BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 12.10.2022

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THE HONOURABLE MRS.JUSTICE **S.SRIMATHY**

W.P.(MD)No.1300 of 2013
and
M.P(MD)Nos.1 & 2 of 2013

The Regional Provident Fund Commissioner,
Employees Provident Fund Organization,
Regional Office,
No.1, Lady Doak College Road,
Chokkukulam, Madurai – 625 002. ... Petitioner

vs.

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

2. M/s.Bojaraj Textile Mills Limited,
represented by its Director,
Registered Office,
M/s.Silakakshimi Mills Premises,
Madurai – 625 006. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of ***Certiorari***, calling for the records relating to the impugned order bearing No.ATA No.447 (13) 2006 dated 03.03.2009 issued by the 1st respondent and quash the same.

For Petitioner	: M/s.K.Murali Sankar
R-1	: Tribunal
For R-2	: Mr.C.Karthikeyan

ORDER

This Writ Petition is filed by the petitioner for issuing ***Writ of Certiorari*** to quash the impugned order, dated 03.03.2009, bearing No.ATA No.447 (13) 2006, issued by the 1st respondent.

2. The 2nd respondent is an establishment, covered under the Employees Provident Fund Act, with Code No.TN/MD/4831. The 2nd respondent did not remit Employees Provident Fund contribution for the period from November 2003 to April 2004, within due dates and committed default. A notice was issued and personal hearing was also granted on 06.07.2006 and 26.07.2006. The 2nd respondent has also appeared for hearing and submitted that the

information furnished in the statement made available by the EPF Organization authority was incorrect. Moreover, the EPF authority had levied heavy damages for the belated payment and the second respondent was directed to remit a sum of Rs.9,62,402/-towards damages, vide order bearing No.TN/RO/MDU/4831/14B/ 1299/PDC(1) 2006, dated 27.07.2006. Aggrieved the same, the 2nd respondent had preferred an appeal before the Tribunal. The Tribunal, vide order, dated 03.03.2009, held that the petitioner's organization had not followed the law, while levying damages and the damages levied by the authority were restricted to 10% per annum of the arrears of the contribution payable by the second respondent and disposed of the appeal.

3. Heard M/s.K.Murali Sankar, learned counsel appearing for the petitioner and Mr.C.Karthikeyan, learned counsel appearing for the second respondent. Perused the material documents available on record.

4. The contention of the petitioner's organization is that the Tribunal has not followed the principles of natural justice, before passing the impugned

order. The reasons set out in the impugned are is incorrect, since the Tribunal assumed that Section 14(B) of the Employees Provident Fund Act, conferred discretionary powers on the authority. An amendment was made in the year 1991 and material changes were made in the statutory provisions and that was not taken into account by the Tribunal. Similarly, the tribunal has failed to note that the revision in the rate of damages came into effect only from 26.09.2008, whereas the present case pertains to an earlier period. The Tribunal has also erred in holding that, Section 32 A of the Employees Provident Fund Scheme, is only a guideline. The EPF authority has passed a speaking order and the same was not considered by the Tribunal. For the aforesaid reasons, the organization has filed this Writ Petition.

5. The learned counsel appearing for the EPF further submitted that the provisions had not stated that EPF authorities have discretionary power to reduce or waive the penalty. The organization has power to levy damages under Section 14(B) of the Act and para 32-A of the Scheme. The authority to wavier and reduce damages is conferred only to the Central Board. If at all, the 2nd

respondent is seeking any reduction, the second respondent ought to approach the Central Board. He further submitted that the Tribunal is not having any discretionary power and the Tribunal is bound by the Employees Provident Fund Act as well as Employees Provident Fund Scheme. Therefore, the petitioner submitted that the reduction granted by the Tribunal is outside the scope of the Employees Provident Fund Act. Hence, the impugned order is an illegal. Even, if the Tribunal is exercising the power of discretion, it cannot reduce 50% as stated in paragraph 32(B) of the Employees Provident Fund Scheme. Hence, the petitioner prays to allow this Writ Petition.

6. The learned counsel appearing for the respondents submitted that the power conferred under Section 14-B of the Employees Provident Fund Act, is a discretionary power and the Commissioner is one of the notified Officers by the Central Government. The provision he “may” recover such damages not exceeding the amount of arrears, which would clearly indicate there is scope for exercising discretionary power. The learned counsel further submitted that the Central Board may grant waiver or reduce, wherever the establishment is under

Board of Industrial and Financial Reconstruction (BIFR) proceedings and such other terms and conditions as may be specified in the scheme under para 32-A. It is also stated that if there is change of management or sick industries 100% waiver can be granted and in any other case upto 50% may be allowed. Hence there is always a scope for reduction or waiver, the Tribunal has rightly exercised the power and prayed to dismiss the writ petition.

