Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 20758 of 2019
With
IA No. CAN 2 of 2022

M/s. New Engineering Enterprises
Vs.
The Regional Provident Fund Commissioner & Ors.

For the petitioner	:	Mr. Suvadip Bhattacharjee
For the respondents	:	Ms. Debjani Ghosal
Heard on	:	30th June, 2023.
Judgment on	:	**30th June, 2023**.

Raja Basu Chowdhury, J:

1. The present writ application has been filed, inter alia, challenging the order dated 17th September, 2019 passed by the Appellate Authority in Appeal No.EPF35/2016 arising out of the order dated November 2016 passed by the Assistant Provident Fund Commissioner under Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "said Act").

2. Mr. Bhattacharjee, learned advocate representing the petitioner submits that the petitioner is a proprietorship concern having all requisite and valid licence.

3. It is the petitioner's case that the petitioner is engaged as mechanical and electrical engineers and contractors and that the petitioner is covered by the provisions of the said Act. It is contended by the petitioner that by a notice in writing dated 4/19th August, 2016, the petitioner was summoned to appear in a hearing under Section 14B of the said Act, in connection with belated remittance of provident fund contributions for the period 1st April, 1996 to 4th August, 2016, the aforesaid period was later enhanced to April, 2005 to April, 2016.

4. Records reveal that the petitioner had preferred an appeal in connection with a determination made by the respondents for the period April, 2005 to April, 2013, such determination was stayed by the Tribunal. Notwithstanding the aforesaid, the Assistant Provident Fund Commissioner, had proceeded with the aforesaid summons and by order dated 10th November, 2016, upon ascertaining that the petitioner had defaulted in making payment for the escaped months-March, 2013 and April, 2013–which had been deposited by the petitioner on 11th January, 2014 and 26th May, 2014 respectively, had levied damages under Section 14B of the

said Act read with paragraph 32A of the Scheme, inter alia, for belated remittance made by the petitioner for the period May, 2013 to April, 2016 totaling in Rs.4,36,261/-.

5. The petitioner contends that challenging the aforesaid order, a statutory appeal was filed under Section 7(I) of the said Act and the Tribunal by an order dated 17th September, 2019 was, inter alia, pleased to reject the same on the ground that the petitioner had not produced any evidence so as to demonstrate that the petitioner was prevented from making payment due to financial crisis.

6. Mr. Bhattacharjee, learned advocate representing the petitioner submits that the power to levy damages under Section 14B of the said Act is a discretionary power. The Assistant Provident Fund Commissioner while exercising such power did not give adequate opportunity to the petitioner to represent his case. There has been violation of principle of natural justice. He says that the discretion in the matter has been improperly exercised by the Assistant Provident Fund Commissioner. The Assistant Provident Fund Commissioner did not give any reasons for imposing penalty in the form of damages on the petitioner.

7. In support of his contention that the power to levy damages is discretionary, he has placed reliance on a judgment delivered by

the Division Bench of this Hon'ble Court in the case of ***Regional Provident Fund Commissioner – II v. Hooghly Mills Company Limited and Another,*** reported in **2022 SCC OnLine, Cal 248**. He says that the Tribunal had overlooked the fact that the hearing of the proceeding before the Assistant Provident Fund Commissioner was concluded in absence of the petitioner and as such the petitioner had no occasion to lead evidence or to demonstrate before the Assistant Provident Fund Commissioner that it was prevented from making payment in time or that there were no contributing factors, for the delay in payment of contributions. According to Mr. Bhattacharjee, the Tribunal had proceeded mechanically and had rejected the said appeal by holding that the same had no merit.

8. In the backdrop as aforesaid, it is submitted that the order passed by the Assistant Provident Fund Commissioner levying penalty under Section 14B of the said Act and the order dated 17th September, 2019 passed by the Appellate Authority both stand vitiated for reasons indicated hereinabove. The same should be set aside and quashed.

9. *Per contra*, Ms. Ghosal, learned advocate representing the provident fund authorities has taken me through the provisions of Section 14B of the said Act. It is submitted that Section 14B of the

said Act has been enacted to not merely compensate for the loss occasioned but to provide for a deterrent. She says that the financial inability, simplicitor cannot be a ground for not imposing damages under Section 14B of the said Act. She submits that the petitioner was duly notified by the authorities and a summon was also served. Incidentally, on 20th September, 2016, the petitioner chose not to appear and as such the proceedings were concluded in his absence. If the petitioner had stayed away from the proceedings, the Assistant Provident Fund Commissioner cannot be faulted for deciding the matter *ex parte*. In any event she submits that all aspects of the case have duly been considered by the Appellate Authority. The Appellate Authority did not find the order passed by the Assistant Provident Fund Commissioner to be unreasonable and consequentially dismissed the appeal.

