Appellate Tribunal whereby the appeal filed by the appellant

therein, also arrayed as the present petitioner, under Section 7-I of the Employees Provident Fund & Miscellaneous Provision Act, 1952 was declined in view of the provisions of Sections 14-B & 7-Q of the enactment, having observed *inter alia* also to the effect that there was no document placed on behalf of the appellant which could reveal the mitigating circumstances, by which the appellant establishment was restrained from complying with the provisions of the Act timely.

2. It was thus observed by the EPFAT that there was no ground to interfere with the findings dated 1st September, 2016.

3. Vide the order dated 1st September, 2016, of the Assistant Provident Fund Commissioner, whereby in terms of Section 14-B of the enactment as observed by the Assistant Provident Fund Commissioner on application of his mind to the facts and circumstances of the case and on a perusal of the relevant records, it was considered to be a fit case for levy of damages as per the rates prescribed under Para 32-A of the EPF Scheme, 1952, Para 5(1) of the Employees' Pension Scheme, 1995 and Para 8-A of the EDLI Scheme, 1976 notified vide notification dated 14.08.1991 and 26.09.2008 issued by the Government of India and it was thus directed that the damages for the delayed payments for the period from 01.09.2013 to 05.02.2016 totalling to Rs.18,01,080/- be recovered as per the account wise schedule, as was detailed in the said order dated 01.09.2016 from the employer in relation to M/s Kee Pharma Limited, bearing code No.DL/2119:

NAME OF INTEREST	AMOUNT DUE	ACCOUNT No.
P.F. CONTRIBUTION	RS.1454294/-	1
ADMINISTRATIVE CHARGES	RS.60651	2
FPF/EPS CONTRIBUTIONS	RS.261606/-	10
EDLI CONTRIBUTIONS	RS. 24050/-	21
EDLI ADMINISTRATIVE CHARGES	RS.479/-	22
TOTAL	RS.1801080/-	

[RS.EIGHTEEN LACS ONE THOUSAND EIGHTY ONLY]

4. It was directed vide the order dated 1.09.2016 by the Assistant P.F. Commissioner that the non-payment of the said damages and interest would attract interest @ 12% per annum from the due date to the date of remittance as prescribed under Section 7-Q of the Act.

5. It has been submitted on behalf of the petitioner by the learned counsel for the petitioner while placing reliance on the verdict of the Division Bench of this Court in ***Assistant Provident Fund Commissioner v. Hi-Tech Vocational Training Centre; 2015 SCC Online Del 12215*** to the effect that the impugned order dated 1st September, 2016 of the Assistant Provident Fund Commissioner which has been upheld by the EPFAT vide the impugned order dated 28th February, 2017 was erroneous. It is essential to observe that the direction laid down in this verdict was to the effect that in that case there

had been a specific non-application of mind by the concerned authorities in relation to the aspect as to what extent the damages were to be levied and para 32 A of the Employees Provident Fund Scheme, 1952 would show that the legislature has used the word 'may' in the phrase '*may recover from the employer by way of penalty*', which signifies that it is left to the discretion of the authority to determine in each case as to whether or not damages have to be levied, and if yes, the extent thereof.

6. The observation in para 10 of the verdict of the Division Bench in ***Assistant Provident Fund Commissioner v. Hi-Tech Vocational training Centre*** (supra) is as follows:

“10. A perusal of Para 32A of the Employees Provident Fund Scheme, 1952 would show that the legislature has once again used the word ‘may’ in the phrase ‘may recover from the employer by way of penalty’. Para 32A of the scheme is in conformity with the main section. The discretion in the Section is retained in the scheme. The table referred to in Para 32A of the scheme would mean that the damages indicated in the table of said paragraph fix the upper limit and leave it to the discretion of the authority to determine in each case as to whether or not damages have to be levied, and if yes the extent thereof. Para 32B mirrors the power conferred on the Central Board under the second proviso to Section 14B and thus the argument that since power to waive or lower the penalty is conferred on the Central Board as per Para 32B of the Scheme, the Commissioner would have no power to waive or lower the penalty as per Para 32A of the Scheme, has to be rejected

on the reasoning given by us in para 8 and 9 above.”

7. During the course of submissions that were put forth on behalf of the petitioner and in response to the specific Court’s query, it is also admitted that the only contention raised by the petitioner before the EPF authorities was to the effect that there were financial constraints and unavoidable circumstances due to which the petitioner did not deposit its contribution of the provident fund of its employees. This aspect was found to have been considered vide order dated 1.9.2016 of the Assistant P.F.Commissioner which led to delayed payments which delay was for the period from 1.9.2013 to 5.2.2016 and as observed by the impugned order dated 28.02.2017 of the EPFAT no document was placed on behalf of the appellant which could reveal the mitigating circumstances due to which the establishment had been restrained from timely compliance of the provisions of the Act.

8. Learned senior counsel appearing on behalf of the respondent submits that the enactment, i.e., the Employees Provident Fund & Miscellaneous Provision Act, 1952 is a social welfare legislation and is to serve the purpose for which it has been enacted.

