

**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. 08 of 2016
[ATA 878(15) of 2016]

Food Corporation of India, Durgapur Appellant
Vs.	
Assistant Provident Fund Commissioner, Durgapur Respondent

ORDER

Dated: 31st May, 2023

Mr. Rajeev Sharma, learned advocate for the Appellant.
Mrs. Mousumi Ganguli, learned advocate for the Respondent.

1. Instant appeal has been preferred by the appellant under section 7-I of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred as the EPF Act) against order No. WB/DGP/0042767/000/Enf 500/Damages/665 dated 05.07.2016 passed by the Assistant Provident Fund Commissioner (Damages), Sub-Regional Office, Durgapur, in a proceeding under Section 14-B of the EPF Act for belated remittance of Provident Fund dues in respect of Food Corporation of India (hereinafter referred to as FCI), Durgapur Depot in respect of their contractual employees for the period from December, 2005 to January, 2008.

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2. The Respondent Authority issued summons to the appellant bearing No. WB/DGP/0042767/000/Enf 500/Damages/ dated 12.03.2014 for appearance and hearing under Section 14-B for belated deposit of EPF dues from 22.02.2006 to 13.03.2008 and for payment of interest under Section 7-Q of the EPF Act. In the Notice it was stated that M/s. F.C.I. Durgapur Depot is an establishment covered under the EPF Act with establishment ID WBDGP0042767000 and is required to remit the contribution under Section 6, 6A and 6C of the Act read with Paragraph 38 of Employees' Provident Fund Scheme, 1952 (hereinafter referred to as EPF Scheme) and 3 of Employees' Pension Scheme, 1995 (hereinafter referred to as EPS) and 8(1) of Employees' Deposit Linked Insurance Scheme, 1976 (hereinafter referred to as EDLI Scheme) along with administrative charges within fifteen days of the close of every month. It was further stated that the employer made default in payment of the contribution of charges and the commissioner is required to recover such damages by way of penalty, not exceeding the amount of arrears and the rates of Damages at rates specified in Paragraph – 32A of EPF Scheme, Paragraph – 5 of EPS and 8A of EDLI Scheme. Rate of damages for the aforesaid period were calculated as Rs.25,73,376/- and the interest under Section 7-Q of the Act as Rs.8,36,128/-. The matter was fixed for hearing on 22.04.2014.

3. In the impugned order it has been observed that on 22.04.2014 none appeared on behalf of the establishment and hearing had to be adjourned to 03.07.2014 and thereafter on 19.07.2014 and 19.08.2014. Finally, the case was heard on 28.04.2016 when Rita Singh appeared on behalf of the establishment and raised no objection regarding the date of deposit and the calculation sheet in Annexure 'A'. Assessment was made on the basis of available record and the Respondent authority levied damages at the rates permissible in Paragraph – 32A of the EPF Scheme. M/s. FCI, Durgapur Depot was directed to deposit Rs.49,45,709/- in respect of contractual employees for the period of December, 2005 to January, 2008.

4. The present appeal has been filed challenging the impugned order on the grounds that the Assistant Provident Fund Commissioner passed the impugned order on the basis of wrong calculation without verifying the records submitted by the applicant and further miscalculating the delay mentioned in the Show Cause Notice dated 12.03.2014, for which the order is liable to be set aside.

5. It is contended that the respondent in the notice mentioned that the delay is of 547 days for the period from 15.11.2006 to 16.05.2007. But the appellant deposited their Provident Fund dues for the period of November 2006 on 19.12.2006, for the period of December 2006 on 19.01.2007, for the period of February 2007 on 20.03.2007, for the period of March 2007 on 16.04.2007, and for the period of April 2007 on 08.05.2007. It is urged that the impugned order was passed without any reason and without considering submission of the appellant, resulting in passing a perverse order which is liable to be set aside.

6. Further contention of the appellant is that in the summon the respondent raised a demand of Rs.34,09,504/- which included interest of Rs.8,36,128/- on delayed payment and the penalty of Rs.25,73,376/- but while passing the impugned order the respondent demanded payment of Rs.49,45,709/- comprised of Rs.44,34,020/- under Section 14-B of the Act and Rs.5,11,689/- under Section 7-Q of the Act. It is urged that the respondent authority illegally travelled beyond the period mentioned in the Notice.

