



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 23.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.S. SUNDAR

W.P.(MD).No.933 of 2011
and M.P.(MD).No.1 of 2011

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The South India Mines and
Mineral Industries Ltd.,
rep. by its Executive Director,
Sri.R.Rajagopal,
No.315, Narayana Nagar,
Sankarnagar - 627 357,
Tirunelveli District.

.. Petitioner

Vs.

1.The Employees Provident Fund Appellate
Tribunal.
(Ministry of Labour & Employment)
Core II, 4th Floor, Laxmi Nagar District Centre,
Laxmi Nagar, Delhi Camp : Coimbatore.

2.The Regional Provident Fund Commissioner,
Employee's Provident Fund Organisation,
Sub-Regional Office,
Bhavishya Nidhi Bhawan,
NGO "B" Colony,
Tirunelveli - 627 007.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorarified Mandamus, calling for the records from the first respondent culminating the Order, dated 28.12.2010 bearing Ref. No.107/23/2008 and quash the same and direct them to waive the damages for the various periods of defaults in terms of Office Memorandum dated 29.05.1990.

For Petitioner : Mr.M.Aravind Subramaniam

For Respondents : Mr.K.Murali Sankar for R2
R1 - Dismissed as default on 15.03.2013

ORDER

This writ petition has been filed for issuance of writ of Certiorarified Mandamus to quash the impugned order of the first respondent, dated 28.12.2010, bearing Ref. No.107/23/2008 and direct them to waive the damages for the various periods of defaults in terms of Office Memorandum, dated 29.05.1990.



2.The brief facts that are necessary for the disposal of this writ petition are as follows:

The petitioner is a Limited company incorporated under the Companies Act, 1956. It is stated that the petitioner company carrying on business in the limestone for the past 50 years. It is stated that the petitioner's company initially had a tie-up arrangement with M/s. India Cements Ltd., for a period of 10 years from 01.10.1989 and that as per the agreement, M/s. India Cements Ltd., had guaranteed to lift 400 Tons of Limestone per day. It is further stated that the petitioner company employed more than 200 workers. Based on the agreement, though M/s. India Cements Ltd., promised to renew the agreement, after 1999, they had not renewed. Therefore, the petitioner company suffered a huge loss. Giving details about the loss incurred by the petitioner company from 2000, it is stated that the contributions payable to the Provident Fund authorities had not been remitted properly. During the period from 2000 to 2003, a sum of Rs.7,22,772/- was levied as damages under Section 14B of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (in short 'the Act') by order, dated 15.12.2003. Since the company could not remit the Employee's Provident Fund dues in time, due to financial crisis, it is stated that the petitioner filed an appeal challenging the levying of damages before the first respondent in ATA No.107 (13)/2008. The first respondent dismissed the appeal. Though it is recorded by the Appellate Tribunal that the contention of the petitioner was that the default was not intentional, but due to financial problem, the Tribunal is of the view that the financial ups and down is common future in every Industrial Establishment and the same is not a justifiable ground as held by the High Court of Orissa in **ESSKY Machinery Limited Vs. RPFC** reported in **1998 LLR 925**. The Tribunal also relied upon the judgment of Honourable Supreme Court in **Hindustan Times Limited Vs. United of India** reported in **1998 II (SCC) 242**. The Tribunal accepted the contention of petitioner that the delay was on account of financial crisis. From the affidavit, it is seen that the company started facing loss after it could not succeed in getting renewal of contract, it had with M/s. India Cements Ltd., before 1999. The loss according to the petitioner was not less than a Crore for every subsequent years from 2000. It is in the said circumstances, the petitioner contended that the non payment of contribution was not intentional.

