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W.A.No.1435 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	25.04.2023
Pronounced on	27.06.2023

C O R A M

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
AND
THE HONOURABLE MR.JUSTICE J. SATHYA NARAYANA PRASAD

W.A.No.1435 of 2013
and M.P.No.1 of 2013

Assistant Provident Fund Commissioner,
Employees' Provident Fund Organisation,
Dr.Balasundaram Road,
Coimbatore 641 018.

... Appellant

-VS-

1. M/s.Dharmasastha Mat.Hr.Sec.School
Villankurichi
Coimbatore 641 035.

2. The Presiding Officer
Employees Provident Funds Appellate Tribunal
7th Floor, 60th Skylark Buildings, Nehru Palace
New Delhi 110 019.

... Respondents

Prayer: Writ appeal is filed under clause 15 of the Letter Patent against the order of the learned single Judge dated 11.01.2012 made in W.P.No.637 of 2012.



W.A.No.1435 of 2013

For Appellant : Mr.C.Kulanthaivel

For R1 : M/s.T.S.Gopalan & Co for R1

J U D G M E N T

(Judgment of the Court was made by **S.VAIDYANATHAN,J.**)

The Writ Appeal is directed against the order passed by the learned

Single Judge in W.P.No.637 of 2012 dated 11.01.2012 dismissing the writ petition filed by the petitioner.

2. For the sake of brevity, the parties would be referred to as "EPFO / Appellant herein" and "First Respondent / Employer".

3. Brief Facts in general:

3.1. The Employees' Provident Fund Organisation, Coimbatore, (in short "EPFO") issued a show cause notice to the Employer on 31.08.2009 under Section 14-B of Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (in short "Act") with a demand to pay damages for the period from August, 1999 to March, 2009;



W.A.No.1435 of 2013

WEB COPY

3.2. On receipt of the show cause notice, the Employer appeared for personal hearing and requested for waiver of imposition of damages, expressing its inability to pay the damages on the ground of financial loss. However, EPFO, without considering the request of the Employer, insisted them to pay the damages of Rs.2,14,630/- with interest of Rs.64,734/- to that effect under Section 14-B of the Act;

3.3. Aggrieved by the aforesaid order passed by the EPFO under Section 14-B of the Act, the Employer filed an appeal before the Employees Provident Fund Appellate Tribunal, New Delhi, under Section 7(I) of the Act, in which, the Appellate Tribunal remanded the matter to EPFO to assess the dues at the rate of 22%, which was inclusive of interest on 21.09.2011. Challenging the order passed by the Tribunal, EPFO had filed W.P.No.637 of 2012, which came to be dismissed by a learned Single Bench by an order dated 11.01.2012. Against the order of the learned Single Judge, EPFO has preferred this instant intra Court appeal.



4. It was submitted by EPFO that the Employer delayed the remittance of contribution and that the damages in terms of Regulation 32-A of the The Employees' Provident Funds Scheme, 1952 (EPF Scheme, 1952) have got to be applied, which was rightly done by the Authorities and the Tribunal has mechanically remitted the matter back to assess damages @ 22% without any reason. It was further submitted that the amount of damages payable by the Employer shall not cross the actual amount of contribution payable by them and that when there is a schedule in the Scheme, even though the Tribunal is empowered either to modify or nullify the remittance of damages ordered by the Authority, the Tribunal has no power to reduce the same, unless there are genuine reasons. Therefore, it was prayed that since there is perversity in the order of the Tribunal, which was upheld by the learned Single Judge, the order of remittance passed by the Tribunal is liable to be interfered with.

5. Learned counsel appearing for the EPFO stated that the question of *mens rea* does not arise in the light of the judgment of the Apex Court in the case of **Horticulture Experiment Station, Gonikoppal, Coorg vs. The**



Regional Provident Fund Organization [Civil Appeal No.2136 of 2012].

decided on 23.02.2022, wherein it has been held as under:

"13. Taking note of the exposition of law on the subject, it is well-settled that *mens rea or actus reus* is not an essential element for imposing penalty or damages for breach of civil obligations and liabilities.

14. The judgment on which the learned counsel for the appellant(s) has placed reliance i.e. Employees State Insurance Corporation(supra), the Division Bench in ignorance of the settled judicial binding precedent of which a detailed reference has been made, while examining the scope and ambit of Section 85B of the Employees State Insurance Corporation Act, 1948 which is *pari materia* to Section 14B of the Act 1952 placing reliance on the judgment of Division Bench of this Court in Dilip N. Shroff (supra) held that for the breach of civil obligations/liabilities, existence of *mens rea or actus reus* to be a necessary ingredient for levy of damages and/or the quantum thereof.

15. It may be noticed that Dilip N.Shroff (supra) on which reliance was placed has been overruled by this Court in Union of India and Others v. Dharmendra Textile Processors and others (supra). For the aforesaid reasons, the view expressed by this Court in Employees State Insurance Corporation (supra) may not be of binding precedent on the subject and of no assistance to the appellant(s).

16.Learned counsel for the appellant(s) further placed reliance on the judgment of this Court in Mcleod Russell India Ltd. (supra), wherein the question emerged for consideration was as to whether the damages which has been charged under Section 14B of the Act 1952 would be recoverable jointly or severally from the erstwhile as well as the current managements. At the same time, the judgment relied upon in Assistant Provident Fund Commissioner, EPFO and Another (supra) was decided placing reliance on the judgment of this Court in Mcleod Russell India Ltd. (supra), which may not be of any assistance to the appellant(s).