7. According to the appellant delay in contribution towards Provident Fund is not intentional and the same was beyond their control. During the period of demand, it is claimed that there were no casual workers. The said thirty-four (34) casual workers were already absorbed w.e.f. 09.06.1999 as per order of the Hon'ble Supreme Court dated 09.12.2014. It is contended that forty-nine (49) casual workers were engaged by the appellant through a contractor in the year

1991 for the purpose of storage and distribution of grain at Modern Rice Mill at Durgapur within the premises of Food Storage Depot. Those casual workers approached the High Court at Calcutta and filed a Writ Petition CO No. 5109 (W) of 1994 demanding their absorption as regular cadre of the appellant. The Hon'ble High Court at Calcutta by order dated 22.03.1994 direct the appellant to maintain status quo with regard to the service of 49 workers and referred the casual workers to the Central Government Industrial Tribunal -Cum- Labour Court (CGIT), Asansol. The said 49 casual workers filed a case No. 21 of 1996 before the CGIT, Asansol which passed an Award in favour of the workman, directing the appellant to absorb the said workers at Durgapur. The appellant establishment challenged the said order dated 09.06.1999 before the High Court at Calcutta and the Writ Petition was dismissed by order dated 18.02.2005. The appellant filed an appeal before the Division Bench of the Hon'ble Calcutta High Court and the said appeal was allowed. On 25.02.2009 the order dated 18.02.2005 passed by the learned Single Judge of the Hon'ble Calcutta High Court and the order passed by the CGIT, Asansol on 09.06.1999 were set aside. The casual workers' union filed a Special Leave Petition (SLP) before the Hon'ble Supreme Court and the Apex Court by judgment dated 09.12.2014 confirmed the Award of the Tribunal, whereby the appellant was directed to absorb the casual workers. According to the appellant the casual workers were absorbed as workers of the establishment as per order of the Hon'ble Supreme Court w.e.f. 1999.

8. It is a case of the appellant that after 1999 the status of casual workers were changed and the appellant was not liable to pay any dues with respect to Employees' Provident Fund as the employees were governed by their rules and regulation. Due to pendency of litigations initiated by the casual workers since 1994 and their continuation before the Hon'ble High Court as well as the Hon'ble Supreme Court, the status of the casual workers were finally determined in March 2015 and they were treated as employees of the establishment w.e.f. 1999.

During the pendency of the litigations, the appellant for the sake of precaution deposited the Provident Fund dues in respect of the casual workers and paid a sum of Rs.66,01,022/- in a proceeding under Section 7-A and 7-Q of the EPF Act for the period from July 1991 to October 2005. After absorption of casual workers, the scheme applicable to the employees of the appellant would apply to them and the amount already deposited by the appellant with the respondent for such employees involved in litigation has to be transferred to the scheme applicable to all the employees of the appellant. It is urged that the status of employees for whom the damages have been imposed in the impugned order are not the casual workers.

9. The appellant asserted that under Section 14-B it is not mandatory to levy damages in all situation and each case has to be decided on its merit. The respondent can waive and reduce the penalty as envisaged in Paragraph -32A of the EPF Scheme but the respondent has failed to consider the fact and mechanically imposed the penalty which is bad in law and the impugned order is liable to be set aside.

10. According to the appellant details of computation of damages has not been stated in the impugned order therefore the decision of respondent is arbitrary and needs to be set aside. Further contention of the appellant is that the notice for proceeding under Section 14-B to levy damages was issued after a great delay of five years from the date of alleged default as such the same is bad in law. In this connection the appellant has relied upon the decision in the case of **Orissa Forest Department Corporation vs Regional Provident Fund Commissioner [1995 (71) FLR 388 (ORI)]**, which held that failure to initiate proceeding within a reasonable time was not justified. It is contended on this ground alone the impugned order passed by the learned RPFC, is liable to be quashed.

