

CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL -CUM- LABOUR COURT, ASANSOL

PRESENT: Justice Ananda Kumar Mukherjee (Retd.),
Presiding Officer,
C.G.I.T-cum-L.C., Asansol

EPFA No. 02 of 2014 [ATA No. 739(15) of 2014]

Dated: the 20th of April, 2023

M/s. Arambagh Hatcheries Ltd.

..... Appellant

Vs.

Regional Provident Fund Commissioner, Durgapur

..... Respondent

ORDER

Representatives:

For the Appellant : None Appears.

For the Respondent : Mrs. Mousumi Ganguli, learned advocate.

1. The appeal has been preferred by the appellant under Section 7-I of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (herein after referred to as EPF Act) against order no. WB/DGP/0042582/000/Enf 503/Damages/2499/5885 dated 18.06.2014 passed by the Regional Provident Fund Commissioner – II, Durgapur in a proceeding under Section 14-B of the EPF Act for belated remittance of Provident Fund dues in respect of M/s. Arambagh Hatcheries Limited, Illam Bazar, Suri, Dist: Birbhum (W.B.) for the period from March, 2005 to October, 2009.

2. The respondent authority issued summons to the Employer establishment under office letter no. WB/DGP/0042582/000/Enf503/Damages/1642 dated 12.03.2014 to appear for hearing under Section 14-B and for payment of interest under Section 7-Q of the Act for belated

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remittance of Provident Fund dues by the establishment during the period from March, 2005 to October, 2009. The matter was fixed up on 08.05.2014 for hearing. Mr. Asit Roy and Mr. Subrata Pal, appeared on behalf of the establishment but they could not produce the challans showing payment. In the impugned order it was observed that the establishment has delayed in payment of statutory dues without any valid reason therefore, to recover the loss of interest caused to the Fund and also deter the Employer from such violation of rules, Penal damages under Section 14-B of the Act was levied so that in future dues were paid in time. On the basis of such reasoning the Provident Fund authority assessed damages of Rs. 27,48,083/- against the appellant under Section 14-B of the EPF Act.

3. In their Memorandum of Appeal, it has been urged that the appellant company continuously sustained losses since the financial year ending on 31.03.2008 and the company has been referred to the Board for Industrial and Financial Reconstruction (herein after referred to as BIFR) in the year 2011 and by order dated 13.08.2013 the BIFR declared the company as a Sick Industrial Company under Section 3(1)(o) of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA 1985).

4. The present appeal has been filed on the grounds inter-alia that the respondent failed to appreciate that the discretionary power conferred upon the Respondent while levying damages should be exercise in rational and objective manner. It is contended that levy of damages is not limited by paragraph 32-B of EPF Scheme and the respondent has failed to appreciate the financial stringency of the appellant establishment. It has been asserted that the basis of calculation of interest is perverse in nature and the unreasoned order is liable to be set aside. Other major contention of the appellant is that the order has been passed by the respondent authority in a very hasty manner preventing the appellant establishment from invoking the provisions of paragraph 32-B of the EPF Scheme for the purpose of reduction and waiver of damages. According to the appellant the Rehabilitation Scheme was to be framed and implemented by BIFR as a special provision and the Provident Fund Authority ought to have given opportunity to the appellant establishment to conclude the 14-B proceeding after approval of the Rehabilitation Scheme.

5. Appellant urged that they have no mens rea for delayed remittance of Provident Fund as such the order under Section 14-B of the EPF Act is bad in law and liable to be set aside.

6. Though the appeal has been preferred against The Regional Provident Fund Commissioner, Durgapur, the Assistant Provident Fund Commissioner, Durgapur has filed a reply in this appeal to contest the same, which is inappropriate. The Assistant Provident Fund Commissioner had the right to seek this impleadment to contest the appeal.

