BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **26.09.2022**

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THE HON'BL MRS.JUSTICE S.SRIMATHY

W.P.(MD)No.5827 of 2014
and
M.P.(MD)No.1 of 2014

The Assistant Provident Fund Commissioner,
Employees Provident Fund Organization,
Sub-Regional Office,
Bhavisha Nidhi Bhawan,
NGO "B" Colony, Perumalpuram P.O.,
Tirunelveli. ... Petitioner

Vs.

1. The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
Scope Minor, Core II, 4th Floor,
Lakshmi Nagar District Centre,
Lakshmi Nagar, New Delhi.

2. M/S.ABCOY,
represented by its Managing Partner,
Ms. Radhika Raman,
Abcoy Gardens,
Sankar Nagar – 627 357,
Tirunelveli District. ... Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, to call for the records relating to the order passed by the first respondent in A.T.A. No. 431 (13) 2009, dated 16.03.2010 and quash the same.

For Petitioner	: Mr.K.Murali Sankar
For R1	: Tribunal
For R2	: Mr.M.Aravind Subramaniam

ORDER

This Writ Petition is filed by the Assistant Provident Fund Commissioner for issuance of Writ of Certiorari, to quash the order passed by the first respondent Tribunal in A.T.A.431 (13) 2009, dated 16.03.2010.

2. The brief facts of the case as stated in the affidavit is that the second respondent firm is an establishment coming under the purview of the provisions of the Employees Provident Fund & Miscellaneous

Provisions Act, 1952 and bearing the code number TV/8708. The contention of the petitioner is that the respondent establishment is habitual defaulter and had remitted the dues for the period from March 2000 to February 2004 belatedly. Hence, action was initiated under Section 7Q for levy of interest and Section 14-B for levy of damages and granted opportunity to the employer and thereafter interest of Rs. 1,45,283/- and damages of Rs.4,33,059/- was levied for the said period, vide proceedings, dated 17.11.2006. Aggrieved over the same, the establishment has filed a writ petition in W.P.(MD)Nos.1646 and 1647 of 2007, alleging that the impugned orders were non-est in the eye of law as the same are non-speaking orders. On 18.12.2008 the Hon'ble Court had set aside and remitted the matter back to the EPF Organization for fresh consideration and directed to grant sufficient opportunity to the establishment.

3. The Assistant Provident Fund Commissioner fixed the date of hearing on 18.02.2009 and the respondent was directed to submit detailed statement of delayed remittances, but the hearing was adjourned

to several dates. After considering the submissions, the EPF organization had passed a speaking order, dated 09.04.2009, levying the same amount for the said period. Aggrieved over the same, the establishment has preferred an appeal before the first respondent Tribunal in A.T.A.No.431 (13)2009 and on 16.03.2010 the first respondent Tribunal, remanded the matter back with the direction to calculate penalty at 37% (inclusive of interest) and to adjust the payment already made. The establishment was directed to appeal before the EPF authority within 2 months of the order and submit his case, failing which the EPF authority may decide the case as per law. The establishment has remitted a sum of Rs.2,50,000/- as per the Interim Order, dated 27.02.2007, of this Court and balance outstanding amount is Rs.1,83,059/-. Further, the second respondent is liable to pay interest under Section 7Q amounting to Rs.1,45,283/-. The EPF authority had submitted that the authorities had given sufficient opportunity to the establishment and passed speaking order. However, the said order was not considered by the Tribunal. Aggrieved over the same, the present writ petition has been filed.

4. The second respondent establishment had filed a counter affidavit stating that the second respondent is a Partnership Firm started in the year 1968 for hiring out Earth Moving equipment like Bulldozer, Excavators and Tippers. The Firm has undertaken several contracts in various States of India for earth moving work. However, the Firm became sick and subsequently, the operations dwindled and at present, there are only two equipment in operation. There are 8 workers in the employment of the Firm. The Firm undertook some mining activity for quarrying lime stones and selling to local buyers, since the said activity was discontinued and no dues are pending as on today. The second respondent has also stated that for the past 5 years, the Firm has sustained loss.

5. The petitioner has also relied on the earlier orders passed by the High Court in W.P.(MD)Nos.1646 of 2006 and 1647 of 2006, wherein it has directed the authority to carry out the Assessment afresh in accordance to law. The said order was passed on 18.12.2008, in the meanwhile the amendment came into effect on 28.09.2008 and it was this

reduction that the High Court sought to enforce. However, the EPF organization had enforced old rates. The establishment submitted that the rate of damages was reduced from 37% to 25% and hence the EPF organization ought to impose 25% and not 37%. Moreover, the second respondent has also submitted that there was decrease in the business and therefore, the establishment cannot pay the salary itself. Subsequently, the establishment has paid the salary belatedly. Thereafter, the EPF was also paid belatedly and the petitioner organization has imposed the interest and damages. The contention of the establishment / respondent is that they have paid the interest, however, as far as the damages is concerned, the establishment has paid 25% which has been prescribed in the amended rates. Therefore, the establishment prayed to dismiss the writ petition.

6. Heard Mr.K.Murali Sankar, learned Counsel appearing for the petitioner and Mr.M.Aravind Subramaniam, learned Counsel appearing for the second respondent and perused the records.

7. The Learned Counsel appearing for the establishment further submitted that issue of levying rate of damages was considered by the High Court vide order 24.08.2022 in the case of the Assistant Provident Fund Commissioner Vs. the South India Mines and Minerals Industries Limited in W.P.(MD)No.10374 / 2012 and has held that the damages of 37% is inclusive of interest and the EPF organization cannot levy over and above the 37%.

8. The contention of the establishment is that the amendment came into effect in the year 2008 and the matter was remitted back to the authority for reconsideration. When the amendment has come into effect, the authority ought to impose the amended rate of interest and not the previous rate of interest. However, the petitioner organization has vehemently submitted that the amendment has come into effect only on 28.09.2008 but the period of delay is prior to the amendment, then the old rate is applicable. This Court is of the considered opinion that the EPF organization is right in stating so. Whenever, the amendment was carried out, the amended provisions will come into effect from the date

of amendment. Likewise, the rates prevailing during the period of default is applicable for the period of default and not the subsequent rates. In the present case, the amount payable is for the year 2001-2004. Therefore, the rate of interest applicable during that period is 37% and not 25%.

9. The contention of the respondent is that the respondent establishment could not pay because there was unrest and the employees were reduced and there was a huge loss in the establishment and has relied on the profit and loss account. The establishment had incurred loss of during the period and the same is extracted hereunder:

Sl.No	*Period*	***Amount (Rs.) Loss***
01.	*As on 31.03.2000*	*2,30,206.00*
02.	*As on 31.03.2001*	*2,88,531.00*
03.	*As on 31.03.2002*	*2,78,965.00*
04.	*As on 31.03.2003*	*1,52,343.00*
05.	*As on 31.03.2004*	*4,39,183.00*

Since the establishment has incurred loss every year this Court is of the considered opinion the establishment is entitled to the relief. However, the EPF organization submitted that the respondent had not submitted any evidence to this effect before the authorities. But the Learned Counsel for the respondent submitted that to establish the loss, the respondent had submitted the profit and loss account to the EPF organization, wherein there was loss of Rs.4,39,183/- on 31.03.2004. Therefore, this Court is of the considered opinion that 25% of damages levied to the second respondent is sustainable.

10. With the above direction, this Writ Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

26.09.2022

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

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To
1. The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
Scope Minor, Core II, 4th Floor,
Lakshmi Nagar District Centre,
Lakshmi Nagar, New Delhi.

Order made in
W.P.(MD)No.5827 of 2014

26.09.2022