11. The appellant expressed its discontentment over the impugned order on the ground that in the absence of any determination of EPF contribution under Section 7-A of the Act, the Provident Fund authority failed to appreciate that the EPF dues have been regularly paid by the contractors or appellant and that no reason has been assigned for imposing maximum damages without taking into account the extenuating factors such as inspection report by Enforcement Officers over the years not pointing out any default, confirmation of payment of the Provident Fund dues and FCI being a statutory organization, functioning under the aegis of the Government of India with the object of providing grains to the members of society especially below the poverty line.

12. The appeal has been contested by the Assistant Provident Fund Commissioner, Durgapur, who in his reply claimed that the impugned order was passed by the Provident Fund Authority after due application of mind and after affording a reasonable opportunity to the petitioner to submit his written reply and to place his case at the time of hearing. It is urged that a speaking order has been passed after considering the submission made by the petitioner / appellant and the period of delay in remittance.

13. It is the case of the respondent that during scrutiny of the records maintained by the respondent it was found that the remittance for the period from 12/2005 to 01/2008 was made by the establishment after expiry of the due date. The appellant did not appear before the Enquiry Officer on 20.01.2014 and various other dates fixed for enquiry. It is their case that during course of verification of records previous assessment order dated 16.11.2006 for assessment under Section 7-A of the EPF Act for the period from 07/1991 to 10/2015 was taken on record and contribution in respect of 7-A of the EPF Act was bifurcated and recalculated. It is the case of the respondent that the impugned order has been passed strictly in accordance with the provisions of

EPF Act for belated payment by the appellant without any valid reason. It is urged that the appeal is liable to be dismissed since the appellant has admitted delay in remitting their Provident Fund contribution.

14. The rival contentions are juxtaposed for consideration as to whether the impugned order dated 05.07.2016 passed by the Assistant Provident Fund Commissioner (Damages), Durgapur is sustainable under facts and circumstances of the case and the law involved.

15. The appeal was taken up for hearing on 02.02.2023, 23.03.2023, and 27.04.2023. Mr. Rajeev Sharma, learned advocate for the appellant argued that the employees in respect of whom the impugned order has been passed under Section 14-B of the EPF Act for the period from 12/2005 to 01/2008 have already been absorbed as employees of the appellant establishment in compliance with the order of the Hon'ble Supreme Court dated 09.12.2004 passed in SLP No. 31531 of 2009 and order dated 15.07.2015 passed by the Appellant establishment. It is argued that the appellant establishment has their own scheme for Provident Fund and are exempted from application of the EPF Act. Therefore, the respondent has failed to take into consideration such relevant facts and has committed an error in imposing damages which the establishment is not liable to pay. Learned advocate for the appellant argued that in the Notice to appear for hearing under 14-B of the EPF Act it was stated that there was a delay in remittance of the Provident Fund dues for the period from 22.02.2006 to 13.03.2008 but in the impugned order the respondent has travelled beyond the period of notice and imposed damages for belated remittance for the period from 12/2005 to 01/2008 without any prior notice and without providing opportunity to the appellant to place their materials. It is argued on behalf of the appellant that in the impugned order the Provident Fund authority has not assigned any reason regarding computation of damages. Furthermore, the case

was not consider on its merit and the respondent imposed the maximum penalty in a mechanical way. Learned advocate argued that the impugned order is liable to be set aside.

16. Mrs. Mousumi Ganguli, learned advocate for the respondent argued that the FCI, Durgapur Depot, has made belated remittance in respect of Provident Fund dues under Section 7-A of the EPF Act, thereby the appellant has admitted that the EPF Act is applicable against it in respect of its casual workers and the appellant cannot claim exemption from the application of the EPF Act against them. Learned advocate further argued that for delayed remittance of Provident Fund dues from 12/2005 to 01/2008 the appellant is required to pay Rs.44,34,020/- as damages under Section 14-B of the EPF Act and Rs.5,11,689/- as interest under Section 7-Q of the EPF Act. It is submitted that the appellant has already deposited the interest under Section 7-Q the EPF Act, therefore they are liable to pay the unpaid damages for the said period. In support of her argument learned advocate for the respondent relied upon the decision of **Ansal Housing and Construction vs the Regional Provident Fund Commissioner – II, Delhi [W.P. (C) 6435/2011]** and argued that under Section 6 of the EPF Scheme, the employer establishment is required to contribute 10% of the Basic Wages, Dearness Allowance, with respect to its employees whether employed by it or through the contractor and that the said contribution was required to be made within 15 days of the close of every month. In the instant case no case was set out by the appellant to deviate from the provision of law in relation to the damages assessed. Therefore, it is argued that the appellant cannot set out new grounds at this stage claiming exemption of application of the EPF Act to its employees due to their subsequent absorption as the employees of FCI, Durgapur.

