

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 27.09.2019

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.Nos.4635 & 4636 of 2012

The Assistant Provident Fund Commissioner,
Employees Provident Fund Organisation,
Dr.Balasundaran Road,Coimbatore. ... Petitioner in both WPs

..Vs..

1.Employees Provident Fund Appellate Tribunal,
(Ministry of Labour and Employment Govt. of India),
Scope Minar Core - II, 4th Floor, Lakshmi Nagar,
District Centre, New Delhi - 110 092.

2. M/s. NEPC Tea Gardens Ltd.,
Waterfalls P.O., Valparai,
Coimbatore. ... Respondents in both WPs.

COMMON PRAYER : Petition filed Under Article 226 of the
Constitution of India praying to issue a Writ of Certiorari,
calling for the records from the file of the 1st respondent in
Order in ATA Nos.460 (13) 2002 & 461 (13) 2002 dated 07.10.2009
and quash the same.

For Petitioner : M/s.R.Meenakshi
[in both W.Ps.]
For Respondents : R1-Tribunal
[in both W.Ps.] Mr.S.Gunalan [R2]

COMMON ORDER

The order dated 07.10.2009 passed in A.T.A Nos.460 (13) 2002
& 461 (13) 2002 are under challenge in these writ petitions.

2. The writ petitioner is the Assistant Provident Fund
Commissioner. The second respondent is an establishment covered
under the Employees' Provident Fund & Miscellaneous Provident
Act, 1952 (hereinafter referred to as 'the Act'). Admittedly,
there is delay in payment of employees provident Fund
contributions. To be precise, the establishment paid EPF
contribution for the period of May, 1997 to February, 1999
belatedly. The management contended that due to continuous loss,
the second respondent herein could not pay the PF Contribution
in time. The petitioner herein had issued a show cause notice on
17.08.2001 & 12.06.2001 respectively proposing to levy damages

under Section 14B of the Act. There was no representation on behalf of the second respondent herein. On 31.08.2001 & 23.06.2001 respectively, the petitioner herein has passed an order under Section 14B of the Act levying a sum of Rs.2,67,413/- & Rs.1,87,546/- towards damages. The second respondent preferred an appeal before the Employees Provident Fund Appellate Tribunal under Section 7(1) of the Act. The Appellate Tribunal disposed of the Appeal, holding that RPF Commissioner, failed to follow the law laid down by the Apex Court in the case of M/s. Hindustan Steel Limited Vs. State of Orissa [reported in AIR (1970) SC 253]. The Appellate Tribunal without setting aside the order of RPF Commissioner or remitting the matter for fresh enquiry, proceeded further and restricted the damages payable by the establishment to 5% per annum of the arrears of the contribution, keeping in view of the reasons and circumstances in which the delay in remittance of PF dues occurred. Thus, the petitioner is constrained to move the present writ petition.

3. The learned counsel appearing for the second respondent states that the second respondent company is in financial crisis and it is not in a position to pay the damages, when Section 14B contemplates waiver of damages or quantify the damages. Considering various facts and circumstances of the Company, the respondents ought to have waived the damages as far as the petitioner company is concerned and the Tribunal also failed to consider the financial condition of the writ petitioner Company and confirmed the damages issued by the Competent Authorities.

4. The learned counsel for the petitioner, the Regional Provident Fund Commissioner disputed the contentions by stating that the second respondent company was a defaulter in payment of contribution as per the provisions of the Act under Section 14B of the Act. The Authorities are empowered to quantify the damages, considering various factual aspects and accordingly the damages were quantified as Rs.2,67,413/- & Rs.1,87,546/- in respect of the second respondent Company. Thus, the second respondent is liable to pay the damages to the petitioner Department.

