IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON: 09.11.2023
ORDER PRONOUNCED ON:14.12.2023
Coram:

THE HONOURABLE MRS.JUSTICE N.MALA

W.P.No.4598 of 2011
and
WMP.No.1 of 2011

M/s.Harrisons Malayalam Limited,
Bristow Road, Willingdon Island,
Cochin-3, Owning Wentworth Estate,
Represented by its Manager-Legal,
Mr.M.V.H.Menon.

...Petitioner

Vs.

1.The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
Scope Minar, Core II, 4th floor,
Laxmi Nagar District Centre,
Laxmi Nagar, New Delhi- 110 092.

2. The Regional Provident Fund Commissioner,
Employees Provident Fund Organisation,
Sub Regional Office,
Coimbatore-641 018.

...Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari to call for the records on the file of the first respondent and to quash the impugned order dated 22.11.2010 in ATA.No.969 (13) 2004.

For Petitioner : Mr.M.Vijayan
for M/s.King and Partridge
For Respondents : R1- Court
R2- Mr.C.Kulanthaivel
Standing Counsel

ORDER

The writ petition is filed for a writ of Certiorari to call for the records on the file of the first respondent and to quash the impugned order dated 22.11.2010 in ATA.No.969 (13) 2004.

2. The petitioner is a Public Limited Company registered under the Companies Act, 1956. The company is a plantation company owning tea and rubber estates in the State of Kerala and Tamil Nadu. The company employs around 25,000 workers, who are covered under Provident Fund Act and other statutes. The plantation industry particularly in South India experienced severe financial crisis since 1998-1999. Because of the financial crises prevailing in the industry, the petitioner incurred heavy losses since

1999-2000. The petitioner therefore remitted the Provident Fund dues belatedly for the period April 2000 to January 2004. A show cause notice was issued by the 2nd respondent to the petitioner for levy of damages to the tune of Rs.10,87,609/- vide letter dated 02.09.2004. The petitioner vide letter dated 24.09.2004, informed the 2nd respondent that due to prolonged financial crisis, the company was unable to comply with its statutory obligations in time. The 2nd respondent thereafter passed an order on 01.12.2004 under Section 14(B) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (herein after referred as the 'Act'), levying damages for an amount of Rs.8,78,523/-. Aggrieved by the aforesaid levy, the petitioner preferred an appeal before the 1st respondent in ATA.No.969(13) 2004. The Tribunal vide order dated 22.11.2010, dismissed the appeal filed by the petitioner. Aggrieved by the order passed by the 1st respondent in the appeal, the petitioner has filed the above writ petition.

3. The learned counsel for the petitioner submitted that the delay in

remitting the contribution was not wilful, but because of severe financial crisis faced by the petitioner company and therefore the respondent ought not to have imposed damages under Section 14(B) of the Act and that too at the highest rate. The learned counsel further submitted that there was no deliberate omission by the petitioner and delay was only due to the financial crisis prevailing in the entire industry. The learned counsel submitted that the past record of the petitioner would show that the petitioner was prompt in paying the contribution before and after the default period. The learned counsel further submitted that the respondents ought to have exercised the discretion vested in them under Section 14(B) of the Act and imposed lesser rate instead of the maximum rate. The counsel relied on the Division Bench Judgment of the Kerala High Court reported in *2013 ICO 1672* in the case of *Regional Provident Fund Commissioner Vs. Harrisons Malayalam Limited* dated 19.08.2023 and also the Judgment of this Court reported in *2003 (2) L.L.N. 850* in the case of *Shanti Garments (Private), Ltd. v. Regional Provident Fund Commissioner* in support of his case.

4. The learned counsel for the respondents on the other hand submitted that there was absolutely no discretion vested in the authorities to reduce the damages, that the respondents were bound to impose rates fixed under the scheme wherever there was default. The learned counsel further submitted that financial problem was not a ground to avoid liability, as ups and downs were part and parcel of commercial establishments. The counsel further submitted that mens rea or wilful default was not a ground to wriggle out of the statutory obligations and the damages under Section 14(B) of the Act would be levied irrespective of the intention as it was only the breach of the civil obligation that was to be considered by the authorities. The counsel relied on the Judgment of the Hon'ble Supreme Court reported in *2022 (4) SCC 516* in the case of *Horticulture Experiment Station Gonikoppal, Coorg vs. Regional Provident Fund Organization* in support of his submission.

5. I have heard both the learned counsels and have perused the

materials placed on record.

6. The core issue to be decided in this writ petition is whether the respondents were justified in imposing the maximum rate of penalty while levying damages under Section 14(B) of the Act.

7. As rightly pointed out by the learned counsel for the respondents mens rea or actus reus is not a ground to be considered while imposing damages under Section 14(B) of the Act. The Judgment of the Hon'ble Supreme Court in the case of *Horticulture Experiments Station, Gonikoppal, Coorg vs. Regional Provident Fund Organization* reported in *2022(4) SCC 516,* fortifies the contention of the learned counsel. The Hon'ble Supreme Court in para '19' of the said Judgment clearly states as follows:

> *" 19. Taking note of the three-Judge Bench judgment of this Court in Union of India v. Dharamendra Textile Processors, 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 14-B of the 1952 Act and mens rea or actus reus is not an essential element for imposing penalty/damages for breach of civil*

obligations/liabilities."

