

#16

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Delivered On: 11.05.2018

LPA 269/2018 & CM APPL.19430-19432/2018

**THE ASSISTANT PROVIDENT FUND
COMISSIONER, DELHI (N)**

..... Appellant

versus

M/S KANGAN SECURITY SERVICE (REGD)

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Puneet Garg, Advocate

For the Respondent : None

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE PRATHIBA M. SINGH

J U D G M E N T

SIDDHARTH MRIDUL, J (ORAL)

CM APPL.19432/2015 (Exemption)

Exemption granted subject to all just exceptions.

The application is disposed of accordingly.

CM APPL. 19430/2018 (Condonation of Delay)

The present application under Section 151 of the Code of Civil Procedure, 1908 instituted on behalf of the applicant/appellant seeks condonation of 155 days delay in filing the accompanying petition.

For the reasons stated in the application which are duly supported by an affidavit we are of the view that the applicant/appellant has shown sufficient cause for delay in instituting the accompanying petition. The delay of 155 days in instituting the accompanying petition is accordingly condoned.

The application is disposed of accordingly.

LPA 269/2018 & CM APPL.19431/2018 (Stay)

1. The present Letters Patent Appeal assails an order dated 18.09.2017 rendered by the learned Single Judge of this Court dismissing Writ Petition (Civil) No.8053/2017, titled as '*APFC, Delhi vs. M/s Kangal Security Service (Regd.)*', whereby the petition instituted on behalf of the appellant (hereinafter referred to as the 'assessing officer') challenging an order dated 04.11.2016 passed by the Employees Provident Fund Appellate Tribunal (for short 'EPFAT') in appeal being ATA No.94(4)2011, which in turn

challenged the order dated 07.12.2010, passed by the assessing officer under Section 14-B and 7Q of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'said Act'), was dismissed.

2. The solitary contention made on behalf of the assessing officer is that, both the orders of the courts below, erroneously arrived at a conclusion, that he did not consider the plea of mitigating circumstance, put forth by the respondent (hereinafter referred to as the 'establishment') qua the delayed payment of dues, inasmuch as, despite opportunity the latter had failed to produce any document in support of this plea.

3. Before we proceed to determine the submission made on behalf of the assessing officer, it would be profitable to encapsulate a few specifics of the case in hand. The department, pursuant to a notice under Section 14-B and 7Q of the said Act, vide order dated 07.12.2010, held the establishment liable for the relief of damages and interest on account of belated payment of the provident fund due from the latter.

4. In the instant case, the period for which there was delayed contribution of payments, was from September 2004 to January 2008 i.e. period prior to 26.09.2008.

5. The establishment carried the order dated 07.12.2010 in appeal before the EPFAT, *inter alia*, on the basis of their assertion that they had deposited the provident fund contribution by cheque on an earlier date, but on account of belated encashment of cheque by the bank, delay was incurred in actual remittance of the amounts into the account of the assessing officer and consequently, the department had mistakenly taken the date of realization of cheque into account, in arriving at a finding that the contribution was belated. In this behalf, the establishment had asseverated as follows:-

“6. Facts of the case” The facts of the case & grounds are given below:-

- a) That the respondent issued Notice No.DL/8873/C-20/Damages/CA/3446 dated 08.07.2010 (Annexure A-II) for the delayed remittances for the period 09/04 to 01/08.
- b) That Sh. O.P. Narang, Advocate appeared before the respondent from time to time and submitted the representation dated 24.08.2009 (Annexure A-III) this fact has been admitted by the respondent in his impugned order. However, it is incorrect to suggest that “Sh. Narang has no objection in this regards”. The Ld. Respondent mis-led the facts in his impugned orders.
- c) ***That the appellant is depositing P.F. contribution by cheque, but the department has taken the date of realization of cheque. In fact the Ld. Respondent is required to take the date of presentation of cheque to SBI, & not date of realization of cheque/pay orders.***

