IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 26/9/2018
C O R A M
THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Appeal No.2185 of 2018

St. Michael's Hr. Sec.School
rep. By its Correspondent
Gingee 604 202
Villupuram District. ...Appellant/Petitioner

Vs

1. The Assistant Provident Fund Commissioner
(Compliance)
Employees Provident Fund Organisation
Sub-Regional Office
P.B.No.588 Shree Complex
D Block
No.18 Madurai Road
Trichy 620 008.

2. The Enforcement Officer
Employees Provident Fund Organisation
Cuddalore & Villupuram Districts
22 Nethaji Road
ARA Complex
Manjakuppam
Cuddalore 607 001. ...Respondents/Respondents

Appeal filed under Clause 15 of Letters Patent against the order dated 19/7/2018, made in W.P.No.16455 of 2017.

Prayer in WP.No.16455/17:Filed under Article 226 of the constitution of India praying for issuance of a writ of certiorarified mandamus calling for the records in respect of the impugned proceedings dated 19.5.2017 in No.TN/ SRO-TRY/PDC/C -21/76742/7Q PROC/2017 and in No.TN/ SRO-TRY/PDC/C-21/ 76742/14B PROC/2017 on the file of the 1st respondent and quash the same directing the respondents to waiver the penal damages in respect of the petitioner school for the period from June 1996 to March 2011.

For appellant ... Mr.Father Xavier Arulraj
for Father Xavier Asso.

J U D G M E N T

(Judgment of the Court was made by S.Manikumar,J)

Being aggrieved by the order, made in W.P.No.16455 of 2017, dated 19/7/2018, by which the writ Court, while declining the issuance of a writ of certiorarified mandamus, calling for the records, in respect of the impugned proceedings, dated 19/5/2017, in No.TN/SRO-TRY/PDC/C-21/76742/7Q PROC/2017 and in No.TN/SRO-TRY/PDC/C-21/76742/14B PROC/2017, on the file of the first respondent and quash the same, directing the respondents, to waive penal damages, in respect of the petitioner's School, for the period from June 1996 to March 2011, on the grounds of availability of alternative remedy, instant writ appeal has been filed.

2. Short facts leading to the appeal are as follows:-

Earlier, the Assistant Provident Fund Commissioner (Compliance), Employees Provident Fund Organisation, Tiruchirapalli, issued a demand notice No.TN/s RO-TRY/PDC/C-21/76742/14B PROC/2014, dated 10/12/2014. Enforcement Officer, Employees' Provident Fund Organisation, Cuddalore and Villupuram Districts, issued a show cause notice, dated 11/3/2015. Contending inter alia that the petitioner had paid a sum of Rs.13,99,196/-, towards Employers Contribution for Provident Fund and on other grounds, St. Michael's Higher Secondary School, represented by its Correspondent, Villupuram Districts, filed W.P.No.9715 of 2015, to quash the demand notice, dated 10/12/2014, issued by the Assistant Provident Fund Commissioner (Compliance), Tiruchirapalli and the prosecution notice, dated 11/3/2015, issued by the Enforcement Officer, Employees Provident Fund Organisation, Cuddalore and Villupuram Districts. School had also sought for a direction to adjust a sum of Rs.13,99,196/-, said to have been paid in excess.

3. After considering the material on record and the submission of the learned counsel for the parties, therein, writ Court, vide order dated 16.11.2015, disposed of W.P.No.9715 of 2015, as hereunder:-

> "11. In the light of the above, the writ petition is disposed of, with a direction to the petitioner to appear before the first respondent along with all records along with a detailed representation giving all facts and figures. On such representation being made with records, the first respondent shall fix a date for hearing the case and after affording an opportunity of personal hearing to the petitioner Management or their authorised representative, take a fresh decision in the matter and if satisfied may clarify, verify or ever rectify and subject to such orders and it is open to the first respondent to pass further orders under the provisions of the Act.
>
> 12. In the light of the above direction, the impugned demand as well as the show cause notice for prosecution has to be

necessarily kept in abeyance till the final decision is taken by the first respondent in terms of the above directions."

4. Taking note of the order, made in W.P.No.9715 of 2015, dated 16/11/2015, the Assistant Provident Fund Commissioner (Compliance), Employees Provident Fund Organisation, Sub-Regional Office, Tiruchirapalli, based on the Enquiry Officer's report and documentary evidence produced, assessed the dues period between 06/1996 and 03/2011, under Section 7 A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and determined the amount as Rs.21,00,666/-, as the balance amount due and payable into the Employees Provident Fund, Employees' Pension Fund and Employees' Deposit Linked Insurance Scheme, for the above said period.

5. Accordingly, on 20/3/2017, ordered as hereunder:-

"THEREFORE, I Shri Shashikant Dahiya, Assistant Provident Fund Commissioner, Trichy, in exercise of the powers conferred on me under Section 7 A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 hereby determine the amount of Rs.21,00,666/- (Twenty one lakhs six hundred and six only) as shown in the Schedule as the balance dues payable into Employees' Provident Fund, Employees' Pension Fund and Employees' Deposit Linked Insurance Scheme for the period from 06/1996 to 03/2011 in accordance with the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

As the employer remitted the entire dues for the enquiry period, I hereby conclude the enquiry as remitted and dropped.

