IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.11.2019

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THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.6850 of 2011
and M.P.No. 1 of 2011

K.M. Saleem & Co.
No.172, Sydenhams Road,
Periamet, Chennai - 600 003. .. Petitioner

vs.

1. The Employees Provident Fund Appellate Tribunal
SCOPE MINAR, core II 4th Floor,
Laxmi Nagar District Centre,
Laxmi Nagar, New Delhi - 110 092.

2. The Assistant Provident Funds Commissioner,
Office of the Regional Provident Fund Commissioner,
Tamil Nadu & Pondicherry States,
20, Royapettah High Road,
Chennai - 600 014. .. Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, calling for the records of the 1st respondent in ATA.No.915(13)2004 and quash the order dated 28.01.2011.

For Petitioner : Mr. D.Abdullah

For Respondents : R1 - Tribunal

Mr. T.R. Sundaram [R2]

O R D E R

The order dated 28.01.2011 passed in ATA No.915(13)2004 is under challenge in the present writ petition.

2. The writ petitioner is a firm established during the year 1985. The learned counsel for the writ petitioner states that the petitioner was continuously suffering financial loss on account of an Industrial unrest in the factory. The main ground

raised by the petitioner is that the Appellate Tribunal accepted the factual situation placed by the writ petitioner. While accepting the factual situation and the financial condition, the Tribunal passed an order stating that the petitioner is liable to pay damages under Section 14B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "EPF Act").

3. The findings of the Tribunal says that the default was not intentional, but occurred due to financial problem. Relying on the said finding, the learned counsel for the writ petitioner states that the financial condition of the writ petitioner company was admitted by the Tribunal and therefore, there is no reason whatsoever to deny the benefit of waiver of damages imposed by the respondent under Section 14B of the EPF Act.

4. In respect of the said contention, the learned counsel cited the judgment of the Supreme Court in the case of Employees' State Insurance Corporation Vs. H.M.T. Ltd and Anr. [reported in 2008 (1) LLJ 814]. The relevant paragraphs are extracted hereunder:

> "20. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions.
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> 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 proceedings is an adjudicatory one or compliance of the principles of natural justice is necessary thereunder.
>
> 21. 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."

5. In respect of the judgment cited supra by the learned counsel for the writ petitioner, the Supreme Court made an observation that the statute itself does not say that a penalty

has to be levied only in the manner prescribed. Therefore, in that particular case, the statute did not say regarding the manner in which the penalty has to be levied. However, the provisions of the EPF Act is entirely different, wherein, Section 14B proviso clause specifically enumerates that a company must be declared as a sick industry under the provisions of the statute, then the facts dealt with by the Supreme Court can be applied with reference to the facts and circumstances of the present case on hand. Thus, the judgment cited is of no avail to the writ petitioner.

6. The learned counsel appearing on behalf of the second respondent disputed the contentions by stating that only if the petitioner is able to establish that the company was declared as a sick industry as contemplated under the proviso Clause to Section 14B of the EPF Act, the authorities cannot waive the damages. It is not as if the competent authority can grant waiver in a mechanical manner and they have to follow the conditions stipulated in the proviso to Clause 14B of the EPF Act. Section 14B of the EPF Act stipulates that the Central Board may 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 the Board for Industrial and Financial Reconstruction established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in the scheme. Therefore, only if the petitioner is able to establish that the company declared as a sick industry under the statute, then alone the waiver of damages can be considered and not otherwise.

7. This Court earlier consider the similar issue in W.P.No.4633 of 2012 and the relevant paragraphs are extracted hereunder:

> "7. Let us now consider the spirit of Section 14-B of the Employees Provident Fund and Miscellaneous Provisions Act 1952. Undoubtedly, Section 14-B of the Act provides Power to the authorities to recover damages. Where an employer makes default in the payment of any contribution to the Fund, the [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to him, then they are empowered to impose penalty. Such damages not exceeding the amount of arrears, as may be specified in the Scheme.
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> 8. However, Proviso Clause to Section 14-B of

the Act enumerates that the Central Board may 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 the Board for Industrial and Financial Reconstruction established under section 4 of the sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]

9. ....

10. Discretionary powers are to be exercised cautiously and restrictedly. The Power of discretion provided under the Proviso Clause impliedly speaks that the reasons must be recorded. In the absence of any reason, it is to be construed that the exercise would exceed the main provision. The Proviso Clauses are provided to exercise the discretionary power discretely and in order to mitigate the injustice, if any noticed. Thus, any such discretionary powers contemplated in the Proviso Clause of any statute, the authorities competent must be cautious and apply their mind for the purpose of such exercise of discretionary power, so as to reduce the quantum of damages, as such reduction will affect the revenue of the State. Thus, the provision regarding the discretion under the Proviso Clause would not provide any absolute power. Such a discretionary power is an exception to the main clause and therefore, every authority should ensure that the exercise of discretion does not exceed the main provision enacted, empowering the authorities to impose damages in all such cases, where there is a default. The Rule is stipulated in Section 14-B of the Act. Section 14-B of the Act is unambiguous that the authority competent is empowered to impose damages. Thus, the said power provided under the Statute will prevail over. The Proviso Clause providing Power to the authorities to reduce the damages. The Rule must be implemented at the first instance and the discretionary powers provided in the Proviso Clauses are to be exercised as an exception on exceptional circumstances. The exceptions are to be carved out only on genuine circumstances,

wherein the parties approaching the Tribunal are unable to establish that they are declared as a sick industry and their financial condition is so much in distress and they are not in a position to pay the damages. Thus, Rule is to be implemented strictly and the power of discretion is to exercise discretely.

11. This being the interpretation to be provided for Section 14-B of the Act. The exercise of discretionary powers should not exceed the scope of the main provision and in such an event, exercise of discretionary power became null and void and in violation of the main provision itself."

Accordingly, the order dated 28.01.2011 passed in ATA.No.915(13) 2004 is confirmed and the writ petition stands dismissed. No costs. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//
Sub Assistant Registrar

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To

1. The Employees Provident Fund Appellate Tribunal
SCOPE MINAR, core II 4th Floor,
Laxmi Nagar District Centre,
Laxmi Nagar, New Delhi - 110 092.

2. The Assistant Provident Funds Commissioner,
Office of the Regional Provident Fund Commissioner,
Tamil Nadu & Pondicherry States,
20, Royapettah High Road,
Chennai - 600 014.

+1cc to Mr. D.Abdullah, Advocate SR.92995
+2cc to Mr. T.R. Sundaram, Advocate SR.92972

W.P.No.6850 of 2011
and M.P.No. 1 of 2011

PM(CO)
CB(13/12/2019)