- d) ***That according to para 38 of the EPF Scheme, 1952 the appellant is allowed to make the payment of contribution by bank Draft or cheque provided that if payments made by cheque it should be drawn only on local bank of the place in which deposits are made. Accordingly payments were through local banks.***
- e) That it has been held as under when delay is attributable to bank/postal department.
“The Employer remitted by registered post in time the contribution amounts by cheque in terms of Para 38 of the Scheme within the prescribed time limit. But on account of delay of the bank or the postal department there was delay in the actual remittance of the amounts to the fund. The authority levied penal damages on the employer under section 14B of the Act on the ground that the employer should have sent the cheque by post earlier to ensure that the amount of the cheque was remitted to the fund within the prescribed time limit. Held that when the employer had remitted the amount through cheque in time in the manner prescribed in Para 38 of the Scheme, the order of the authority levying penal damages was arbitrary and so liable to be quashed – *Indian Process Chemical Laboratory (P) Ltd. Vs. R.P.F. Commissioner, Bangalore* 1979 Lab I. C. 84, (1978) 53 F.J.R. 298 Kar.”
- f) “The appropriate date to be taken note of is payments by draft/cheque and not date of encashment. There may be cases, where remittance is made in the manner prescribed under EPF Schemes, 1952 within the time fixed but amount is credited after due date on account of postal delay or delay in encashment of the draft/cheque. In such cases levy of damages by taking date of credit to be the relevant date would be inappropriate and illegal.”

(Orissa High Court Orissa State Electricity Board & others Vs. Union of India (JC No. 782 of 1993)

- g) That in this connection attention of the Ld. respondent is also invited to Para 170 at Page 54 of the Manual of Accounting Procedure Vol. 1 the extract of which are reproduced below:-
- a) No Damages need be levied in case of remittance by the employer on the next day when the due date, including days of grace happens to be Bank Holiday.
 - b) Damages may not be levied on an employer who sends a Bank Draft or Cheque on or before 20TH of the month even though the actual realization of money into the accounts of the Fund takes place after the due date, including days of Grace.
- h) In this connection the judgment in the case of ATA/12 (11) 99 M/s Jaipur Metals & Electrical Ltd. Vs. RPFC Jaipur (Annexure A-IV) is enclosed at is worth repeating:-
“The date of Payment of cheque should taken to be *within a week* from the date of deposit of Cheque.”
- i) That in this connection a reference is invited to the Circular No. P.Q.Cell/3(3) 86/Dam. Dated 29.05.1990, (Annexure-A-V) which stated that the Damages under Section 14B include Damages and Interest chargeable under section 7Q of the Act. The said circular inter- alia states:-
“that imposition of damages at a flat rate of 25% per annum, was considered to be exorbitant, it has become necessary to revise the rate of damages. Ultimately the Ministry of Labour & Employment vide Notification No. GSR-688 (E) published on 26TH September 2008 have revised the Table of levy of damages as under:-

Sl. No.	Period of Default	Rate of Damages (Percentage of arrears per annum)
1	2	3
(a)	Less than two months	Five
(b)	Two months and above but less than four months	Ten
(c)	Four months and above but less than six months	Fifteen
(d)	Six months and above	Twenty Five

j) That the Provisions of above circular were also corroborated by the Hon'ble High Court of Delhi in the recent case of M/s Systems & Stamping ANR. V. EPF Appellant Tribunal & Ors. LPA No.562-63/2006 decided on 14th January,(Annexure A-VI) and directed RPFC to calculate the amount payable by Appellant for various period of default in term of office memorandum dated 29.05.1990 as has been explained in the judgment. The Ld. Respondent hasdepartment or to adjudicate upon the matter. In the present case he acted as a judge as well as representative of department.

vi. That it is a settled law that the Ld. Respondent who consider the objection was in substance one of the parties to the dispute and thus it is against the principal of natural justice.

