IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 18-10-2019
Coram
THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM
W.P.No.6637 of 2014
And
M.P.No.1 of 2014

The Regional Provident Fund Commissioner,
Office of the Regional Provident Fund Commissioner,
Bhavishyanidhi Bhavan,
Dr.Balasundaram Road,
Coimbatore-641 018.
.. Petitioner

vs.

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

2.M/s.KICM (Madras) Ltd.,
Mushroom Factory,
Kaikatty Road,
Yelanahalli Post,
Ketti, The Nilgiris.
.. 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 first respondent dated 04.03.2013 in Ref.No.ATA No.89(13) 2012 and quash the order passed therein.

For Petitioner : Ms.R.Meenakshi

For Respondent-1 : Tribunal

For Respondent-2 : Mr.R.Babu

O R D E R

The present writ petition is filed by the Regional Provident Fund Commissioner, challenging the order passed by the first respondent dated 04.03.2013 in Ref.No.ATA No.89(13) 2012.

2. The learned counsel appearing on behalf of the writ petitioner states that the second respondent is an establishment covered under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and the claims framed thereunder.

3. On account of the default committed by the second respondent-establishment, the authorities competent initiated actions under the provisions of the Provident Fund Act and damages were quantified with reference to Section 14-B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 read with Para 32-A of the EPF Scheme 1952, which stipulates that the Central Provident Fund Commissioner or the Authorised Officer may recover by way of penalty such damages not exceeding the amount of arrears for any belated payment of contributions and administrative charges at the rate prescribed in Para 32-A of the EPF Scheme, 1952. The said order passed by the competent authority was challenged by the second respondent before the Employees Provident Fund Appellate Tribunal in ATA No.89(13) 2012.

4. The Tribunal allowed the claim by reducing the quantum of damages to 5%. The impugned order of the Tribunal states that it would be sufficient to penalise the appellant by directing to pay the 5% of the actual damages levied under the order passed by the competent authority. To arrive such a conclusion, the Tribunal made a finding that the delay in remittance of Provident Fund dues was not deliberate and therefore, it would not be appropriate to levy damages on the second respondent-Company.

5. This Court is of the considered opinion that the circumstances under which reduction of damages can be considered is well enumerated in the Section itself. Only in the event of establishing that the Company is declared as a sick company, then alone, the quantum of damages can be reduced or waived. Contrarily, by exercising the discretionary powers provided under the proviso clause, the Tribunal cannot reduce the damages based on certain factual aspects which may not be relevant or may not be true in some occasions. Even in such factual circumstances, the Tribunal has to follow the Section at the first instance which stipulates that the authorities competent are empowered to impose damages.

6. The proviso clause is provided to exercise the discretionary powers only on certain exceptional circumstances. In the event of excess exercise of proviso clause, the main spirit of proviso is defeated which is impermissible. The legal principles in this regard are already adjudicated by this Court

in WP No.4633 of 2012 dated 01.10.2019 and the relevant paragraphs 7, 8, 9, 10, 11, 12 and 13 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.
>
> 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.]
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> 9. In the present writ petition on hand, the 2nd respondent Spinning and Weaving Mills Limited is unable to establish that the company was sick and declared as a sick industry under the provisions of the Act. Only, if an application was moved by the 2nd respondent before the Board for Industrial and Financial Reconstruction (BIFR) to declare the company, the 2nd respondent may not be eligible for such a reduction of damages imposed by the competent authority under the provisions of the Employees Provident Fund Act. Therefore, it is not as if, a mere representation of a person should be considered for the purpose of reduction of the quantum of damages. Any such reduction with reference to the Proviso Clause to Section 14-B of the Act, must be done with sufficient reasoning, which is to be recorded in writing. Contrarily, the Tribunal cannot

adopt a mechanical approach of reducing the damages merely based on certain blanket statements. Unless there is an adequate proof to establish and there is a reason to believe that the company was declared as sick, then alone, such a discretionary power of reducing the power of damages can be exercised and not otherwise. The Proviso Clause undoubtedly provides power to Tribunal to reduce the damages. However, reduction must be done on exceptional circumstances, where any party filing an application, is able to establish that the reasons are genuine and accordingly, the discretionary power should be exercised by the Tribunal, so as to reduce the quantum of damages.

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.

12. This being the factum, in the present case on hand, the 2nd respondent Company has not produced any document to show that they were declared as sick union under the BIFR Act and therefore, reduction of damages is in violation of Section 14-B itself. The exercise of discretionary power by the Tribunal became excessive and under these circumstances, there is no reason whatsoever to reduce the damages imposed by the competent authority under the EPF Act.

13. The Tribunal hereafter should follow such guidelines, while exercising the power of discretion and mechanical reduction of damages cannot be adopted and therefore, this Court is inclined to upheld the order of damages passed by the competent authority. Consequently, the impugned order dated 03.08.2009 passed by the 1st respondent in ATA No.723(13)/2008 is quashed. The 2nd respondent is directed to pay the damages within a period of 12 weeks from the date of receipt of a copy of this order in 3 equal installments and the first installment will commence from 1st November 2019."

7. In respect of the present writ petition on hand, the second respondent-Company was not declared as a sick unit under the provisions of the BIFR. In the absence of any such declaration or establishing these factors before the Tribunal, the Tribunal cannot reduce the quantum of damages without any basis or based on certain facts which shall not be considered for the purpose of reduction of damages as such reduction would affect the very spirit of Section 14-B of the Act.

8. This being the factum, the second respondent-Company has to pay the damages as quantified by the competent authority under the Provident Fund Act. Thus, the order passed by the Tribunal in Ref.No.ATA No.89(13) 2012 is quashed.

9. In view of the fact that the amount of damages is about Rs.50,14,862/-, the learned counsel appearing on behalf of the writ petitioner made a submission that the second respondent-Company may be permitted to deposit by way of instalments considering the quantum of damages alone, the second respondent-Company is directed to pay the entire due amount by way of seven equal monthly instalments commencing from 1st November, 2019. In the event of any default, the writ petitioner-Organisation is at liberty to initiate all appropriate actions by following the procedures contemplated under the Act and the Rules.

10. With the above directions, the writ petition stands allowed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

Svn

To

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

2.The Regional Provident Fund Commissioner,
Office of the Regional Provident Fund Commissioner,
Bhavishyanidhi Bhavan,
Dr.Balasundaram Road,
Coimbatore-641 018.

+1cc to Ms.R.Meenakshi, Advocate sr.87554
+1cc to Mr.R.Babu, Advocate sr.87461

W.P.No.6637 of 2014

vgi(co)
nr 14/11/2019