

BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-2, MUMBAI

M/S. SMS INTEGRATED FACILITY SERVICES PVT. LTD.

MUMBAI

- APPELLANT

V/s.

ASSISTANT PROVIDENT FUND COMMISSIONER

MUMBAI.

- RESPONDENT

ORDER

Dated : 19th FEBRUARY 2020

Present: Mr. H.L. Chheda for the Appellant.

Ms. Prerana Janvekar, Advocate for the Respondent.

1. Appeal is filed by the appellant under section 7 (i) of the EPF & MP Act, 1952 [hereinafter referred to as 'Act'] against the order dated 24.7.18 passed by the Assistant Provident Fund Commissioner, R.O. Bandra, Mumbai – I who conducted the enquiry under section 14B of the Act and levied the penal damages for the period from 1.4.1996 to 30.03.2014.

2. The case of the appellant is that the appellant is into the business activities of providing various services including manpower supply. The RPFC having noticed that the appellant has made belated remittances for the period from 1.4.1996 to 30.03.2014 served the summons and conducted the enquiry and then passed the impugned order dt. 24.7.18.

3. According to the appellant he pleaded before the respondent that the appellant is not a wilful defaulter but due to compelling circumstances created by the clients which was beyond his control the appellant has made belated remittances to the fund

after disbursement of the salaries to the employees. The financial constraints created by the clients were beyond the control of appellant hence deserved to be treated differently since in the actions of the appellant neither mens-rea or actus-rius was present.

4. It is then contention of the appellant that the appellant remitted the monthly PF contributions according to the paramount importance secondary to disbursement of salary of the employees and further remitted the dues without interference of either compliance or recovery machinery attached to the Respondent Commissioner but the respondent has passed the impugned order in most casual nature ignoring mitigating circumstances submitted by the appellant and the written submissions made without offering any tenable reasons for not considering the oral and written submissions. As such the respondent Commissioner has not applied himself to the facts of the case and levied the damages at maximum without providing tenable grounds for primarily electing to invoke the provisions made u/s. 14B.

5. Learned Counsel for the respondent supported the order passed by the PF authority stating that estt. is covered under the provisions of the act vide code draft letter dt. 1.4.2000 u/s. 1 (3) (b) of the act. Employer in relation to the said estt. had failed to pay the dues within the stipulated time. It is stated that excuses put forth by the appellant for non-payment of PF contributions are not appreciable because mere financial crunch does not provide any immunity to the employer from the above statutory period. It is thus submitted that sufficient opportunities for hearing were extended to the estt. and as such the impugned order is a speaking order whereby it was considered by the PF authority that the appellant being the habitual defaulter deserved to be imposed damages @ 100% of arrears in view of ratio laid down by the

Hon'ble S.C. in case of Organo Chemicals Ltd. and Anr. V/s. Union of India – (1979) – 4 – SCC – 573. Learned Counsel for the respondent requested this tribunal to uphold the order passed by PF authority.

6. Authorised representative for the appellant while advancing his arguments has stated that it is settled under the law that the belated remittances of PF dues liability to pay the damages does not arise automatically but the same will have to be decided by PF authorities by applying mind to the facts and merits of the case and not by resorting to arithmetic calculations. It is only under compelling circumstances left with no alternate / economic management in place to falter with the manager having no means to manage has remitted the monthly PF without interference of recovery machinery and that it is not a wilful defaulter.

7. It is mainly submitted by the appellant that the circumstances under which the appellant was performing his business activities was presented to the respondent Commissioner during the last enquiry proceedings held u/s. 14B, which were not considered by the then respondent Commissioner but were considered by the tribunal and the same was upheld by the Hon'ble HC of Bombay in WP No. 8510 / 2015 vide its order dt. 28.2.17. Since there was no changes in the circumstances of the business which was considered by the tribunal, the appellant made request to the respondent Commissioner to confirm the same percentage which shall be apt. The respondent Commissioner refused to accept the verdict of Hon'ble HC in WP No. 8510 / 2015 and levied the damages at the rates specified in the summons and therefore levy of maximum damages by the respondent is incorrect.

8. Authorised representative for the appellant reply upon the decision in case of Poothundu Plantations P. Ltd. V/s. APFC, WP No. 12916 / 2010 submitted that

financial difficulties beyond the control of estt. are mitigating factors to lessen the liability. Certainly it is not the factor to exonerate once liability it will depend upon facts and circumstances of each case to lessen their liability of damages. If the petitioner is able to elaborate certain mitigating circumstances to lessen damages certainly the authority must consider the reduction of damages. Therefore the financial difficulty or other factors causing the delay in non-payment of amount may be taken into consideration in assessing the quantum of damages.

9. Heard both sides.

10. According to Learned Counsel for the appellant admittedly the appellant has remitted monthly PF contributions for the period from 1.4.96 to 30.3.14 which is required to be segregated as follows.