7. According to the Respondent Authority Notice dated 12.03.2014 / 14.03.2014 under Section 14-B of the Act along with calculation sheet of damages and interest in Annexure

-A were served upon the appellant with a direction to appear before the Assistant Provident Fund Commissioner on 08.05.2014. Per-contra argument of the respondent is that the appeal is liable to be dismissed as admittedly there was delay in remittance of Provident Fund contribution and the authority after giving sufficient opportunities to the party levied the damages by taking into the consideration the due date, date of deposit and period of delay in making the contribution. The respondent urged that the provisions under Section 14-B does not make any difference between intentional and unintentional delays. Therefore, non-payment of Provident Fund dues within the time will constitute default, making the establishment liable for damages. It is further urged that non-availability of funds or running in losses is not a valid reason for delay in Provident Fund remittance. Citing the decision in **Arvind Mills Limited vs R. M. Gandhi (1982 Lab IC 344)**, the respondent authority has contended that the object of Section 14-B of the EPF Act was to deter the Employers from making default in carrying out their statutory obligation to make the Provident Fund contribution and the purpose of such section is to authorized the Regional Provident Fund Commissioner to impose exemplary or punitive damages to prevent Employers from making defaults.

8. Relying upon the principles laid down by Supreme Court in **Maharashtra State Cooperative Bank Limited vs the Assistant Provident Fund Commissioner and Others (2009 10 SCC 123)** ; **Hindustan Times Ltd. vs Union of India (1998 2 SCC 242)** ; and **M/s. Organo Chemical Industries and Another vs Union of India and Others (1979 4 SCC 573)** it is contended the financial problems and dispute between partners were not relevant explanations for delayed remittance or default and that the object and purpose of the Section 14-B is to authorize the Regional Provident Fund Commissioner to impose exemplary or punitive damages and thereby prevent employers from making defaults.

9. The appeal was initially filed before EPFAT, New Delhi on 12.09.2014 after hearing the advocate for the appellant an order was passed staying operation of the impugned order subject to deposit of an amount of Rupees fifteen Lakh with the respondent within four weeks and the respondent authority was directed not to take coercive measure till disposal of the appeal subject to said deposit.

10. The record of this appeal was transferred from EPFAT, New Delhi to CGIT, Kolkata and then to CGIT, Asansol. None appeared for M/s. Arambagh Hatcheries Ltd. Notices were issued to the appellant under registered post but none appeared. Finally, the appeal was taken up for hearing on 12.01.2023, 02.02.2023, and 09.03.2023 in presence of the learned advocate for the Respondent authority.

11. The point for contention before the Tribunal is whether the impugned order is sustainable under the law and facts.

12. The copy of the order has been annexed at page 84 to 86 of the Memorandum of Appeal. The period of delayed remittance of Provident Fund dues of the Employer establishment is for the period from March 2005 to October, 2009. In the Memorandum of Appeal no dispute has been raised by the appellant regarding the period for which such delayed payment has been made. The appeal is not in respect of interest imposed under Section 7-Q.

13. In order to find out whether the assessment of damages under Section 14-B of the Provident Fund Act has been correctly computed it would be prudent to consider the provisions in paragraph 32-A of the EPF Scheme, 1952, which lays down the different rates of damages which are to be levied on the arrears. The rates which have been provided in table in Section 32-A for recovery of damages for default in payment of any contribution ranges from 5% to 25%. On a close scrutiny of the summons to appear Notice under Section 14-B dated 14.03.2014 it appears to me that for the purpose of computing the damages the Provident Fund Authority has assessed damages at the rate of 17% to 37% from 16.06.2005 to 25.09.2008 and for the rest of the period from 26.09.2008 to 07.10.2010 damages have been computed at the rate of 5% to 25%.

14. In my considered view the rate of interest which prevailed at the time of holding the proceeding under Section 14-B and the time of passing order on 18.06.2014 was applicable and not the rate of damages which was previously in force till 25.09.2008. Applying different rates for assessing damages is not based upon the sliding table in paragraph 32-A of the scheme, as such the damages levied against the appellant in the impugned order is not tenable.

15. In the case of **Atal Teal Company Ltd. and Ors. vs Regional Provident Fund Commissioner (C.O. No. 13362 (W)/1996**, the Hon'ble High Court of Calcutta while considering the rate of damages to be levied held, "After the amendment his power to levy the damages upto maximum rate of 100% appears to have been curtailed. He is now to follow the sliding table incorporated in paragraph 32-A of the Scheme for applying rates for levy of damages according to the periods of default specified therein. The proceeding under Sec. 14-B was not at all pending at the time when the relevant amendment was made and para 32-A of the Scheme was introduced. Admittedly, such proceeding was initiated for the first time only in the year 1996 when the petitioner was served with a notice to show cause on April 16, 1996. The defaults for which writ petitioner did incur the liability for such damages, did occur at a time when the amendment was yet to be made. It is true that the right to levy the damages had already accrued to the Regional Provident Fund Commissioner long before amendment was made. But such right or the liability was not sought to be enforced till issuance of the said Notice dated April 16, 1996 when amendment had already been brought into force. Now, the

