IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE T.RAJA
AND
THE HONOURABLE MR.JUSTICE V.SIVAGNANAM

W.A.NO.1286 OF 2013
AND
M.P.NO.1 OF 2013

The Assistant Provident Fund Commissioner,
Office of the Regional Provident
Fund Commissioner,
Bhavishya Nidhi Bhavan,
Dr.Balasundaram Road,
Coimbatore – 641 018.

... Appellant

.Vs.

1. M/s.Kongarar Textiles Ltd.,
   Krishnapuram, Madathukulam,
   Udumalpet-642113
   represented by Official Liquidator,
   High Court of Madras.

2. The Presiding Officer,
   Employees Provident Fund Appellate Tribunal,
   New Delhi - 110 092.

3. G.Venkataraman

4. M/s.Booma Realty Private Limited,
   Rep. by its Director P.K.Ganeshwar,
   No.21, Pollachi Road,
   Palladam - 641 664,
   Tirupur District.

5. Shri Ganesh Textiles
   Rep. by its Proprietor P.K.Ganeshkumar,
   No.21, Pollachi Road,
   Palladam - 641 664,
   Tirupur District.

... Respondents

PRAYER:-

Writ appeal filed under Clause 15 of the Letters Patent praying to allow the Writ Appeal by setting aside the order of the learned Single Judge made in W.P.No.15569 of 2012 dated 19.02.2013.

PRAYER IN W.P.NO.15569 OF 2012:-

Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari, to call for the records relating to the proceedings of the second respondent dated 09/02/2012 in Ref.No.ATA No.299(13)2011, 300(13)2011, 301(13)2011 & 302(13)2011 and quash the same.

For Appellant	:	Ms.R.Meenakshi
For R1	:	Mr.Kiran Manokaran (Official Liquidator)
For R2	:	Court
For R3	:	No appearance
For R4 & R5	:	Mr.B.Kumarasamy

JUDGMENT

(Judgment of the Court was pronounced by T.RAJA.J)

This Writ Appeal has been directed against the impugned order passed by the learned Single Judge in W.P.No.15569/2012 dated 19.02.2013 in and by which the learned Single Judge declined to entertain the plea of the appellant to cancel the order passed by the Employees' Provident Fund Appellate Tribunal, New Delhi, ordering reduction of damages to 10% for the reasons mentioned therein.

2. Learned Counsel appearing for the appellant-Assistant Provident Fund Commissioner vehemently contended that originally, the 4th respondent company, namely, M/s.Booma Realty Private Limited, Palladam, Tirupur, having purchased the sick company, namely, M/s.Kongarar Textiles Limited, Krishnapuram, Madathukulam, Udumalpet, the 1st respondent herein was liable to pay the provident fund contributions of the employees to the appellant that became due from 1999 till 2004. Since it became

a sick industry resultantly approached the BIFR. The BIFR also in its order dated 21.01.2004 accepting the sickness of the 1st respondent company declared the same as sick unit. Thereafter for its inability to clear the debts due to the creditors, the company was brought to the public auction for sale of the properties under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (hereinafter referred to as, 'the SARFAESI Act''). Finally, the properties of M/s.Kongarar Textiles Limited Textiles were sold on 30.03.2010. Three Sale Certificates dated 30.03.2010 were issued and the purchasers are respondents 4 and 5, namely, M/s.Booma Realty Private Limited and Shri Ganesh Textiles. Therefore, now the core issue raised before all the courts below and also before this Court was that when the subsequent purchasers respondents 4 and 5 jointly have paid the total contribution including the interest payable by the 1st respondent before it became sick whether the respondents 4 and 5 are also liable to pay the damages.

3. Learned Counsel for the appellant further contended that when the matter was taken up before the Provident Fund Appellate Tribunal in ATA Nos.299 (13)/2011, 300 (13)2011, 301(13) 2011 and 302 (13) 2011 finding fault with the officer conducting enquiry under Section 14(B) of the Act, the Tribunal held that the officer has not provided full opportunity to the respondents 4 and 5 to represent their case. On this basis, to meet the ends of justice, keeping in mind that the sick company 1st respondent herein was sold away and the same was purchased by the respondents 4 and 5 and that they have also paid the contribution along with interest, restricted the damages upto 10% p.a. on the arrears of contribution and accordingly allowed the appeal. This was questioned by the appellant-Assistant Provident Fund Commissioner before the learned Single Judge of this Court. The learned Single Judge going into the sole question whether the Tribunal has kept in mind the relevant facts into consideration before reducing the damages levied against the company, namely, M/s.Kongarar Textiles Limited, finally went into the vital aspect that the 1st respondent company after becoming sick was sold away in a public auction in which the respondents 4 and 5 have purchased the property and thereupon they have also cleared the contribution and also the interest. Therefore, when the 1st respondent company became sick unit, this has also been accepted by the BIFR and subsequently, the Provident Fund Appellate Tribunal has also found that the 1st respondent company became sick and the properties and machineries have been sold away and purchased by the respondents 4 and 5, giving the benefit of the Sick Industries Act, has reduced the damages upto 10%. Agreeing with the findings recorded by the learned Provident Fund Appellate Tribunal, the