(i) From 1.4.96 to 30.6.97

(ii) From 1.7.97 to 26.9.08 and onwards upto 30.3.14.

But then the respondent Commissioner has passed the impugned order for the period 8/05 to 2/08 which was already included in the earlier order. Submission is to the effect that the respondent Commissioner while passing the impugned order has not considered the mitigating circumstances and the grounds for reducing the damages which were taken into consideration by the Hon'ble H.C. while deciding WP No. 8510 / 2015 especially when the mitigating circumstances and the grounds for reducing the damages still exists.

11. According to Learned Counsel for the respondent the appellant cannot rely on the earlier judgment & order dt. 30.6.14 and the order of Hon'ble H.C. in WP No. 8510 / 2015 because the earlier order is based upon the facts and circumstances of that

case. Submission is to the effect that during the enquiry which was initiated earlier on 1.4.13 for the period from 8/05 to 2/08 did not include all the challans paid by the estt. during the period from 2005 to 2008 and therefore the enquiry was initiated on 19.11.16 for the period from 1.4.96 to 30.3.14 [default period 4/2000 to 2/2010]. The latter enquiry did not include the challans that were previously taken during the previous enquiry and the challans which were not covered in the earlier notice have been included in the present enquiry and as such there is no overlapping period while assessing the damages.

12. I have gone through the impugned order, it certainly appears to me that the earlier judgment & order dt. 30.6.14 and the order of Hon'ble HC has not been considered especially when mitigating circumstances which were appearing at that time are also appearing and have to be considered while passing the impugned order. The objection raised by the CBT/petitioner in WP No. 8510 / 2015 was that the appellate authority cannot reduce the quantum of damages imposed u/s. 14B of the act and that there is no question of considering financial crises of the company at the time of considering imposition of damages. However, it was considered that the objection raised by the CBT/petitioner in that writ petition was not the matter and that at the time of imposing damages authority have to consider the mens-rea as well as financial crises of the company and that is not considered by the authority. These were the observations which I borrow from the decision in case of CBT V/s. Sanjay Maintenance Services P. Ltd. in WP No. 8510 / 2015.

13. Even the Learned Counsel for the respondent submitted that from the record it clearly reveals that the appellant is the habitual defaulter who has challenged 10 orders of the authority and imposed the damages for different periods. Reliance is

placed on the decision in case of Organo Chemicals Ltd. and Anr. V/s. Union of India – (1979) – 4 – SCC – 573 to submit that financial difficulty cannot be a ground for not complying with the provisions of PF Act.

14. In the context the appellant has also placed reliance on the decision in case of Shanti Garments P. Ltd. V/s. RPF – 2003 – (1) – LLJ – 467 to submit that where there has been default discretion to reduce the damages should be exercised by the authorities. It has been observed that extent of damages should not be confined to statutory interest payable so that employees may not be put to any loss. The authorities were accordingly directed to re-quantify the amount of damages. I find therefore that PF authorities under the act has to consider whether PF contributions are paid belatedly due to any deliberate inaction on the part of employer concerned or if his actions are contumacious or dishonest. If the reasons stated by the employer are correct wherein financial constraints is also a matter of relevance to be looked into in considering whether damages can be levied at all. But then each case will have to be dealt with under special facts of that particular case.

15. In the facts of present case I find that the appellant has demonstrated through documentary evidence that the appellant estt. was under severe financial constraints. The respondent has not analysed the reasons for default committed by the appellant and also not recorded the reasons for not considering the mitigating financial circumstances advanced by the appellant while passing the impugned order. It is stated that in the earlier enquiry initiated on 1.4.13 some of the challans were not included which were subsequently included and the challans previously taken into consideration at the time of earlier enquiry were not included in the subsequent enquiry initiated on 29.11.16. However, there is no details in the order as to which

were the challans which were not included in the earlier enquiry and which were the challans which were included in the earlier enquiry.

16. In the present case the respondent has not analysed the reasons for default committed by the appellant and has also not recorded the reasons for not considering the mitigating financial circumstances advanced by the appellant especially when it has been demonstrated by the appellant that the mitigating circumstances which were to be considered at the time of order passed by the respondent for the period upto 2/08 are the same even at present and has not been considered while levying maximum damages.

17. In view of discussions made at supra, the impugned order passed by the respondent does not sustain in the eyes of law. In my considered opinion with a view to secure substantial justice between the parties the damages levied by the respondent are reduced to 25% of the amount so levied which will be the appropriate damages under the facts & circumstances of the case.

18. Hence I order accordingly and impose 25% of the assessed amount of damages as penal damages to be collected from the appellant for the period in question. If the appellant has deposited 10% of the assessed amount for staying the order dated 24.7.2018, that amount be subtracted from 25% of the assessed amount of damages.

19. The copy of order be sent to both the parties. File be consigned to the Record Room after due compliance.

Date: 19.02.2020

(M.V. Deshpande)
Presiding Officer
CGIT -2, Mumbai