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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13636 OF 2016

WITH

WRIT PETITION NO.876 OF 2017

WITH

WRIT PETITION NO.879 OF 2017

WITH

WRIT PETITION NO.12137 OF 2016

WITH

WRIT PETITION NO.14329 OF 2016

Central Board of Trustees, EPF

...Petitioner

vs

The Managing Director,

Rajgad Sahakari Sakhar Karkhana

...Respondent

.....

Mr. Suresh Kumar, for the Petitioner.

Mr. Balasaheb R. Deshmukh, for the Respondent.

.....

CORAM : S.C. GUPTE, J.

DATED: JUNE 19, 2018

(ORAL JUDGMENT) :

. Heard learned Counsel for the parties.

2. These petitions challenge an order passed by the Presiding Officer, Provident Fund Appellate Tribunal, New Delhi. The Appellate Tribunal by its impugned order quashed and set aside an order passed by the Regional Provident Fund Commissioner, Pune under Sections 14-B and 7-Q of the Employees' Provident Funds and Miscellaneous

Provisions Act, 1952 (“the Act”). The case of the appellant before the Tribunal (Respondent No.1 herein) was that it was a sugar factory and the business was seasonal in nature; that their financial position between year 1998 and 2010 was not good; and that they could not even pay salary in time to their employees or deposit provident fund contributions within time. Due to huge financial losses, the unit was declared 'sick' by the Sugar Commissioner, State of Maharashtra and provided a package applicable to the sick industry. It was the appellant's case that there was no willful default on their part to pay the contributions under the Act and, in the premises, the order of interest and damages under Sections 7-Q and 14-B of the Act could not have been passed in a mechanical way.

3. Insofar as levy of damages under Section 14-B is concerned, the Appellate Tribunal considered the law on the point laid down by several High Court decisions and held that, in the present case, the appellant had not accepted the liability unequivocally. Whether there was any willful default or *mens rea* in delaying the payment of contributions or not was not considered by the Commissioner at any point of time. On the question of levy of interest, the Tribunal held that the order passed by the Commissioner did not disclose in what manner the assessment of interest was made; no details of the amounts defaulted or interest credited to the respective accounts of the employees of the appellant were disclosed in the order. The Tribunal held that in the absence of these details, mere mentioning of the interest amount in the order amounted to miscarriage of justice. In other words, the Tribunal was of the view that this was a case of non-application of mind and the order could not be sustained on both counts. Accordingly, the Tribunal

allowed the appeal and quashed and set aside the impugned order. The Central Board of Trustees has come by way of these petitions challenging the order of the Appellate Tribunal.

4. Learned Counsel for the Petitioner submits that absence of *mens rea* was not a ground raised in the appeal before the Appellate Commissioner and that on the basis of alleged lack of *mens rea*, the impugned order could not have been passed. It is to be noted at the very outset that an order under Section 14-B is in pursuance of a power to recover damages by way of penalty. Where an employer makes a default in payment of contributions to the fund, the Provident Fund Commissioner or other officer authorized by the Central Government has the discretion to recover from the employer by way of penalty the amount of arrears as may be specified in the scheme. Before allowing and recovering such damages, the employer is required to be given a reasonable opportunity of being heard. A further proviso to Section 14-B provides for the power of the Central Board to 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 BIFR. These provisos do suggest, firstly, that the amount levied by way of damages is a penalty. Secondly, it is not that in every case of default in payment, penalty has to be levied or damages have to be recovered mechanically. In every case, the Provident Fund Commissioner or other authorized officer has a discretion whether or not to levy any penalty by way of damages. The Commissioner or the Officer, as the case may be, has also to consider the quantum of arrears that may be recovered by way of damages. The

section merely contains a ceiling limit. The amount levied by way of damages under this Section cannot exceed that limit. It may be any amount within that limit. Even this aspect has to be considered by the Commissioner or other Officer, as the case may be, judicially. Before any such order is passed, an opportunity of hearing has to be given to the concerned employer. On top of it, the Central Board has also power to reduce or waive damages in case of a sick industrial company. The order of the Provident Fund Commissioner in the present case discloses, at worst a lack of, or at best a mere mechanical application of mind. The declaration of the unit as a sick unit by the Sugar Commissioner of the State and provision of a special package applicable to such sick industries was an important consideration which the Commissioner could have applied in the facts of this case. The Commissioner ought to have considered whether in the facts of the case there could be said to be a willful default on the part of the employer. The Commissioner should have next considered what should be the proper quantum of damages not exceeding the amount of arrears. Nothing of this appears to have been done by the Commissioner.

5. In the premises, the impugned order of the Commissioner cannot pass muster and is rightly quashed and set aside by the Appellate Tribunal on the point of damages under Section 14-B of the Act.

6. Learned Counsel for the Petitioner also takes exception to the jurisdiction of review exercised by the Tribunal. The appeal was originally dismissed by the Tribunal by an order dated 18 June 2014. The appellant thereafter applied for review. That application was allowed by

the Tribunal. The Tribunal thereafter heard the matter afresh and passed the impugned order. Learned Counsel submits that there is no power in the Tribunal to review its own order. Learned Counsel submits that power to review is a statutory power. The Act does not confer any such power on the tribunal. In the first place, the order of the Tribunal allowing the review, passed on 26 September 2014, has never been challenged by the Petitioner; it has attained finality. No such contention was raised before the Tribunal when it heard the matter afresh. No ground in that behalf is raised even in the present petition. Having come to the conclusion that the final order of the Tribunal on the appeal is unexceptionable and in accordance with law, I am not inclined to entertain any objection to the maintainability of review at this stage. I would rather leave that question open as a matter of law.

7. Insofar as interest awarded under Section 7-Q is concerned, it is agreed by learned Counsel for the Respondent that since interest was denied by the Appellate Tribunal only on the ground of want of particulars, the matter can go back to the Provident Fund Commissioner for a fresh decision in accordance with law.

8. In the premises, the following order is passed :

(i) The impugned order of the Tribunal and the original order of the Provident Fund Commissioner insofar the same deal with interest awarded under Section 7-Q of the Act are quashed and set aside and the matter is remanded to the Provident Fund Commissioner for a fresh hearing in accordance with law.

(ii) As for the damages awarded under Section 14-B of the Act, there is no merit in the challenge to the impugned order of the Appellate Tribunal and the petition is dismissed to the extent of rejection of the levy under Section 14-B by the Provident Fund Appellate Tribunal.

(iii) No order as to costs.

(S.C. GUPTE, J.)