17. I have considered the impugned order dated 05.07.2016, the summons issued to the appellant dated 12.03.2014, Memorandum of Appeal with Annexures, reply filed by thereto, and argument advanced by the learned advocates for the respective parties. It appears from Annexure-5, an Office Order dated 15.07.2015 passed by the Assistant General Manager (Personnel) that 34 ex-casual workers of Depot Office Durgapur were absorbed in the post of "Helper" notionally w.e.f. 09.06.1999 and with monetary benefit from the date of joining to the post in FCI. The Notice relating to the proceeding under Section 14-B and 7-Q of the EPF Act was issued on 12.03.2014, which was prior to the Office Order dated 15.07.2015 passed by the Assistant General Manager (Personnel), FCI regarding absorption of ex-casual workers in compliance with the Hon'ble Supreme Court's order dated 09.12.2014. It is absolutely clear and evokes no doubt that the Provident Fund authority had no occasion to consider the fact of absorbing casual workers in the folds of regular employees at the time of initiating the proceeding for delayed remittance. The appellant establishment failed to establish that their erstwhile casual employees in respect of whom delayed remittance were made were not covered by the EPF Act at the relevant time. Therefore, the Provident Fund authority committed no mistake in issuing summons to the FCI, Durgapur Depot for their appearance and hearing under Section 14-B and 7-Q of the EPF Act for the period from 22.02.2006 to 13.03.2008.

18. The stage is now set to consider the legality and propriety of the impugned order. On a close reading of impugned order dated 05.07.2016, placed as Annexure – A/6, it appears to me that penalty for delayed remittance was imposed upon the appellant for the period from 12/2005 to 01/2008. Therefore, the respondent travelled beyond the period in the Notice at the time of assessing damages without prior notice thus, the same amounts to violation of natural justice. It appears from the Notice that the claim of damages was Rs.25,73,376/- and interest was assessed as Rs.8,36,128/- but in the impugned order the

order the damages was assessed as Rs.44,34,020/- which is far in excess of the amount specified in the Notice. It is now necessary to consider whether the Provident Fund authority had assigned any reason for computation of damages in excess of the amount mentioned in the notice to show cause and considered the case on its merit during passing the impugned order dated 05.07.2016. It appears from the order that the case was finally heard on 28.04.2016 when the appellant establishment was represented by Rita Singh, the authorized representative. The order is totally silent about the grounds raised by the appellant at the time of hearing. It is contended by FCI that since the casual workers were absorbed as regular workers in the establishment, they were not covered under the EPF Act and were covered by the scheme applicable to them. So far as this contention is concerned no importance can be attached to such argument as the casual employees became entitled to the monetary benefit from the date of their joining. For obvious reasons joining of such employees would be after 15.07.2015. Therefore, the appellant cannot derive any benefit on such ground due to their delayed remittance to the Provident Fund for the period up to 13.03.2008, which is much earlier to the absorption of the casual workers. The contention of the appellant regarding non-applicability of the EPF Act to its employees during the period under notice therefore cannot succeed and the same set at rest.

19. On a close reading of the impugned order and the summons issued to the appellant on 12.03.2014 I find that the respondent has travelled beyond the period of notice while imposing penalty as damages under Section 14-B. This discrepancy in the order has not been explained by any cogent reason. The damages imposed has also exceeded the amount which was denoted in the notice. Under such circumstances I hold that the impugned order is not sustainable.

