BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.10.2022

CORAM

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

W.P.(MD)No.3154 of 2013
and
M.P.(MD)No.2 of 2013

The Regional Provident Fund Commissioner,
Employees Provident Fund Organization,
Regional Office,
No.1, Lady Doak College Road,
Chokkikulam, 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.Bhavadharani Match Industries,
New No.471, Old No.83,
Kamaraj Road,
Sivakasi, Tamil Nadu-626 123. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, to call for the records relating to the impugned order bearing No.ATA No.77 (13) 2004, dated 19.03.2010, issued by the 1st respondent and to quash the same.

For Petitioner	: Mr.Anwar Sameen
R1	: Tribunal
For R2	: Mr.C.Karthikeyan

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O R D E R

This writ petition is filed for issuance of a writ of Certiorari, to quash the impugned order, dated 19.03.2010 passed by the 1st respondent.

2. Heard Mr.Anwar Sameen, learned Counsel appearing for the petitioner and Mr.C.Karthikeyan, learned Counsel appearing for the 2nd respondent and perused the records.

3. The brief facts of the case are that the 2nd respondent is an establishment covered under the Employees' Provident Fund and Miscellaneous Provisions Act,

1952. The 2nd respondent had belatedly remitted the provident fund which was deducted from the hard-earned wages of the employees of the period 04/1997, 06/97, 10/97, 3/98, 5/98 to 12/99, 4/2000 to 05/2000 and 7/2000. Therefore, the authority levied the penal damages to the tune of Rs.1,02,212/- on 13.01.2004 under Sec. 14-B of the Act. The petitioner had intimated the frequency of default, period of default, amount of default and also damages proposed to be imposed by issuing notice dated 14.07.2003. The 2nd respondent was directed to express his willingness to avail opportunity of being heard either in person or through representative but the 2nd respondent did not opt for personal hearing. The authority after having waited for 6 months had come to the conclusion that the 2nd respondent had admitted the delay in remittances of P.F. dues and hence, levied the statutory rates of penal damages vide proceedings, dated 13.01.2004. Aggrieved by the levy of damages, the second respondent preferred an appeal before the first respondent Tribunal. The Tribunal, vide order, dated 19.03.2010, remanded the matter to the EPFO authorities with a direction to assess the penalty and interest as per the circular, dated 29.05.1990. Aggrieved over the said order, the petitioner organization has preferred this writ petition.

4. The learned Counsel appearing for the 2nd respondent relied on the amendment of the Act and submitted that the Tribunal is absolutely right in remitting the matter to consider the claim of the 2nd respondent based on circular, dated 29.05.1990. The circular has clearly stated that the authority has the power to reduce the penal interest or waive the penal interest. Since the authority has not exercised his power, the Tribunal has remitted the matter to consider and pass orders. Hence, the 2nd respondent prayed to dismiss the writ petition.

5. The contention of the petitioner organization is that the Tribunal having decided to remit the case to the authorities, ought not to have issued a positive direction to assess the penalty and interest, as per the circular, dated 29.05.1990, since the circular is not in force after the subsequent amendment. The Act was amended with effect from 01.09.1999, wherein paragraph 32(a) of the EPF Act, 1952 is inserted with a chart to levy damages ranging from 12% to 37% apart

from the interest at the rate of 12%. The circular cannot override the scheme of the provisions. The impugned proceeding was issued after the amendment. Hence, the authority levied the damages, as per the scheme. Moreover, the period of default is after the amendment. These factors were not taken into account, while passing the impugned order. The Tribunal has held in the same order that the circular issued by the Department is a guideline required to be followed by the Officer of the Department, but it cannot supplement the statute. The authorities have set out a clear convincing reason for imposition of the levy of damages. Since there was delay for more than three years in making the remittance, such a huge delay of more than three years warrants levy of damages in higher side. Hence, the establishment is bound to remit 12% interest which is statutory. Therefore, the direction of the Tribunal to assess the penalty and interest as per the circular, dated 29.05.1990 is contrary to the provisions. The learned Counsel appearing for the petitioner further submitted that it is the case of the misappropriation because deduction have been made from the wages of the employees but have not been remitted to the Provident Fund Account. Labour unrest is not a justifiable ground and the proceedings under Section 14B is not barred by limitation. The Tribunal has not assigned any convincing reason for directing to assess the penalty as per the circular, dated 29.05.1990. Moreover, the plea of the financial crisis was rejected by the Honourable Supreme Court in the case of ***M/s.Organo Chemicals Vs. Union of India and others*** and in ***Arvind Mills Limited Vs. R.M.Gandhi***. The very object of levying damages is to deterrent, which will ensure that the PF funds does not suffer depletion on account of the default committed by the erring establishments. There is a delay in remittance of 7A contribution, interest payable under Section 7(Q) of the Act and the authorities can also levy damages under Section 14 B. In the present case, the Tribunal has clubbed both interest payable and levy of damages. Such clubbing is not permissible in law. The interest under Section 7(Q) is not appealable before any forum and the Tribunal has no jurisdiction to hear the plea in interest payable by the establishment as it is not provided under Section 7(I) of the Act. Hence, the clubbing of damages and the interest is bad in law. Under Para 32B(b) of Employees' Provident Fund Scheme, 1952, if the establishment comes under sick unit, the Board has power to waive or reduce the damages and the Tribunal has no jurisdiction. The 2nd respondent establishment is not a sick unit and there is no such sanctioned rehabilitation scheme by BIFR. Seeing from any angles, the petitioner submitted that the 2nd respondent is not entitled to any waiver at all. Therefore, the petitioner claims that remitting the case back to the authorities to consider the case as per the circular, dated 29.05.1990, is illegal.