amended and the unamended provisions of Sec. 14 B are really incompatible and inconsistent with one another, so far as the rates for levy of damages are concerned. By this amendment, the provisions of Sec. 14-B so far as it conferred the discretionary power to determine rates at which damages would have to be levied can be said to have been repealed by implication. The amendment has not provided any saving clause expressly. But one thing is clear that discretionary power of the authority which was to levy the damages stands curtailed by virtue of the amendment. The Regional Provident Fund Commissioner cannot now levy the damages @ 100% if he thinks fit and is now required to follow the Scheme for the purpose of determining the rates at which damages would have to be levied, even though the liability, or the right to enforce the liability, for such damages had already accrued long before the amendment was effected. The intention of the legislature in amending Sec. 14-B and introducing the relevant Schemes in my view, was to curtail the discretionary power of the levying authority. The amendment thus affects both substantive right as well as procedural law and when the authority enforcing the right or liability which had already accrued prior to the amendment has been divested to a great extent of the discretionary power which he earlier had. As such, I have no hesitation to hold that in the instant case the levy of damages is to be governed by the amended provisions of Sec. 14-B read with para 32-A of the Scheme referred to above."

16. In the case of **Andrew Yule & Co. Ltd. vs Regional Provident Fund Commissioner and Ors. (C.O. No. 15347 (W)/1992**, the Hon'ble High Court of Calcutta held "11. The law is equally settled that just as a person accused of the commission of an offence has no right to trial by a particular Court or to a particular procedure, the prosecutor has at the same time no right to insist upon that the accused be subjected to an enhanced punishment under a repealed Act. Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act whether it has been specifically mentioned in the repealing Act or not, will follow, unless, as the Section itself says, a different intention appears. In the case of a simple repeal, there is scarcely any room for expression of a contrary intention. But when the repeal is followed by fresh legislation on the same subject, the Court would undoubtedly have to look to the provision of the new Act, but only for the purpose of determining whether they indicate a different intention. When a later statute again describes an offence created by an earlier statute and imposes a different punishment or varies the procedure, the earlier statute is repealed by implication. The rule is however subject to the restriction imposed by Article 20(1) of the Constitution of India against ex post facto law providing for a greater punishment, *T. Barai v. Henry Ah Hoe and Anr. (supra)*.

12. Applying the aforesaid principles to the fact of the present case, it is apparent that by the amendment provision of Section 14-B of the Act read with paragraph 32-A of the Scheme with effect from September 1, 1991, the legislature has manifested its intention to divest the respondent No. 1, the concerned authority, of the power to impose penalty according to its discretion from the aforesaid day; on the other hand, it has mandated the respondent No. 1 to assess penalty in accordance with the chart shown in paragraph 32-A of the Scheme not

notwithstanding the fact that the delay or default occurred earlier. No contrary intention to retain the earlier power to levy penalty up to 100% in case of pending proceeding is reflected from the amended provision. The position however would have been different if by the aforesaid amendment a higher amount of penalty was recommended than the previous one. In such a case, the petitioner would get the benefit of Article 20(1) of the Constitution of India.”

17. In the instant case the delay in remittance of Provident Fund dues was for the period from March, 2005 to October, 2009 which was made during the period from 16.06.2005 to 07.07.2010. The summon to appear for hearing under Sec. 14-B of EFA and MP Act was issued on 14.03.2014 which appears to have segregated the rates of damages levied in two parts. For the period up to 25.09.2008 higher rate of damages, ranging from 17% to 37% was imposed and rate of damages charged for the period from 26.09.2009 was between 5% to 25%. According to G.S.R. 689(E) dated 26.09.2008 and corrected by G.S.R. 451(E) dated 29.06.2009 the rate of damages which were to be imposed under Sec. 14-B read with paragraph 32-A of the Scheme was less than what was introduced in the earlier Scheme, which came into force from 01.09.1991. Therefore, as the amendment did not provide any saving clause expressly, the Regional Provident Fund Commissioner could not have levied higher rate of damages than what was in force from 26.09.2008. Applying the above principles of law the impugned order is not found in conformity with leviable rate of damages under the law. I, therefore, hold that while levying the damages, applying different rate of interest the Respondent Authority failed to exercise its jurisdiction in accordance with the law.