5. The learned counsel for the petitioner cited a judgment of the Madras High Court in the case of M/s. Lakshmi Machine Works Limited, Coimbatore vs. Union of India, rep. by its Central Provident Fund Commissioner, HUDCO, New Delhi and others, dated 08.09.2011 wherein the High Court made an observation as follows:

"21. In the present case, the contentions raised by the petitioner cannot be countenanced for more than

one reason. The contention that the petitioner was not aware of the liability as it did not reflect in the books of accounts cannot be accepted because the petitioner had paid dues towards PF and had also offered to pay the interest and also paid the said amount for the delay. Hence, it would not be open to them to state that these liabilities was not reflected in the books of accounts, any liability of the transferor company is fastened on the petitioner even under the scheme framed by the BIFR and therefore, they cannot feign ignorance and they are liable to pay the amount. The petitioner did not approach the Central Board of Trustees but they had only filed an appeal before the Tribunal under Section 7I of the EPF Act. It has already been held that the power under Section 7I is wider than the power under second proviso to 14B of the EPF Act. Even there the Appellate tribunal will have to exercise its appellate power only within the four corners of law. When the default had been committed before the transferor company became sick, the petitioner cannot plead the sickness of that company and the subsequent scheme of merger made by the BIFR."

6. The Division Bench of Madhya Pradesh High Court, in the case of Bharat Heavy Electricals Limited vs. Regional Provident Fund Commissioner, held on 07.08.1984 as follows:

"22. However, we are unable to agree with this submission as the impugned order does not indicate that without applying his mind or without taking the facts and circumstances into consideration the respondent has imposed the low of damages for which admittedly he had the jurisdiction. Therefore, the discretion exercised by him cannot be interfered with in a writ petition because the section makes it quite clear that where an employer makes default in as indicated in that section the Central Provident Fund common such other officer as may be authorised by the Central Government may recover from the employer such damages. The sentence is clear that the Central Provident Fund Commissioner or any other officer authorised by the Central Government can recover from the employer such damages not exceeding the amount of arrears as it may think fit to impose. Therefore, no interference with the quantum of imposition of damages is called for in exercise of the writ jurisdiction."

7. The learned counsel for the petitioner cited the judgment in the case of *Organo Chemical Industries vs. Union of India* reported in (1979) 4 Supreme Court Cases 573. Mr. V.R. Krishna Iyer and A.P. Sen, JJ while speaking for the Bench made an observation as follows:

"43. I am clearly of the view that 'damages', as imposed by Section 14-B, includes a punitive sum quantified according to the circumstances of the case. In 'exemplary damages' this aggravating element is prominent. Constitutionally speaking, such a penal levy included in damages is perfectly within the area of implied powers and the legislature may, while enforcing collections, legitimately and reasonably provide for recovery of additional sums in the shape of penalty so as to see that avoidance is obviated. Such a penal levy can take the form of damages because the reparation for the injury suffered by the default is more than the narrow computation of interest on the contribution.

8. Even as per judgment of the Hon'ble Supreme Court of India cited by the learned counsel for the petitioner, it is held that "damages, as imposed by Section 14B, includes a punitive sum quantified according to the circumstances of the case. In 'exemplary damages' this aggravating element is prominent. Constitutionally speaking, such a penal levy included in damages is perfectly within the area of implied powers and the legislature may, while enforcing collections, legitimately and reasonably provide for recovery of additional sums in the shape of penalty so as to see that avoidance is obviated. Such a penal levy can take the form of damages because the reparation for the injury suffered by the default is more than the narrow computation of interest on the contribution.

9. Thus the said provision of Section 14B of the Act has been well recognized by the Supreme Court of India by Hon'ble Justice Mr. V.R. Krishna Iyer. Even in respect of the subsequent cases, the quantum of damages are challenged by few employers mainly on the ground that there was no mens-rea on their part and therefore, the quantification of damages are to be considered by the Competent Authorities.