8. It is no doubt true that the Hon'ble Supreme Court in the aforesaid Judgment held that mens rea or actus reus need not be considered by the authorities while imposing penalty or damages and that breach of civil obligations by the employer was sufficient for imposing penalty or damages. The case before the Hon'ble Supreme Court was one where complete waiver of damages was claimed on a plea of want of mens rea or wilful negligence. In my view, the question of exercise of discretion by the authorities in interfering with the quantum of damages fixed under the scheme did not arise for consideration before the Apex Court in the said Judgement. In the present case, the petitioner is not praying for complete waiver of damages, but is praying for reduction of damages from the maximum rate of 37% to a lesser rate. In this regard, the Judgment of the Hon'ble Supreme Court in the case of *Regional Provident Fund Commissioner vs. S.D.College, Hoshiarpur (1997 (1) L.L.N. 520)* is relevant. The Hon'ble Supreme Court in para '11' held as follows:

"11. Thereby the employer is under a statutory obligation to deposit

the amount to the credit of the fund every month. In the event of any default committed in that behalf. Section 14B steps in and calls upon the employer to pay damages by way of penalty, the maximum of which is the accumulated arrears. The Regional Provident Fund Commissioner is given discretion only to reduce a percentage of damages and he has no power to waive penalty altogether...."

9. The said Judgment of the Hon'ble Supreme Court was followed by this Court in the case of *Shanthi Garments (Private), Ltd. Vs. Regional Provident Fund Commissioner* reported in *2003 (2) L.L.N. 850.* This Court following the aforesaid Judgment held in para '5' as follows:

"...In Regional Provident Fund Commissioner v. S.D.College, Hoshiarpur [1997 (1) L.L.N. 520], it was observed, in Paras. 10 and 11, at page 522:

"10. In other words, the Act envisages the imposition of damages for delayed payments. The Act is a beneficial welfare legislation to ensure health and other benefits to the employees. The employer under the Act is under a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and matching contribution, the entire amount is required to be deposited in the fund within 15 days after the date of the collection,

every month.

11. Thereby the employer is under a statutory obligation to deposit the amount to the credit of the fund every month. In the event of any default committed in that behalf. Section 14B steps in and calls upon the employer to pay damages by way of penalty, the maximum of which is the accumulated arrears. The Regional Provident Fund Commissioner is given discretion only to reduce a percentage of damages and he has no power to waive penalty altogether..."

10. Therefore from the aforesaid Judgments, it is clear that though the authorities have no discretion in the matter of waiver of damages all together, the authorities do have discretion to reduce the quantum of damages. At this stage, it would be pertinent to note here that the very same authority in a matter relating to the very same petitioner, but with respect to the Kerala region, after observing that prior to the default period, the petitioner was making regular payments, held that the imposition of penalty and interest at the highest rate was not justified and allowed the appeal of the petitioner by reducing the damages to 22% inclusive of interest. Though the learned counsel for the respondent tried to explain

that in the above case, the period of delay was lesser and therefore the damages were reduced, I am of the view that the order is not based on the period of delay, but is based on fact that there was financial problem and also that the payments were made regularly prior to the default period. Therefore it is seen that the contention of the respondents that the authority has no discretion to reduce the rate fixed under the scheme cannot be accepted as it is against their own aforesaid order.

11. It is to be noted that the levy of damages can be either penal or compensatory in nature. The authorities should therefore have examined the case and exercised the jurisdiction vested in them to find out if the maximum rate fixed under the scheme had to be levied or lesser rate could be levied. It is seen that in the present case, it is not disputed by the respondents that the past history of the petitioner shows that the petitioner was remitting the contribution regularly before and after default period. The reason given by the petitioner for delay in paying dues was the financial crisis faced by its company, which was due to the policy pursued

by the Central Government. That the entire plantation industry was crippled and was reeling under severe financial doldrums, is seen from the plan scheme on rehabilitation package for closed tea gardens dated 29.06.2007 of the Ministry of Commerce and Industry. In my view, the respondents ought to have considered these aspects before imposing the maximum rate fixed under the scheme. At the risk of repetition it is pointed out that in a similar matter concerning the same petitioner, the authority had considered the documents filed by the petitioner and found that due to financial problems, the payments could not be made and that prior to the default period, the petitioner was making the payments regularly. The authority on such finding held that the imposition of penalty and interest on higher was not justified and reduced the same to 22% inclusive of interest.

12. I am therefore of the view that the impugned order cannot be sustained and hence the same is quashed.

13. The case is remitted to the 1st respondent to requantify the damages payable by the petitioner by confining the same to 22% including interest, as fixed in ATA.No.752(7)2003 within a period of four (4) weeks from the date of a receipt of this order. The petitioner is directed to pay the reduced amount within a period of four (4) weeks from the date of communication of the fresh order.

In view of the above the writ petition is allowed. There shall be no order as to costs. Consequently connected Miscellaneous petition is closed.

14.12.2023

Index:Yes/No
Speaking Order: Yes/No
Neutral Citation: Yes/No

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2. The Regional Provident Fund Commissioner,
Employees Provident Fund Organisation,
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N.MALA.J,

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PRE-DELIVERY ORDER IN

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