9. Reliance is also placed on behalf of the respondent on the verdict of this Court in *Birla Cotton Spinning & Weaving v. Union of India and Ors.*; ILR 1984 DELHI 60 to contend

that merely because the contributions which had delayed had been deposited, the same would not suffice to accept the contention that the provisions of Section 14B of the Act would not apply and reliance in relation thereto has been placed on the observation in para 10 of the verdict in *Birla Cotton Spinning & Weaving* (supra) to the effect:

“(10)The next contention was that [Section 14-B](#) of 1952 Act can only be applicable if any arrears of contribution are still outstanding at the time of issue of show cause notice by the Commissioner. Admittedly in most of the petitions the contributions had already been deposited (though late) prior to issue of show cause notice and the contention is that as such proceedings under [Section 14-B](#) were not maintainable. We cannot agree. A reading of the Act and Para 38 of the Scheme makes it absolutely clear that the employer is under a statutory obligation to deposit the contribution by fifteenth of subsequent month to the Fund by cheque or bank draft. Similarly para 9 of Pension Scheme requires that from and out of contribution payable by the employer and employee in each month under [Section 6](#) of the Act, a part of the contribution shall be remitted by the employer to the Family Pension Fund by a separate bank draft or cheque. Thus the contributions are payable for each month by a fixed period. A statutory obligation is thus cast on the employer. The moment payment has not been deposited by the prescribed period, a default has been made ; the amount that was to be deposited is the arrears. Proceedings under [Section 14-B](#) can be initiated on the occurrence of a default. This power is not nullified by the mere fact of having paid the arrears Subsequently. Rigour of [Section 14-B](#) of

the Act cannot be avoided by merely saying that the default which was committed has been made good by the time show cause notice was issued. It should be remembered that each time there is delay in making deposit of contribution as required by the Scheme it amounts to an employer making a default ; each one of these defaults is liable to be proceeded with under [Section 14-B](#) of 1952 Act. It is not a condition precedent to the exercise of powers under [Section 14-B](#) of the Act that any arrears should be outstanding at the point of time when show cause is issued. Arrears arise on the very day on which the employer defaults in making payment of contribution. The default having been committed, power of the Commissioner to proceed under [Section 14-B](#) arises. This power is not taken away by the mere fact that arrears have since been deposited by the employer. The power of the Commissioner to proceed under [Section 14-B](#) arises immediately as the employer makes the default. It is only when the question arises as to what should be the quantum of damages that the question of arrears' has any relevance, for the simple reason that damages which can be imposed are not to exceed the amount of arrears. Thus reference to arrears in [Section 14-B](#) has relevance only to the limit of damages imposable, not to the power to impose damages, which is distinct and. is available the moment when the default was committed. To accept the argument of the petitioners would amount to an open invitation to the employer to defeat the purpose of [Section 14-B](#) by not depositing the contribution within the prescribed time, and utilise the funds for his business and still avoid the penal damages under [Section 14-B](#) by simply depositing the contribution before show cause is issued. This would make a mockery

of [Section 14-B](#) of the Act.”

10. It was also submitted on behalf of the respondent while placing reliance on the verdict of the Supreme Court in ***Organo Chemical Industries & Anr v. Union of India & Ors; 1979 AIR 1803*** that the delay in deposit of Provident Fund money which is an unqualified statutory obligation cannot be allowed to be linked with the financial position of the establishment, over different points of time, and it was thus contended on behalf of the respondent that there exists no scope for variation of the impugned orders dated 28th February, 2017 of the EPFAT and 1st September, 2016 of the Assistant Provident Fund Commissioner.

11. The observations in the verdict of the Apex Court in ***Organo Chemical Industries & Anr.*** (supra) are to the effect:

“This is a petition under [Article 32](#) of the Constitution by M/s. Organo Chemical Industries, Sonapat directed against an order of the Regional Provident Fund Commissioner, Chandigarh, dated October 12, 1977, by which he imposed a penalty of Rs. 94,996.80 on the petitioners as damages under [s. 14B](#) of the Employees' Provident Funds and [Miscellaneous Provisions Act](#), 1952, for delayed remittances of the Employees' Provident Fund, Family Pension Scheme contributions of their employees, including their own contributions, and the administrative charges thereon.