10. This Court is of the opinion that the contention deserves merit consideration as in the absence of any mens-rea and the quantum of compensation is to be considered by the Competent Authority, more specifically, by considering certain financial crisis, factual circumstances and other situations that the employer was not in a position to deposit the contribution within the time limit prescribed. Undoubtedly, for

the belated payment of contributions, interest is imposed. Thus, the department is calculating interest for the belated payments. Thus, the award of damages must be made reasonably, so as to ensure that the factual circumstances and the mensrea for not paying the contributions by the employer are taken into account. The only point to be considered is that quantum of damages imposed and not the damages itself. The department is empowered to impose damages and the said position is upheld by Supreme Court. Thus, the quantum of damages imposed alone is to be considered. In Section 14B of the Act, when the Statute contemplates "'may'", a discretionary power has been provided to ascertain the quantum of damages to be paid by defaulted employer. Under these circumstances, the facts and circumstances are to be taken into account for the purpose of arriving at the quantum of damages to be recovered from the defaulted employer under Section 14B of the Act.

11. The learned counsel for the second respondent solicited the attention of this Court with regard to the spirit of Regulation 32 A of Employees Provident Fund Scheme, 1952. The said provision reads as under:

"32 A. Recovery of damages for default in payment of any contribution.

(1) where an employer makes default in the payment of any contribution to the fund, or in the transfers of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 or in the payment of any charges payable under any other provisions of the Act or Scheme or under any of the conditions specified under section 17 of the Act Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty, damages at the rates given below:

(2)

Period of default arrears per annum)	Rate of damages (%) of
(a) Less than two months	: 5
(b) Two months and above but less than four months	: 10
(c) Four months and above but less than six months	: 15
(d) Six months and above	: 25"

12. Under the above regulation, maximum of damages to be imposed is contemplated. Thus, the scheme would be a guiding factor and the Authorities are bound to ascertain the mitigating factors and other criterias for the purpose of assessing the damages. Assessment of damages should not be made in an illogical or mechanical manner. Application of mind on the part of the Authorities Competent, while assessing the damages are highly warranted by invoking Rule 14B of the Act and the Authorities cannot impose damages including certain mitigating factors placed by the parties before the Authorities.

13. The power of waiver must be exercised cautiously. The discretionary power must be exercised based on logical reasonings and by applying the facts and circumstances as well as the relevancy. The waiver, if any granted, by the Authorities Competent must be in consonance with the whole scheme and the spirit of the Act itself. At no point of time, the Authorities should violate the purpose and object of the Act and they are bound to ensure that the waiver is to be granted without affecting the object sought to be achieved under the Act. The intention of the employers are also to be considered and if there is any intention on the part of the employer in evading the payment of contribution, then there is no option but to impose the maximum damages as contemplated under the Act.

14. The very object of the Act is to ensure the rights of the employees are protected, which is of paramount important. Thus, the Authorities must ensure that industrial peace as well as the industrial developments are consistently increased. The interest of both the employer as well as the employees are to be taken into account and a balancing approach is to be adopted, so as to ensure that the rights of the employees are protected and equally the interest of the industry and its developments are also protected. The balancing approach is necessary in the interest of all the concerned and therefore, the Authorities Competent also bound to implement the Constitutional perceptives in respect of protection of the rights of the employees as well as the interest of the industries and also the developments of our great Nation.

15. The judicial review under Article 226 of the Constitution of India in respect of assessing the quantum of damages are undoubtedly limited. The quantum of damages imposed by the Competent Authorities, if shockingly unfair or in violation of the object sought to be achieved under the provisions of the Act, then alone the power of judicial review can be exercised. Only on certain exceptional circumstances, where the High Court is able to identify the error apparently in quantifying the damages imposed by the Competent Authorities,

the power of judicial review can be exercised under Article 226 of the Constitution of India and not otherwise.

