CGIT-2/ EPFA/89 OF 2018

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 1.4.2010 to 31.03.2012.

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 1.4.2010 to 31.03.2012 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 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.

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 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.

11. 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 177 months during the entire period and that this track record itself shows that the default was wilful and intentional. However, it is submitted on behalf of the appellant that the said period under all circumstances cannot be for 177 months and as such there is no application of mind while passing the impugned order.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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