(emphasis supplied)

6. In response to the above finding, it had been urged on behalf of the assessing officer that it was learnt from the office records that the establishment had deposited Employee's Provident Fund remittances

belatedly. However, the establishment was given ample opportunities during the proceedings to produce supporting documents in support of any mistakes pointed out by them. But even after giving reasonable opportunities, the establishment did not provide any supporting documents in support of its statement. Hence the contention of the establishment is not acceptable and is denied.

7. A perusal of the order dated 04.11.2016 passed by EPFAT clearly reflects that, the order of the Assessing Officer was held liable to be set aside on account of the finding that; he did not consider the decision in **Roma Henny Security Services Pvt. Ltd. Vs. Central Board of Trustees, EPF Organisation through Assistant PF Commissioner, Delhi (North)**, reported as (2013) 1 LLJ 29 Del., which followed the decision rendered by a Division Bench of Delhi High Court in **System & Stamping and Anr. Vs. Employees' Provident Fund Appellate Tribunal and Ors.**, reported as (2008) 2 LLJ 939, based upon which it was held that for the period prior to 26.09.2008, damages under Section 14B of the said Act included interest chargeable under Section 7Q of the said Act and consequently, the assessment prior to 26.09.2008 was on a higher side.

8. In this behalf, learned EPFAT observed as follows:-

“6. In case law titled as **Roma Henny Security Services Pvt. Ltd. Vs. Central Board of Trustees, EPF Organisation 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 the Act.”**

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

9. The learned EPFAT having arrived at this conclusion rendered an opinion that the interest of justice would be met by imposing 60% of the assessed damages on the establishment, along with the entire assessed interest.

10. Being aggrieved by the order of reduction in amount of damages to 60%, passed by the learned EPFAT, the assessing officer carried the same to this Court by way of the present proceedings.

11. Vide the impugned order dated 18.09.2017, the learned Single Judge observed as follows:-

“3. As observed vide the said order dated 07.12.2010 of the APFC(N), a summary vide office letter No. DL/8873/CII/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 Account No.		Amount
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		Rs.7,80,408/-

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.

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XXXX XXXX XXXX XXXX XXXX

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 upon the respondent. Reliance was placed on behalf of the petitioner on the verdict of the Supreme Court in RPEC 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 Capital 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.”

12. A conjoint reading of the above extracted paragraphs clearly and unequivocally leads to the inescapable conclusion that the learned Single Judge concurred with the findings arrived at by EPFAT, to the effect that the assessing officer had failed to consider, that the establishment had duly deposited the cheque in the designated bank for remittance of the amount due, but owing to the same being done belatedly, the dues could not be deposited in the account of the assessing officer in time; and the establishment could, therefore, not be said to have been in default, owing to circumstances, which were beyond their control and unintentional. Further, it was observed that the assessing officer had passed the original order, not

on the basis of the earlier table that continued to govern the subject assessment, in accordance with law, and was, therefore, disentitled from recovering the entire amount for failure of the establishment to carry out their obligation within the declared time and consequently, the same is untenable and could not be sustained. It is in this view of the matter, that the learned Single Judge arrived at the conclusion that keeping in mind the circumstances of the case, both antecedent and attendant, the interest of justice were met by imposing 60% of the assessed damages on the establishment along with the entire assessed interest, as directed by the EPFAT.

13. Having heard learned counsel appearing on behalf of the assessing officer and perused the material on record, we find ourselves in agreement with the determination of the issue made by the learned Single Judge, as well as, EPFAT.

14. The assessing officer, in our view, failed to consider the mitigating circumstances whilst determining the imposition of penalty and interest on the establishment.

15. In view of the foregoing, the solitary submission made on behalf of the assessing officer does not find favour with us and is decided against

them. Consequently, we see no reason to interfere with the findings arrived at in the impugned orders. The appeal is accordingly dismissed. The pending application also stands disposed of.

SIDDHARTH MRIDUL
(JUDGE)

PRATHIBA M. SINGH
(JUDGE)

MAY 11, 2018
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