16. The High Court cannot in random reduce, modify or decide the quantum of damages to be imposed under Section 14B of the Act. However, while exercising the powers of judicial review, the High Court can test the manner in which such assessments were made, the logic behind the assessment and adherence of legal principles by the Competent Authorities and take a decision. Therefore, the language adopted in the Statute must be read as it is and different interpretation, so as to entertain the discretionary power is impermissible. Discretionary power, if at all required to be exercised then it must be based on certain sound principles and on rebuttable factors. Thus, the High Court cannot interfere with the quantum of damages in a routine manner. It is not as if, the High Court can modify or reduce the quantum of damages by extending any leniency or misplaced sympathy which would affect the very object sought under the Act.

17. However, the learned counsel for the second respondent states that the second respondent/ M/s.N.E.P.C.Tea Gardens Limited is a sick unit and facing financial crisis. Considering that factor, this Court is inclined to grant time by way of instalment for depositing damage amount. Accordingly, the second respondent is directed to pay the damages quantified by authorities for a sum of Rs.2,67,413/- & Rs.1,87,546/- in 5 equal instalments from 01.11.2019, if the second respondent commits any default in payment on monthly instalments then the petitioner is directed to initiate all further actions by following the procedures contemplated under the Acts and Rules.

18. Accordingly, both the writ petitions stand disposed of. No costs.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

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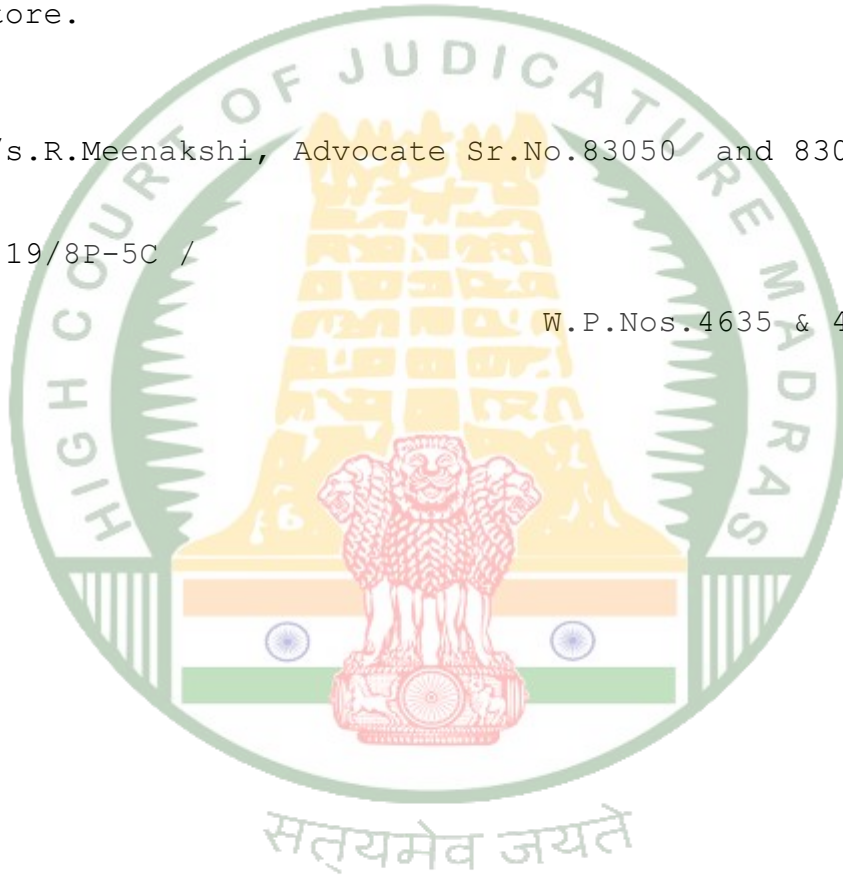
1.The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
Scope Minar Core - II,
4th Floor, Lakshmi Nagar,
New Delhi - 110 092.

2. The Assistant Provident Fund Commissioner,
Employees Provident Fund Organisation,
Dr.Balasundaran Road,
Coimbatore.

+2cc to M/s.R.Meenakshi, Advocate Sr.No.83050 and 83051

AKM/04.12.19/8P-5C /

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