learned Single Judge dismissed the Writ Petition against which the present appeal has been filed.

4. Learned Counsel for the appellant taking us to Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and 32-A and 32-B of the Employees' Provident Fund Scheme, 1953, attempted to demonstrate that the Provident Fund Tribunal has no authority to reduce the damages to 10% p.a. On the other hand, the Central Board alone has got authority to reduce or waive the damages levied under section 14-B of the Act in relation to an establishment specified in the second proviso to section 14-B subject to the terms and conditions specified in Section 32-B of the Act.

5. Opposing the above, learned Counsel for the respondents 4 and 5 submitted that when the 1st respondent herein has been declared as a sick unit by the BIFR and finally, expressed their inability to clear the contribution and other liabilities, their properties were also sold away in the public auction held on 30.03.2010, hence, the 1st respondent is entitled to get the benefit of the Sick Act. This has been rightly appreciated by the Provident Fund Tribunal as well as by the learned Single Judge of this Court. Moreover, if the 1st respondent company has not been purchased by the respondents 4 and 5, the appellant would not have even received the amount of contribution and interest.

6. Learned Counsel for the respondents 4 and 5 further submitted that in the present case for the reason that the sick company was purchased by the respondents 4 and 5, they have genuinely come forward to clear the total contribution including the interest. Keeping in mind these vital and crucial aspects both the learned Provident Fund Appellate Tribunal and the learned Single Judge have held concurrently that only 10% reduction also need not be borne by the respondents 4 and 5 as the 1st respondent company had become sick, he pleaded.

7. In this regard, it is relevant to extract the said Sections here under:

''[14-B. Power 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 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 provision of this Act or of [any scheme or Insurance scheme] or under any of the conditions specified under Section 17, [the 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 such damages, not exceeding the amount of arrears, as may be specified in the scheme]:

[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:]

[Provided further 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 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.]

[32-A. Recovery of damages for default in payment of any contribution :[(1) Where a employer makes default in the payment of any contribution to the Fund, or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 of the Act or in the payment of any charges payable under any other provisions of the Act or the Scheme or under any of the conditions specified under Section 17 of the Act, the Central Provident Fund Commissioner or such 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 in the table below:

TABLE

Sl. No.	Period of default	Rate of damages (percentage of arrears per annum)
(1)	(2)	(3)
(a)	Less than 2 months	Five
(b)	Two months and above but less than four months	Ten
©	Four months and above but less than six months	Fifteen
(d)	Six months and above	Twenty Five]

(2) The damages shall be calculated to the nearest rupees, 50 paise or more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignore.

32-B Terms and Conditions for reduction or waiver of damages: The Central Board may reduce or waive the damages levied under section 14-B of the Act in relation to an establishment specified in the second proviso to section 14-B, subject to the following terms and conditions, namely,-

(a) in case of a change of management including transfer of the undertaking to workers' co-operative and in case of merger or amalgamation of the sick industrial company with any other industrial company, complete waiver of damages may be allowed;

(b) in cases, where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its Scheme, in this behalf recommends, waiver of damages up to 100 per cent may be allowed;

(c) in other cases, depending on merits, reduction of damages up to 50 per cent may be allowed.]''

8. We are in full agreement with the submissions made by the learned Counsel for the respondents 4 and 5. The reason being that it is an admitted case that the 1st respondent company who was liable to pay the provident fund contribution had committed default for the reason that it went into a huge loss and ultimately landed before the BIFR. When the BIFR having seized of the matter, went into the aspects whether the 1st respondent has really suffered any sickness and after considering the pros and cons of the case of the 1st respondent and the appellant, in its order dated 21.01.2004 has held that the 1st respondent is a sick unit, resultantly its properties were also brought to public auction and the respondents 4 and 5 purchased the properties and they have also cleared the total contribution along with interest. Therefore, the learned Employees' Provident Fund Appellate Tribunal, considering the fact that the sick unit has disappeared and the respondents 4 and 5, the subsequent purchasers have paid the entire contribution along with interest, has rightly reduced the damages to 10% p.a., as there is no mens rea or willful default, in dismissing the appeal filed by the 3rd respondent cannot be found fault with. Hence, we do not find any illegality or infirmity in the order of the learned Single Judge.