18. The second facet of the appellant’s case is that during the proceeding under Sec. 14-B of EFP and MP Act, representatives of establishment had informed the Provident Fund Authority that the appellant was declared a sick industry under Sec. 3(1)(O) of SICA, 1985 and BIFR had instructed the appellant for preparing a Rehabilitation Scheme under Sec. 22(1) of SICA, 1985 for protection from levy of damages by EPF and ESIC dues.

19. Section 11 of EPF&MP Act deals with priority attached to payment of Provident Fund contribution over other dues. However, in case of **M/s. Gowri Spinning Mills (P) Ltd vs Assistant Provident Fund Commissioner and Ors.**, the Hon’ble High Court of Madras held that “The levy of interest for delayed payment as well as administrative charges are very much part of provident fund under the scheme framed under the EPF Act. As far as damages under Section 14-B are concerned, it would be open for sick industrial company to request the authorities under the EPF Act, to postpone the determination of damages till the reference case is finally decided by the BIFR and or the Appellant Authority, as the case may be. In case such a request is made, the concerned authority shall pass appropriate orders in the light of the provisions of Section 14-B of the EPF Act.”

20. In the case of **TTG Industries Limited vs Regional Provident Fund Commissioner and Ors. (W.A. No. 1577 of 2011)**, the Hon’ble High Court of Madras held that “The payment of

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provident fund dues to the Fund, therefore, stands on the same footing as the payment of wages which is due to the employees. That is an entitlement to which the employees are entitled by dint of the work which they have put in. These are dues which are payable whether or not an undertaking is sick. They constitute an intrinsic part of the employees' right to life under Article 21 of the Constitution. Having regard to the principles which have been laid down by the Supreme Court in the Corromandal Pharmaceutical's case (supra) and by the learned Single Judges of this Court, including those in Baburao P. Tawade's case I am of the view that the recovery of provident fund and other dues under the E.P.F. Act, 1952 does not fall within the scope and purview of Section 22(1) of the S.I.C.A., 1985. In coming to this conclusion I am fortified by the fact that Parliament, when it amended the provisions of the E.P.F. Act, 1952 granted only a limited protection confined to a waiver of damages under Section 14-B of the Act in the case of a Sick Industrial Company in respect of whom a sanctioned scheme is under implementation."

21. On a conspectus of facts and circumstances of this case, consideration of argument advanced by learned advocate for the Respondent and the various authorities referred to above, I hold that the Provident Authority has exceeded jurisdiction by assessing damages beyond the scope of prevailing law. The Respondent failed to consider the representation of the appellant that a rehabilitation scheme of establishment was under the examination of BIFR. Therefore, the Provident Fund Authority ought to have postponed its determination of damages u/s 14B of EPF Act against the appellant till the rehabilitation scheme was sanctioned or disapproved. In view of my foregoing discussions, the appeal succeeds on contest.

22. The impugned order dated 18.06.2014 passed by the respondent authority is not found sustainable under the law and the same is set aside. The case needs to be remanded to the Respondent Authority for reconsideration of the same in light of my foregoing observations. The Provident Fund Authority shall pass a fresh order after providing opportunity to the appellant to represent its case. The matter shall be finally disposed of preferably within three months from receiving copy of this order.

Hence,

ORDERED

that the appeal under section 7-I of the EPF and MP Act is allowed on contest. The impugned order dated 18.06.2014 passed by the Regional Provident Fund Commissioner,

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Durgapur is set aside. The case is remanded to the Provident Authority, Durgapur for passing a fresh order after giving opportunity to the Appellant to represent their case. The matter shall be disposed of preferably within a period of three months from the date of communication. Amount deposited by the appellant, if any, in compliance with order dated 12.09.2014 be refunded to the appellant within thirty days from the date of communication of this order. Let copies of order be communicated to parties under Rule 20 of the Tribunal (Procedure) Rules, 1997.

Sd/-
(ANANDA KUMAR MUKHERJEE)
Presiding Officer
CGIT-cum-Labour Court, Asansol