3.The learned counsel for the petitioner further submitted that there was change in the internal Administration. It is further stated that new Management after assuming charge had mobilize funds to clear all the statutory dues and earnest efforts have been taken by the new management to settle all the dues. It is further stated that the liabilities towards interest in entirety had been settled before levying of damages under Section 14B of the Act. It is also admitted before this Court that the company has paid 25% of amount levied by way of damages pursuant to the interim order granted in



the writ appeal which was preferred by the petitioner as against the interim order granted by the learned Single Judge imposing 50% of the amount levied as a condition precedent for grant of interim stay.

4.The Honourable Division Bench of this Court in the case of **Regional Provident Fund Commissioner II, Employees' Provident Fund Organisation, Madurai and another vs Sree Visalam Chit Funds Limited, Palathur and another**, reported in **2010 (4) L.L.N.706**, Bench has held as follows:

"30.In our considered opinion, as we have already concluded, unless it is established that such failure to pay the contribution was attributable to the mens rea or actus reus on the part of the employer, question of levying damages under S.14B of the Act does not arise. It has been repeatedly held by Hon'ble Supreme Court that simply because the statutory provision enables an authority to impose penalty, it does not mean that such penalty should be imposed in a mechanical manner without looking into the attending circumstances and the facts as to whether there was any mens rea or actus reus on the part of the employer."

5.The position has been clarified by the Honourable Supreme Court in the case of **Employees' State Insurance Corporation vs H.M.T. Limited and another**, reported in **2008 (1) L.L.N.491**, with reference to Section 85(B) of Employees' State Insurance Act, 1948. Though the said judgment was with reference to the payment of levy of damages under Employees' State Insurance Act, 1948, having regard to the fact that provisions under the Employees' State Insurance Act, 1948 and Employees Provident Fund Act, are in *pari materia*, this Court is quiet justified in following the judgment of Honourable Supreme Court above referred to. The Honourable Supreme Court has held that existence of *mens rea* or *actus reus* to contravene a statutory provisions was held to be a necessary ingredient for levy of damages and/or the quantum thereof.

6.In the light of the judgments of the Honourable Supreme Court and the Honourable Division Bench of this Court, this Court is of the view that the order of Appellate Tribunal ignoring the financial position is not appropriate. As it has been held by the Honourable Supreme Court, *mens rea* or *actus reus* are necessary to invoke the power under Section 14B of the Act to levy damages. It is also admitted that a sum of Rs.1,80,693/- representing 25% of amount levied as damages was remitted on 28.03.2011.

7.However, considering the submission of the respondent that there was default in payment of Provident Fund and the damages could have been avoided by prompt payment of contributions after financial



crisis is over, this Court is inclined to dispose of the writ petition in the following direction.

a) The impugned order passed by the first respondent dated 28.12.2010 bearing Ref. No.107/23/2008 is set aside.

b) The order dated 15.12.2003, levying damages under Section 14B of the Employee's Provident Fund and Miscellaneous Provisions Act is set aside and the amount deposited by the petitioner namely 25% of the amount levied as damages under Section 14B of the Act shall be the liability of the petitioner under Section 14B in modification of the original order of levy as confirmed by the Appellate Tribunal by the impugned order.

c) The respondents are restrained from proceedings against the petitioner for the remaining amount pursuant to the impugned order.

Accordingly, this writ petition is disposed of with the aforesaid directions. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar ()

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Sub Assistant Registrar(CS)

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To

1.The Employees Provident Fund Appellate
Tribunal.
(Ministry of Labour & Employment)
Core II, 4th Floor, Laxmi Nagar District Centre,
Laxmi Nagar, Delhi Camp : Coimbatore.

2.The Regional Provident Fund Commissioner,
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Bhavishya Nidhi Bhawan,
NGO "B" Colony,
Tirunelveli - 627 007.

+1CC to M/s.M.ARAVIND SUBRAMANIAM, Advocate SR-94315.

+1CC to Mr.K.Murali Sankar, Advocate, SR.No.18245, dated:24.10.2019.

W.P. (MD) .No.933 of 2011

23.10.2019

CS (08.11.2019) 4P 5C