

**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 : 19<sup>th</sup> 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 that conducted the enquiry under section 14B of the Act and levied the penal damages for the period from 1.10.2012 to 31.3.2013.

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 10/12 to 3/13 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 various payments for the months as given in the excel sheet annexed to the representation are shown differently in the statement of dues and the dept. is

directed to recalculate the dues based on verification of challans provided. The respondent Commissioner has considered the acceptance of changes made with reference to the recorded evidence provided by the appellant as acceptance of damages @ specified and quantum of amount mentioned in the revised statement and recorded the presumption as though the appellant's acceptance. However, the respondent ignoring to the facts of case and written submissions, representations submitted by the appellant passed the impugned order and levied the damages mechanically and illegally.

4. It is also a case of the appellant that the appellant is not a wilful defaulter but due to compelling circumstances appellant has made the belated payments to the fund after disbursement of the salaries to the employees employed which were beyond his control. But then the Respondent Commissioner has passed the impugned order in most casual manner and mentioned in the order that in lieu of 8 months it has recorded 80 months. As such the respondent Commissioner has not applied himself to the facts of case and levied the damages at maximum without providing tenable ground 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 and other allied charges within the stipulated time as prescribed under the act for the period from 1.10.2012 to 31.3.2013. Therefore show cause notice was issued and after giving opportunity to the estt. the impugned order is passed.

6. It is submission of Learned Counsel for the respondent that the 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 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.

7. Authorised representative for the appellant while advancing his arguments has stated that the appellant being a service sector is depending upon the clients for all its needs and can be in other words is parasite on its clients. Under the circumstances the appellant has considered the disbursements of salaries to its employees employed as of prima-facie importance and thereafter to protect their interest to remit the PF contributions to protect their future together with other statutory dues. As such under these circumstances the appellant remitted the monthly PF contributions to the fund belatedly for the enquiry period.

8. it is submitted that as per settled law 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.

9. It is mainly submitted by the appellant that in the past order u/s. 14B dt. 1.11.13 for the period upto 2/08 was issued determining the maximum damages and the said order was challenged before EPFAT by the appellant. Appellant tribunal after hearing both the sides was pleased to allow the appeal partly by reducing the total claim of damages to 25% by order dt. 30.6.14. The respondent aggrieved by the order dt. 30.6.14 filed writ petition before Hon'ble H.C. of Bombay under CAJ WP No. 8510 / 2015. The Hon'ble H.C. after hearing both the sides was pleased to reject the petition filed by the respondent under its judgment dt. 28.2.17 and confirmed the reduction of damages by the appellate tribunal. The mitigating circumstances are the same for the past and present and therefore levy of maximum damages by the respondent is incorrect.

10. 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.

11. Heard both sides.

12. According to Learned Counsel for the respondent the appellant cannot rely upon the order dt. 28.2.17 because the earlier order is based upon the facts and circumstances of that case. However, it cannot be ignored that in earlier order the

present appellant was the appellant and the order was passed by the respondent Commissioner in that case considering the similar mitigating circumstances and also the grounds for reducing the damages by levying 25% of the total damages. That order passed by the appellate tribunal was confirmed by the Hon'ble H.C. vide CAJ WP No. 8510 / 2015. Obviously therefore the reliance is placed by the appellant on the decision case of CBT V/s. Sanjay Maintenance Services P. Ltd. in CAJ WP No. 8510 / 2015 wherein it has been observed in para – 8 of the judgment that the objection raised by the CBT / petitioner in that case 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 the financial crises of the company at the time of considering the imposition of damages is not the case in the present matter and that at the time of imposing the damages, authority have to consider the mens-rea as well as financial crises of the company and that it is considered by the authority in para – 7 & 8 of the impugned order.

13. Learned Counsel for the respondent also submitted that appellant is the habitual defaulter who had challenged 10 impugned orders of the authority who imposed damages for different periods and therefore the appellant being the habitual defaulter deserved to be imposed the damages @ 100% of the arrears. In the context, the reliance is placed on the decision in case of Organo Chemicals Ltd. and Anr. V/s. Union of India – (1979) – 4 – SCC – 573. With this the submission is that financial difficulty cannot be a ground for not complying with the provisions of PF Act.

14. However, on going through the impugned order it appears that respondent has not analysed the reasons for the 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 the record clearly reveals that the estt. committed default with immunity for 18 months. Then it has been pointed out that the period from 1.10.2012 to 31.3.2013 under all circumstances cannot be 18 months and as such there is no application of mind while passing the impugned order.

15. In the facts of the present case therefore I find that the appellant has demonstrated through documentary evidence that was annexed to the appeal that the appellant estt. was under severe financial constraints. So in the context reliance is placed on the decision in case of Shanti Garments P. Ltd. V/s. RPFC – 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 many 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 dealt with under special facts of that particular case.

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