17. Taking note of three-Judge Bench judgment of this Court in Union of India and Others v. Dharmendra Textile Processors and



WEB COPY



W.A.No.1435 of 2013

others (supra), which is indeed binding on us, we are of the considered view that any default or delay in the payment of EPF contribution by the employer under the Act is a sine qua non for imposition of levy of damages under Section 14B of the Act 1952 and *mens rea or actus reus* is not an essential element for imposing penalty/damages for breach of civil obligations/liabilities."

5.1. Learned counsel for EPFO further stated that in case of any default, it is incumbent on the Employer to pay the damages. However, the scheduled rate and the assessment of damages was reduced without assigning any reasons, which is contrary to law and warrants interference by this Court.

6. Per contra, learned counsel for the Employer contended that the Tribunal, after considering the reasons pleaded, had assessed the damages @ 22% for various employers, depending upon the financial crisis and other reasons. It was further contended that 50% of the amount as determined by the Original Authority had been remitted, when the matter was pending before the Forum. A plea was also raised by the Employer that the Employer is a Sick Industry and the said contention has been highly refuted by the learned counsel for EPFO, stating that the Employer is not a Sick Industry.



7. We are not going into the applicability of Regulation 32-B of the EPF Scheme, 1952, as the said provision is applicable only to sick industries specified in the second proviso to Section 14-B of the Act, 1952. All the relevant provisions are extracted hereunder:

Regulation 32-A:

32-A. Recovery of damages for default in payment of any contribution -

(1) Where an 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 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 below: —

<i>S.No. (1)</i>	<i>Period of default (2)</i>	<i>Rates of Damages (percentage of arrears per annum) (3)</i>
(a)	Less than two months	Five
(b)	Two months and above but less than four months	Ten
(c)	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 rupee, 50 paise or more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored.



Regulation 32-B:

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

Section 14-B of the EPF Act, 1952:

“14B. 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 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



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W.A.No.1435 of 2013

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 rehabilitation has been sanctioned by the Board for Industrial and Financial 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."

Section 7Q of the EPF Act, 1952:

"7Q - The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment:

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank."

Section 7L of the EPF Act, 1952:

7-L Orders of Tribunal.—

(1) A Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against or may refer the case back to the authority which passed such order with such directions as the Tribunal may think fit, for a fresh adjudication or order, as the case may be, after taking additional evidence, if necessary.

(2) A Tribunal may, at any time within five years from the date of its order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendment in the order if the mistake is brought to its notice by the parties to the appeal: Provided that an amendment which has the effect of enhancing the amount due from, or otherwise increasing the liability of, the employer shall



WEB COPY



W.A.No.1435 of 2013

not be made under this sub-section, unless the Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

(3) A Tribunal shall send a copy of every order passed under this section to the parties to the appeal.

(4) Any order made by a Tribunal finally disposing of an appeal shall not be questioned in any court of law.”

8. A reading of Section 7-Q of the EPF Act, 1952 makes it clear that interest will have to be paid by the Employer. The word used in Section 14-B of the Act, 1952 is 'may' and the discretion exercised by the EPFO Authority cannot be mechanically interfered with by the Tribunal, unless reasons given by the Authority are proper. In the light of Section 7L, the Tribunal is empowered to reduce or completely waive the damages that may be passed by the Original Authority. In this case, the Tribunal has exercised its discretion and passed the order. We have already made an observation in W.A.No.2349 of 2022 dated 06.06.2023 that after introduction and amendment of Section 7-I of the Act, the power of the Tribunal cannot be curtailed, as an appeal can be filed before the Tribunal against the Board's decision. Section 7-I of the Act reads as follows:

"7-I. Appeals to Tribunal -

"(1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central



W.A.No.1435 of 2013

Government or any authority, under the proviso to sub-section (3), or sub-section (4), of section 1, or section 3, or sub-section (1) of section 7A, or section 7B [except an order rejecting an application for review referred to in sub-section (5) thereof], or section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."

9. It is pertinent to point out here that as per the provisions of the EPF Act, 1952, the interest on the PF contribution is mandatory. At the same time, in respect of levy of damages, it is left to the discretion of the Authority to decide the percentage of amount payable by the Employer. Of course, such percentage will have to be decided based on the facts and circumstances of each case. The schedule rate mentioned in Regulation 32-A is only the Upper Limit and it does not mean that the Authority or the Tribunal will have to mechanically apply it.

10. In the result, taking into account the totality of the circumstances and in order to shorten the life of litigation, this Writ Appeal is disposed of, with a direction to the Employer to pay damages at the uniform rate of

S.VAIDYANATHAN,J.
and
J.SATHYA NARAYANA PRASAD,J.



W.A.No.1435 of 2013

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12.5% p.a. or the one as determined by the Tribunal, if it is below 12.5%

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p.a. No costs. Consequently, connected Miscellaneous Petition is closed.

(S.V.N.J.,) (J.S.N.P.J.,)
27.06.2023

Speaking order/Non-speaking order

Index: Yes / No

Internet: Yes / No

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PRE-DELIVERY JUDGMENT IN
W.A.No.1435 of 2013

10/12