10. She says that the power to levy damages has long been upheld by the Hon'ble Supreme Court in the case of ***Organo Chemical Industries & Anr. v. Union of India & Ors.,*** reported in **AIR 1979 SC 1803**. She has also placed reliance on a judgment delivered in the case of ***Hindustan Times Limited v. Union of India & Ors.,*** reported in **(1998) 2 SCC 242.** By placing reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***Horticulture Experiment Station Gonikoppal, Coorg. v. Regional Provident Fund Organization,*** reported in **(2022) 4**

SCC 516, she says that since, damages under Section 14B of the said Act, is in the form of a civil liability, the default or delay in payment of Employees' Provident Fund is the only consideration for imposing damages under Section 14B of the said Act. It is still further submitted that in case of breach of civil obligations/liabilities, the existence of *mens rea* or *actus reus* is not an essential element for penalty/damages and as such the petitioner cannot be permitted to escape the liability.

11. Heard the learned advocates appearing for the respective parties and considered the materials on record. In this case, I find that the determination made by the Assistant Provident Fund Commissioner dated 10th November 2016, was preceded by summon dated 4th August 2016. It would appear from the order passed under Section 14B of the said Act that the Assistant Provident Fund Commissioner had proceeded to determine the liability under Section 14B of the said Act, by noting that the petitioner had delayed in making payment of the contributions for the period March 2013 which was deposited on 11th January, 2014 and April 2013 which was deposited on 26th May, 2014. The aforesaid order also records that for the self-same period of April 2013, deposit had been made on 26th May 2014 along with the remaining period of May 2013 to April 2016.

12. From a perusal of the aforesaid order, it is difficult to find out the exact period for which there had been delay. Two overlapping dates had been indicated, recording that the deposits for such period had been made on two different dates. Thus, the findings based on which damages has been determined appears to be contradictory.

13. I find that the learned advocate representing the respondents while supporting the aforesaid order has, *inter alia*, contended that the right to levy damages, has long back been recognised by the Hon'ble Supreme Court in the case of ***Organo Chemicals*** **(Supra).** The Hon'ble Supreme Court in the aforesaid judgment, while examining the provision of Section 14B of the said Act and taking note of the discretionary power given to the authorities had, inter alia, noted that the order under Section 14B of the said Act, must be a reasoned order and the award of damages would depend upon existence of facts which would require an objective determination and not a subjective one, deterrent being the object of imposition of penalty.

14. A perusal of the provisions of Section 14B of the said Act would, however, lead to the inevitable conclusion that levy of damages in all situations would not be imperative. Default on the part of the employer on account of financial crisis, although, may

not be the justifiable ground to escape liability, however, such aspects need to be considered and the Regional Provident Fund Commissioner, while disposing of the application under Section 14B of the said Act, is obliged to not only give a reasonable opportunity of hearing but to pass a reasoned order, as to why damages are being imposed and the extent thereof. Thus, the objective determination cannot be divorced from the object of providing reasons.

15. In this case, I find that the petitioner did not get appropriate opportunity to represent itself. On 20th September 2016, in absence of the petitioner, the said proceedings were heard and disposed of. This apart, the order appears to be incongruous and based on conflicting facts. I still further find that the Appellate Authority, by its order which is impugned in the present proceedings, had concluded that it was for the petitioner to lead evidence before the Regional Provident Fund Commissioner and the petitioner having failed to lead evidence, the appeal appears to have been dismissed. Since, in this case, the petitioner did not get appropriate opportunity to represent, I am of the view that the order passed by the Assistant Provident Fund Commissioner and the Appellate Authority which are not based on any reasoning, cannot be sustained and the same are accordingly quashed and/or set aside.

16. The matter is remanded back to the Assistant Provident Fund Commissioner for hearing afresh, in respect of the demand made under Section 14B of the said Act. He shall hear out and dispose of the same on merit after giving an opportunity of hearing to the parties by passing a reasoned order in the light of the observations made herein.

17. With the above observations, the writ petition is disposed of.

18. There shall be no order as to costs.

19. Having regard to the aforesaid order nothing survives in the application being CAN 2 of 2022. The same is accordingly disposed of.

20. Urgent Photostat copy of this order, if applied for, be made available to the parties on urgent basis on compliance of all formalities.

(Raja Basu Chowdhury, J.)

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