Without prejudice to this order, the undersigned has reason to believe that by reason of the omission or failure on the part of the Employer any amount so due from such employer for any period escaped his notice the undersigned is at liberty to reopen the case for determining the amount due from the employer in accordance with Section 7 C of the Employees Provident Fund and Miscellaneous Provisions Act, 1952.

However, all the related remittances will attract penal damages under Section 14 B and interest under Section 7 Q of the Act."

6. Thereafter, in terms of Section 7 Q of the Employees Provident Funds and Miscellaneous Provisions Act, Assistant Provident Fund Commissioner, Tiruchirapalli, vide, order, dated 19/5/2017, directed St. Michael Higher Secondary School, Gingee, Villupuram, petitioner therein, to pay a sum of

Rs.17,88,907/-, as interest, for the period between 06/1996 to 04/2014.

7. On the same day, Assistant Provident Fund Commissioner, Tiruchirapalli, passed another order, dated 19/5/2017, in terms of Section 14 B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, directing levy of penal damages of Rs.20,25,867/-.

8. Being aggrieved by the order, dated 19/5/2017, directing levy of penal interest and damages, under Section 14 B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the petitioner has filed W.P.No.16455 of 2017.

9. Material on record discloses that pending disposal of W.P.No.16455 of 2017, writ Court, vide order, dated 30/6/2017, granted interim stay of the order, dated 19/5/2017, on condition to deposit 50% of the demanded amount, within a period of four weeks, from the date of passing of the order.

10. Thereafter, in 2018, the respondents have filed counter affidavit.

11. When the writ petition came up for hearing, on 19/7/2018, without going into the merits of the issues, taking note of the efficacious and alternative remedy available, to an aggrieved person under Section 7 - I of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, in particular to the decisions, viz.,
(i). Madras Bar Association Vs. Union of India (UOI) dated 25/9/2014 - SC:MANU/SC/0875/2014; (ii). Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala and Another [MANU/SC/0445/1973 : (1973) 4 SCC 225]; (iii). P. Kannadasan and Ors. Vs. State of Tamil Nadu and Ors [MANU/SC/0650/1996: (1996) 5 SCC 670) and (iv). State of Tamil Nadu and Ors. Vs. State of Kerala and Ors (7/5/2014 - SC):MANU/SC/0425/2014, writ Court dismissed the writ petition.

12. Being aggrieved, instant Writ Appeal is filed, on the grounds inter alia that the writ Court failed to consider that respondents have not considered the mitigating circumstances, directed to be considered by an earlier order made in W.P.No.9715 of 2015, dated 16/11/2015.

13. Added further, Mr.Father Xavier Arulraj, learned Senior Counsel submitted that as the Management has paid the amount towards the said Act, W.P.No.18010 of 2014 filed, for refund is pending. Contention of the learned Senior Counsel is that when the said writ petition is pending, respondent Assistant Provident Fund Commissioner (Compliance), ought not to have directed the penal interest or damages in terms of Section 14 B of the Act.

14. He further submitted that even without recording the deposit of 50% of the penal interest demanded, in terms of the order, dated 19/5/2017, Writ Petition No.16455 of 2017, has been dismissed, on the ground of alternative remedy.

We have heard Mr.Father Xavier Arul Raj, learned Senior Counsel and perused and materials available on record.

15. Whether Assistant Provident Fund Commissioner (Compliance), Tiruchirapalli, had not taken note of the observations of the writ Court made in W.P.No.9715 of 2015, dated 16.11.2015, is a matter, which can always be urged before the Appellate forum. Question as to whether circumstances are mitigating or not, in the matter of levy of penal interest or damages, under Section 14 B of the Act, is a pure question of fact, which the appellate authority can decide.

16. Yet another aspect to be considered by this Court is whether an observation made by a Court, without reference to the intention of the legislature is penal in nature, when any decision to be on the plea of mitigating circumstances. Law is well settled that obiter is not binding.

17. As rightly observed by the writ Court, when there is an efficacious and alternative remedy, writ would not ordinarily be entertained, except in an extraordinary circumstances, which on the facts and circumstances of the case, we do not find.

18. Learned counsel for the appellant submitted that a statutory appeal would be filed. Merely because the Writ Court has not taken note of the deposit made, at the time of passing final order in W.P.No.16455 of 2017, dated 19.05.2017, that would render the said order to be interfered with.

19. Accordingly, Writ Appeal is dismissed. It is open to the appellant, to take recourse in the manner under law.

mvs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1. The Assistant Provident Fund Commissioner
   (Compliance)
   Employees Provident Fund Organisation
   Sub-Regional Office
   P.B.No.588 Shree Complex
   D Block
   No.18 Madurai Road
   Trichy 620 008.

2. The Enforcement Officer
   Employees Provident Fund Organisation
   Cuddalore & Villupuram Districts
   22 Nethaji Road
   ARA Complex
   Manjakuppam
   Cuddalore 607 001.

+1cc to M/s.Father Xavier Associate, SR.NO.66835

PVS(CO)
sm:29.10.2018

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