IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

W.A.No.776 of 2017

Assistant Provident Fund
Commissioner Office of the Regional
Provident Fund Commissioner Bhavishya Nidhi
Bhawan Dr.Balasundaram Road
Coimbatore-641 018 ... appellant

versus

1 The Presiding Officer
Employees Provident Fund Appellate Tribunal
Scope Minar Core-II 4th Floor Lakshmi
Nagar New Delhi-110 092

2 M/s.The Sam Turbo Industry
Pvt.Ltd. Avinashi Road Neelambur
Coimabatore-641 062 ... respondents

Writ Appeal filed to set aside the order dated 4.11.2015 in W.P.No.35690 of 2015.

WP.NO.35690/2015:

Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Certiorari call for the records relating to the proceedings of 1st Respondent dated 09.04.2012 in ATA No. 515(13) 2011 and quash the order passed therein.

For appellant : Mr.R.Thirunavukkarasu

For 2nd Respondent : No appearance

R1 : Court

J U D G M E N T

(made by K.K.SASIDHARAN, J.)

This intra court appeal is directed against the order dated 4 November 2015 in W.P.No.35690 of 2015, dismissing the Writ Petition filed by the appellant by upholding the order passed by the EPF Appellate Tribunal, New Delhi, reducing the damages, which is in the nature of penalty up to 5% p.a., on the arrears of the contribution payable by the establishment.

Brief facts:-

2. The second respondent is an establishment covered under the EPF and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act"). The establishment failed to pay the contribution and the other statutory benefits within the due date for the period from May 2000 to November 2010. The appellant passed an order dated 18 July 2011, levying damages under Section 14B of the Act read with Para 32A of the EPF Scheme, 1952. The appellant levied damages at the maximum rate without exercising the discretion.

3. The order dated 18.7.2011 was challenged by the second respondent before the EPF Appellate Tribunal, New Delhi. The Tribunal by order dated 9 April 2012 in ATA 96(13) 2012, restricted the damages up to 5% p.a. on the amount due from the second respondent. The order was unsuccessfully challenged by the appellant before the writ court in W.P.No.35690 of 2015. Feeling aggrieved, the appellant has come up with this intra court appeal.

4. We have heard the learned Standing Counsel for the appellant. None appeared on behalf of the second respondent.

Discussion:-

5. The appellant initiated proceedings against the second respondent under Section 14B of the Act for levying damages on account of the belated payment. The said provision permits the Competent Authority to levy damages in case the employer committing default in the payment of contribution to the fund. Paragraph 32A of the EPF Scheme Act, 1952, contain the formula for levy of damages. It would vary from 5% p.a. for delay of two months to 25% in case the delay is six months and above.

6. The appellant, without exercising the discretion, proceeded to recover the damages in accordance with the maximum rate as indicated in paragraph 32 of the EPF Scheme.

7. The core question is was to whether there is any element of discretion in the matter of levy of damages on account of the delay in making the payment.

8. The power to levy damages under Section 14B of the Act is conferred upon the Provident Fund Commissioner to ensure that the contribution is paid by the establishment within the due date. The power should be exercised by the Provident Fund Commissioner in a judicial manner. Section 14B of the Act, gives an element of discretion to the Provident Fund Commissioner. The provision is not mandatory as the word used is "may". There is an element of discretion involved in the matter. It is open to the Provident Fund Commissioner to collect the damages at a

lesser rate taking into account the peculiar facts and circumstances of the case.

9. The first proviso to section 14B provides for issuing notice and a reasonable opportunity to the establishment before levying and recovering damages. Notice is contemplated for the purpose of enabling the establishment to explain the reasons for the delay. In case proper reasons are given by the establishment and those reasons are found to be genuine, an element of discretion is given to the Provident Fund Commissioner to reduce the rate of damages. The scheme contain the minimum and maximum rate of damages. However, there is nothing to show that in case of delay for a particular period, rate of damages indicated in paragraph 32 of the EPF Scheme must be collected.

10. There is a clear indication in paragraph 32B of the EPF Scheme, 1952 that it is open to the Competent Authority to reduce the damages up to 50% in appropriate cases, depending on merits. Section 14B is to be read in the light of paragraph 32A and 32B of the scheme. The Competent Authority is given discretion in the matter for complete waiver of damages in respect of cases covered under Sub paragraph (A) and (B) of paragraph 32B and reduction upto 50% in other cases under sub paragraph (C) of paragraph 32B.

11. The authority while levying damages must consider objectively the reasons given by the establishment for the delay in remitting the amount. The requirement for issuing notice to the establishment before levying damage was therefore inserted in the statute book to serve a larger purpose.

12. The question as to whether the adjudicating authority is entitled to take note of the mitigating circumstances for fixing the damages came up for consideration before the Hon'ble Supreme Court in M/s.Prestolite of India Ltd. vs. Regional Director, 1994 Supp(3) SCC 690. The Hon'ble Supreme Court while negativing the contentions taken on behalf of the Employees State Insurance Corporation of India that guidelines have been indicated as to how damages for delayed payment are to be imposed and no exception should be made to the order fixing the damages on the basis of the said guidelines, made it clear that guidelines only fixed the upper limits at which imposition of damages can be levied.

The Supreme Court said :-

> "Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding

the matter and it is bound to act mechanically in applying the upper most limit of the table."

13. The question of levy of damages for failure to pay the contribution once again came up for consideration before the Hon'ble Supreme Court in Employees State Insurance Corporation vs. HMT Ltd. and another, (2008(3) SCC 35) The Supreme Court after scanning the earlier decisions on the point, observed that existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.

The Supreme Court further observed ::

> 17. A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an endeavour should be made to construe such penal provisions as discretionary, under the statute is held to be mandatory in character.
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> 20. ... The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with no discretion. The legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinarily, even such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance of the principles of natural justice is necessary thereunder.

14. The Supreme Court in HMT Ltd. (cited supra), opined that in certain situations, it would be possible for the employer to claim the benefit of irretrievable prejudice in case the payment for damages is made after several years.

15. The appellant in the subject case without exercising the discretion, made an attempt to levy damages at the maximum rate indicated in the EPF Scheme. The Tribunal was therefore justified in reducing the rate of damages. The learned Single Judge was equally correct in dismissing the Writ Petition filed

by the appellant. The intra court appeal therefore deserves to be dismissed.

16. In the upshot, we dismiss the intra court appeal. No costs. Consequently, C.M.P.No.10811 of 2017 is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1 The Presiding Officer
Employees Provident Fund Appellate Tribunal
Scope Minar Core-II 4th Floor Lakshmi
Nagar New Delhi-110 092

W.A.No.776 of 2017