7. The learned counsel appearing for the second respondent further submitted that under Section 7A there is no scope for any discretionary power. Since the word is used that "*the employer* ***shall*** *pay the amount*". If the employer is committing any default, proceedings would be initiated under Section 7Q of the Employees Provident Fund Act, the employer shall be liable to pay simple interest. Since the word '*shall*' is used for the EPF payment as well as the interest, it is a mandatory provision. However, as far as the damages under Section 14(B) is concerned, it is deterrent provision and the power of discretion granted as stated supra. The Learned Counsel further submitted that the Commissioner himself has issued circular on 29.05.1990 and it has instructed the authorities to

give detailed reasons if damages are imposed at lower rate. The relevant portion of the circular is extracted hereunder:

1. Levy of damages for belated payments.

"With the amendment to the Act providing for payment of simple interest at 12% per annum (section 7Q) payable from the date of amount has become due till the date it is actually paid, the Central Board of Trustees has approved the following revised rates of damages with condition that the position with regard to the incidence of default following the revision of the rates of damages would be analysed after six months from the date of new rates come into force:

S. No.	*Period of delay*	*Interest under section 7Q*	*Revised rate of Damages*	*Total*
1	*2 months or less*	*12*	*5*	*17*
2	*Over 2 months but less than 4 months*	*12*	*10*	*22*
3	*Over 4 months but less than 6 months*	*12*	*15*	*27*
4	*Over 6 months*	*12*	*25*	*37*

2.The levy of damages at the above rates may be subject to the following conditions:

a. the grace period of five days allowed for payment of the dues shall continue to apply. However, any payment *made by the employer after the expiry of the due date (which includes the grace period) for whatever reason including bank holiday, shall attract the damages.*

b. The Regional Provident Fund Commissioners will have to consider judicially all the relevant facts and circumstances of each case of default and pass formal speaking order for levy of damages keeping in view of the rates of damages specified in the scheme. ***However, where it is decided to impose damages at a lower rate, detailed reasons will have to be given in the speaking order itself for imposing damages at a lower rate****.*

3.The revised rates are applicable in respect of all defaults arising on and after 01.06.1990. All other procedure on the subject enunciated in earlier letter particularly those relating to affording a reasonable opportunity to the employees being heard before final order are passed, restricting the number of adjournment to not more than three, avoiding long adjournments, passing a reasoned speaking order and delivering the order on the date on which the hearing is concluded remain unchanged and these instructions should be scrupulously followed.

Procedure for levy of damages

....

(c)Thereafter the grounds, if any, not levying damages or levying damages at the reduced rates, as the case may be should be examined thoroughly with reference to the facts, the reply of the employer and personal submissions.

(d)In case it is found the reason adduced by him are sufficient to justify non levy of damages or levy at reduced rates, orders as deemed fit may be passed and communicated. There would be hardly arise an occasion for not levying damages and discretion to reduce penal damages should be used sparingly in cases of genuine hardship. In every such case, however, a copy of the order should be forwarded to the Central Office, simultaneously. This circular is binding on the Employees Provident Fund Organization.

8. Based on the aforesaid circular the authorities are having power of discretion and the same ought to be exercised judiciously and sparingly in genuine cases. Therefore the 2nd respondent prayed to dismiss the writ petition.

9. After hearing the rival submissions, this Court is of the considered opinion that the Employees Provident Fund Act under section 14-B as well as the under para 32-A of the scheme describes damages only for deterrent purpose and hence it is not mandatory. Even the slab indicates that “range of damages” is fixed i.e. from 1 to 5%, 5 to 10%, 10 to 15% and 15 to 25%. This would indicate that there is a provision for discretion under the Act and the scheme itself.

10. Under section 14-B read with para 32-A and 32-B, the Central Board has power to grant waiver or reduce, wherever the establishment is under Board of Industrial and Financial Reconstruction (BIFR) proceedings and or change of management 100% waiver can be granted and in any other case upto 50% may be granted. This would indicate that there is provision for discretion to grant 100% waiver in genuine, deserving cases and 50% wavier in other cases wherever hardship is claimed by the employer.

11. The Circular issued by the Commissioner of the EPF Organisation would indicate that the authorities were granted power to reduce or waive but only condition is to record the reasons and such orders would be scrutinized by the higher authorities. Because of this condition the lower authorities were not inclined to take risk which would invite the wrath of the higher officials.

12. The submission of the EPF organisation that the Tribunal itself is not having discretionary power can never be accepted. The Tribunal is created by the Act and under section 7D it has been stated as under:

> *7D. Tribunal.—The Industrial Tribunal constituted by the Central Government under sub-section (1) of section 7A of the Industrial Disputes Act, 1947 shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Tribunal for the purposes of this Act and* ***the said Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act****. (inserted by Act 7 of 2017, s. 159, for section 7D (w.e.f. 26-5-2017).*

The Tribunal was created under the Act for effective implementation of the Act. In the Act, Scheme and Circular, the authorities were granted power of discretion as held in the earlier paragraphs of this order. In such circumstances, the Tribunal is also having power to exercise *"discretion"*.

13. Therefore, this Court is of the considered opinion that, by exercising the discretionary power, the tribunal has reduced the damages to 10% is legally sustainable in law. The 2nd respondent has also paid the damages at 10%.

14. Accordingly, this Writ Petition is dismissed. The impugned order, bearing No.ATA No.447 (13) 2006, dated 03.03.2009 issued by the 1st respondent is confirmed. No Costs. Consequently, connected miscellaneous petitions are closed.

Index : Yes / No **12.10.2022**
Internet : Yes
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S.SRIMATHY, J

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