Organo Chemical Industries, an 'establishment' within the meaning of [section 1\(3\)](#) of the Employees' Provident Funds and [Miscellaneous Provisions Act](#), 1952 (hereinafter

referred to as 'the Act') to which the Act applies, committed defaults in payments of Provident Fund and Family Pension Scheme dues for the period from March to October 1975 and again for the period from December 1975 to November 1976 to the extent of Rs. 92,687.00 and of administrative charges amounting to Rs. 2,309.80 i.e. Rs. 94,996.80 in all. The Regional Provident Fund Commissioner, Chandigarh, accordingly, issued a show cause notice dated June 7, 1977 requiring the petitioners to show cause why damages should not be levied under [S. 14B](#) of the Act. The notice was accompanied by a statement showing a break-up of the various amounts in arrears and the extent of delay in respect of each payment and the details of damages proposed to be imposed on the belated payments. The period of delay in payment of the amounts remitted varied from a few months to a year. It was proposed to levy damages at a uniform rate of hundred per cent on each of the amounts in arrears. In response to the notice, the petitioners tried to explain away the delay by alleging that it was due to difficulties beyond their control and, therefore, the payments could not be made in time viz., the facts that there were disputes between the partners of the firm as a result of which, there was a loss of Rs. 1,40,165.15, there was a power cut of 60% by the Haryana Electricity Board w.e.f. May 6, 1974, which compelled the petitioners to purchase a Generating set to tide over the difficulties and that the establishment had borrowed huge sums from the Haryana Financial Corporation and in payment of which it had defaulted for want of financial resources etc. It was, accordingly, contended that the default, if any, was not willful as they had no intention to commit a default. The Regional Provident Fund Commissioner after giving to the petitioners the

opportunity of a hearing by his reasoned order dated August 16, 1977 considered in detail each of the grounds taken in mitigation of the defaults and came to the conclusion that none of the grounds alleged furnished a legal justification for the delay in making contributions in time. As regards the alleged dispute among the partners leading to a loss of Rs. 1,40,165.15, he observed:

"Even if it is assumed that there was a loss as claimed it does not justify the delay in deposit of Provident Fund money which is in unqualified statutory obligation and cannot be allowed to be linked with the financial position of the establishment, over different points of time. Besides 50% of the contributions deposited late represented the employees' share which had been deducted from the employees wages and was a trust money with employer for deposit in the statutory fund. The delay in the deposit of this part of the contribution amounted to breach of trust and does not entitle the employer to any consideration for relief."

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It would thus be manifest that the petitioners instead of making their contributions, deliberately made willful defaults on one pretext or another and have been utilizing the amounts deducted from the wages of their employees, including their own contributions as well as administrative charges, in running their business. The Regional Provident Fund Commissioner, therefore, rightly observed that the petitioners having regard to their past record must be visited

with the maximum penalty. ”
(emphasis supplied)

12. Reliance was also placed on behalf of the respondent on the verdict dated 18th January, 2006 of the learned Single Judge of this court in W.P.(C) No.347/2006 titled as ***The Sonapat Central Co-operative Bank Ltd. v. Assistant Provident Fund Commissioner, Haryana*** wherein the ratio of the verdict in ***Organo Chemical Industries & Anr.*** (surpa) was adhered to and the time taken for completion of procedural formalities for determination and deposit of the provident fund was held to be insufficient for waiver of damages and interest.

13. On a consideration of the rival submissions, the Trial Court record and the rulings relied upon on behalf of either side, it is essential to observe that observations in proceedings dated 1st September, 2016 of the Commissioner and the proceedings dated 28th February, 2017 of the EPFAT bring forth categorically to the effect that they have applied their mind to the facts and circumstances of the case and that their findings are on a perusal of the record while considering it to be a fit case for levy of damages as per the rates prescribed under Para 32-A of the EPF Scheme, 1952, Para 5(1) of the Employees' Pension Scheme, 1995 and Para 8-A of the EDLI Scheme, 1976 notified vide notification dated 14.08.1991 and 26.09.2008 issued by the Government of India, the damages for the delayed payments for the period from 01.09.2013 to 05.02.2016 totalling to Rs.18,01,080/- was directed to be

recovered as per the account wise schedule, as was detailed in the said order dated 01.09.2016 from the employer in relation to M/s Kee Pharma Limited.

14. Significantly also, the Presiding Officer, EPFAT, has categorically observed in paragraph 5 of the impugned order dated 28th February, 2017 to the effect that the ***“entire case file gone through carefully and minutely. There is no document placed on behalf of appellant which could reveal that due to mitigating circumstances, appellant establishment was restrained for complying the provisions of the Act timely. No grounds made out to interfere in the finding of respondent.”***

Thus, the facts of the instant case are not in *pari materia* with the facts of the case in ***Hi-Tech Vocational Training Centre*** (supra) and reliance placed thereon on behalf of the petitioner is misplaced.

15. Even otherwise, the record indicates that the delayed payments have been for the period 1.9.2013 to 5.2.2016 totalling to Rs.18,01,080/- and in terms of para 32A of the Employees' Provident Fund Scheme, 1952 the rate of damages of 25% of the arrears per annum is leviable in terms of Sub-clause 'd' in the event of the payment not being made by the employer for a period of six months and above and having defaulted. As observed herein above, the period for which there has been a delay in making the payment of the EPF Contribution is calculated from 1.9.2013 to 5.2.2016

13. In view of the above facts and circumstances, no ground

is made out to interfere with the order dated 28th February, 2017 of the Presiding Officer, EPFAT nor with the order dated 1st September, 2016 of the Assistant Provident Fund Commissioner.

14. The petition is thus dismissed.

MAY 23, 2017/SV

ANU MALHOTRA, J