6. After considering the rival submissions, this Court has given its anxious consideration. The Commissioner PF had issued circular dated 29.05.1990, wherein guidelines are issued to consider for levying damages. 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 analyzed 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.

2) Procedure for levy of damages

(a)
(b)
(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."

7. On perusal of the provisions of the Act and the Scheme it is seen that the

provisions were introduced on various periods and the same is narrated hereunder:

- **Section 14-B. Power to recover damages** – This provision was enacted in 1953, in order to impose some punishment for contravention of the provisions of the Act. The authorities may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the scheme. The Central Board may reduce or waive the damages levied under this section if the unit is declared sick under BIFR.

- **Sections 7-Q. Interest payable by the employer** – This provision was enacted along with sections 7-B to 7-Q with effect from 01.07.1997 and the section 7-Q was introduced to levy interest. The interest shall be levied at 12% per annum.

- **Para 32-A. Recovery of damages for default in payment of any contribution** – was enacted under the scheme on 16.08.1991 with effect from 01.09.1991. From 1991 until 1997 the rate of damages was 17%, 22%, 27% and 37%. However, after levy of interest under 7Q from 1997 the rate was changed as 5%, 10%, 15% and 25%. And the interest was levied separately at 12%. This would be evident from the contents of the Circular which was issued by the Commissioner.

8. The period of levy of interest as well as damages can be separated into three parts and the following tabulation would be ready reference:

(i). First from 01.09.1991 to 01.07.1997, where only damages are leviable.

(ii). Second from 01.07.1997 to 26.09.2008 where both damages and interest merged and leviable, but based on the Circular the damages may be reduced.

(iii). Third from 26.09.2008 till date where both damages and interest levied separately and based on provisions damages may be reduced.

In the present case the period is from 04/1997, 06/97 which falls within the first period, where damages are leviable and the rates applicable are 17%, 22%, 27% and 37%. From 10/97, 3/98, 5/98 to 12/99, 4/2000 to 05/2000 and 7/2000 falls with second period, where both damages and interest merged and leviable, but based on the Circular the damages may be reduced and the rates applicable are 5%, 10%, 15% and 25% and interest at 12%. In both the cases the PF organisation had power to reduce the rate of damages if the establishment had stated reasons to consider for reduction of rates. The circular also states that the authorities should consider the case judicially by considering all relevant facts and circumstances of each case of default and pass a speaking order. It is also stated if it was decided to impose damages at a lower rate, detailed reasons ought to be given by the authorities. In the subsequent paragraphs of the aforesaid circular also states, if the reply from the defaulted establishments does not show sufficient reasons to reduce the amount and order levying damages as prescribed may be issued. The damages must always be levied by a well-reasoned speaking order. Therefore, the circular, dated 29.05.1990, confer ample power to the authorities to reduce or waive damages. The only condition imposed is that the authorities should pass a well-reasoned speaking order, if they are intending to reduce the rate of damages or waive damages.

9. Therefore, this Court is of the considered opinion that the Circular has issued clear instructions and authorities are empowered to pass orders either reducing it or waiving damages, but cannot pass orders mechanically, the authorities should state reasons for waiving. Without adhering to the guidelines issued under the circular, the authorities are passing order for damages by imposing 37% or 49% for all the cases. The authorities have power to scrutinize the evidence and if real hardship is shown, the authorities are bound to pass an

order reducing the damages. In the present case the EPF payment and the interest levied on the belated payment are already paid to the employees. The establishment has challenged the damages alone. Even according to the EPF organization damages are levied for deterring the establishment for strict compliance. In such circumstances, the damages cannot be levied automatically which should be based on the evidence and well-reasoned order.

10. Therefore, this Court is of the considered opinion that the plea of the PF organization that they are entitled to levy over and above 37%, i.e., 49% can never be accepted. The Tribunal is right in remitting back the case to the PF organization to levy appropriate damages. Therefore, this Court is inclined to remit the case back to the petitioner for imposing damages, but the period for imposition is old and this is prolonged litigation, hence in order to give quietus to the issue, following directions are issued:

(i) In the present case for the period from 04/1997, 06/97, since interest cannot be levied for this period, by taking into consideration of financial difficulties this Court is directing the PF organization to levy 25% as damages.

(ii). As far as for the period from 10/97, 3/98, 5/98 to 12/99, 4/2000 to 05/2000 and 7/2000, since interest is already levied, by taking into consideration of financial difficulties this Court is directing the PF organization to levy 15% as damages.

11. For the above said reasons, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Index : Yes / No **13.10.2022**
Internet : Yes

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Note: Issue order copy on ***21.11.2023.***

S.SRIMATHY, J

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W.P.(MD)No.3154 of 2013

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