9. In the result, the Writ Appeal fails and the same is accordingly dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

tsi

Sd/-
07/09/2021

"FOR BEING MENTIONED"

This Writ Appeal having been listed on Wednesday, The Twenty Seventh Day of October, Two Thousand and Twenty One (27/10/2021), under the caption for being mentioned, inpursuance of the earlier order of this Court, dated 05/07/2021, and made herein in the presence of Ms.R.Meenakshi, Advocate for the Appellant, and of Mr.Kiran Manokaran, Official Liquidator for first Respondent and of Mr.B.Kumarasamy, Advocate for the fourth and fifth Respondents and None Appeared either in Person or by Advocate for the third Respondent, and this Court made the following Order:-

(Order of the Court was made by T.RAJA,J.)

At the instance of the learned counsel appearing for the respondents 4 & 5, the matter has been taken up under the caption 'for being mentioned'.

2. Mr.B.Kumarasamy, learned counsel appearing for the respondents 4 & 5 submitted that when the Employees' Provident Fund Appellate Tribunal in its order dated 4.4.2013 passed in ATA Nos.299(13)2011 to 302(13)2011 has modified and restricted the damages to 10% of the actual damages, instead of 10% per annum assessed under the order impugned dated 9.2.2012, this Court, while disposing of the appeal, confirming the impugned order passed by the learned single Judge, in the penultimate paragraph-8, has observed that the respondents 4 & 5 have to pay damages at 10% per annum, instead of 10% of actual damages. Therefore, learned counsel appearing for the respondents 4 & 5 requested this Court to clarify the same.

3. Objecting to the same, Ms.R.Meenakshi, learned standing counsel appearing for the appellant placed before us two submissions. Firstly, when the Employees' Provident Fund Appellate Tribunal, in its order dated 9.2.2012, directed the sick company to pay damages at 10% per annum, that order was confirmed by the learned single Judge in the order dated 19.2.2013 passed in W.P.No.15569 of 2012. Secondly, when the order dated 9.2.2012 has been confirmed by the learned single Judge vide the order dated 19.2.2013 passed in the above writ petition, on a modification application moved by the respondents 4 & 5, the Employees' Provident Fund Appellate Tribunal, cannot once again restrict the same to 10% of the actual damages assessed under the order impugned, by the order dated 4.4.2013.

4. But we are unable to find any merit on her contentions. The reason being that once the Employees' Provident Fund Appellate Tribunal passed an order dated 9.2.2012 directing the sick company to pay damages at 10% per annum, this order has

been modified by the Employees' Provident Fund Appellate Tribunal in ATA Nos.299(13)2011 to 302(13)2011 vide order dated 4.4.2013 at the instance of the respondents 4 & 5. The appellant has also not questioned the order dated 4.4.2013 passed by the Employees' Provident Fund Appellate Tribunal. Even the learned single Judge also, in his order dated 19.2.2013, while dismissing the Writ Petition No.15569 of 2012, has observed clearly that no case has been made out to interfere with the order passed by the Tribunal in reducing the damages to 10%. Therefore, the appellant is entitled to collect only 10% of Rs.87,65,805/- of the actual damages from the respondents 4 & 5, as per the order dated 4.4.2013 passed by the Employees Provident Fund Appellate Tribunal in ATA Nos.299(13)2011 to 302 (13)2011, and the penultimate paragraph-8 of the order dated 5.7.2021 shall be read accordingly.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

1. The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
New Delhi - 110 092.

2. The Assistant Provident Fund Commissioner,
Office of the Regional Provident
Fund Commissioner,
Bhavishya Nidhi Bhavan,
Dr.Balasundaram Road,
Coimbatore – 641 018.

+1cc to Mr.R.Manokaran, Advocate, S.R.No.55983
+1cc to Mr.K.Murthy, Advocate, S.R.No.31661
+1cc to M/s.R.Meenakshi, Advocate, S.R.No.56034
+1cc to Mr.S.R.Sundar, Advocate, S.R.No.56138

W.A.NO.1286 OF 2013 AND
M.P.NO.1 OF 2013

RSV(CO)
PM/13/09/2021
PVS(CO)
PBS/24/11/2021