20. It is conspicuous that the impugned order has not mentioned the rate applied for computation of damages. In the Notice for appearance and hearing under Section 14-B of the EPF Act the rates which were applied up to 25.09.2008 ranged from 17% to 37%. By Notification dated 26.09.2008, G.S.R. 689(E) laid down that :

“ In exercise of the powers conferred by Section 5 read with sub-section (1) of Section 7 and Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1 952), the Central Government hereby makes the following Scheme further to amend the Employees' Provident Funds Scheme, 1952, namely :-

1. *(1) This Scheme may be called the Employees' Provident Funds (Second Amendment) Scheme, 2008.*

(2) It shall come into force on the date of its publication in the Official Gazette.

2. *In the Employees' Provident Funds Scheme, 1952, for sub-paragraph (I) of paragraph 32A, the following sub-paragraph shall be substituted, namely :-*

“(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 in the table.” ”

The rates of damages (percentage of arrear per annum) were amended to 5% to 25% instead of 17% to 37%.

21. In the case of **Andrew Yule and Company Limited vs Regional Provident Fund Commissioner and others [C.O. No. 15347(W)/1992]**, the Hon'ble High Court at Calcutta held that :

“ By the amendment provision of Section 14B 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 notwithstanding the fact that the delay or default occurred earlier.”

It was held that the respondent assessed penalty which was in excess of Paragraph -32A. The same principle applies to the present case where the respondent has acted in excess of its authority in demanding penalty in excess of the prevailing rate which should have been between 5% to 25% and not 17% to 37%.

22. In the case of **Atal Tea Company Limited and Others vs Regional Provident Fund Commissioner [C.O. No. 13362(W)/1996]**, the High Court at Calcutta in Paragraph – 29 held that :

“ The effect of amendment that was made in Section 14-B of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 as well as the insertion of Paragraph – 32A of Employees' Provident Fund Scheme, 1952 w.e.f. 01.09.1991. Both before and after the amendment it has been option with the Regional Provident Fund Commissioner to levy and recover the damages by the way of penalty. Prior to the amendment, he had the power to levy the damages at the rate, the maximum of which was fixed at 100%. It did not, however, prescribe any minimum rate. He was free to impose damages at such rate as he thought fit. After the amendment his power to levy the damages upto the 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 the rates for levy of damages according to the periods of default specified therein. The proceeding under Section 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 the 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 the amendment was made. But such right or the liability was not sought to be enforced till the issuance of said notice dated April 16, 1996 when the amendment had already been brought into force.”

In the present case the proceeding under Section 14-B was initiated on 12.03.2014. At the relevant time the rate of damages applicable was already amended by Notification dated 26.09.2008 but the respondent in their notice has specified rates between 17% to 37% for the period from 22.02.2006 to 25.09.2008 for the purpose of assessment of damages on arrears. The commissioner ought to have followed the prevailing rate of damages for assessment under Section 14-B of the EPF Act and not the rates which existed prior to the Notification dated 26.09.2008.

23. In my considered view I find that the impugned order is bad in law so far as the period of assessment transcended beyond the notice period by taking into account an earlier period between 12/2005 to 21.02.2006 and it has assessed the damages at the rate which was not prevailing at the relevant time. Furthermore, the impugned order passed by the respondent authority is devoid of any reason.

24. Under such facts and circumstances, in view of my above discussion I hold that the impugned order is liable to be set aside. The appeal therefore succeeds. Employees' Provident Fund case bearing No. WB/DGP/0042767/000/Enf 500/Damages/665 is remanded to the respondent for hearing of the matter afresh after giving opportunity to the appellant and pass a reasoned order within three (3) months preferably from the date of communication of this order. The appellant shall participate in the hearing without any fail and place all their material before the concerned authority.

Hence,

O R D E R E D

that the appeal under Section 7-I of the EPF Act is allowed on contest. The impugned order dated 05.07.2016 is set aside. The Employees' Provident Fund case is remanded to the respondent authority with a direction to hear the matter after giving opportunity to the appellant and pass a fresh order within three (3) months preferably from the date of communication of this order. The appellant shall participate on all dates of hearing without fail. Let copy of the Order be communicated to the parties under Rule 20 of the Tribunal (Procedure) Rules, 1997.

Sd/-

(ANANDA KUMAR MUKHERJEE)

Presiding Officer,
C.G.I.T.-cum-L.C., Asansol.