

CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL NO.1
MUMBAI

Present

Justice Ravindra Nath Kakkar

CGIT-1/EPFA/05 OF 2018

M/s Saket College of Arts, Science, & Commerce
Vs.

... Appellant

Assistant Provident Fund Commissioner
Thane

... Respondent

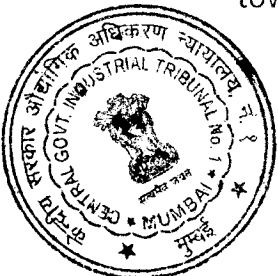
Presence:

For the Appellant : Mr.H.L.Chheda (A.R)
For the Respondent : Mr. Suresh Kumar, Adv.

Mumbai, dated 02nd August 2021.

JUDGEMENT

- 1) This appeal is filed u/s 7-I of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'Act') against the order dated 19-02-2018 passed by Assistant Provident Fund Commissioner – Thane u/s 14-B and 7-Q of the Act for the period from 02/2005 to 12/2008 directing Appellant to pay an amount of Rs. 217154 towards damages u/s 14-B of the Act and Rs. 81606 towards simple interest u/s 7-Q of the Act totaling to Rs. 298760.



2) Brief facts of the case as stated by the Appellant are as follows. Appellant is an educational trust that has formed with the sole aim of providing educational facilities to the children that belong to the weaker sections of the society and educational facilities in commercial institutions are not in their reach. Applicant claims that there always exists a mismatch in between the income from the nominal fees collected from the children and the expenditure at market rates. Trust also renders its services in community development amongst the weaker section and tribal population in the rural areas by conducting free medical camps and bringing awareness amongst the tribal community in and around Kalyan and Dombivali.

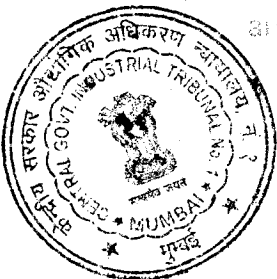
3) Appellant contends that it was unaware of the enactments under the Act till the visit of the Enforcement Officer who was presented with the entire records without concealing and after examining the records produced by the Appellant learned Enforcement officer made a communication that provisions of the Act and the Scheme were made applicable to the Appellant's educational institution with effect from 01-06-2008 vide memorandum number MH/201740/PF/APP/THN/Circle 1/276 dated 29-07-2008. However, the Enforcement Officer, after two years, made afresh inspection of the same records and conveyed the decision that applicability of the Act and the Scheme shall be with effect from 21-06-2004. Afterwards, Appellant received the communication from EPFO, Thane vide letter no. MH/201740/PF/APP/THN/Circle 1/2216 dated 23-01-2009 directing Appellant to comply with the provisions of the Act with effect from 21-06-2004. The Appellant remitted the provident fund contribution for the period from 21-06-2004 up to the date in piece meal and completed rendering compliance belatedly by 13-02-2009.



4) Heard both the parties.

5) Appellant contends that it is financially starved trust which has not gained any profit by retaining the remittances to the fund since trust activities were not meant for profit earning. Further it is stated by the Appellant that Respondent issued summons vide communication no. TH/THA/0201740/000/Enf 503/Damages/2076 dated 30-06-2016 considering the period from 04/1996 to 04/2016 to represent the case against damages or pay the damages at the rates mentioned in the communication. It is further stated by the Appellant that it represented its case before the inquiry officer and submitted the written representation during the inquiry proceedings on 27-11-2017. Appellant submitted that it has not deducted the employees' share of provident fund contributions from the wages of employees employed for pre-discovery period i.e. from June 2004 to June 2008. Appellant further contended that no damages can be levied for the pre-discovery period and further that EPFO is not justified in proposing maximum percentage of penal damages as laid down under the pre-amended Para 32-A of the Scheme, 1952 when simple interest u/s 7-Q has been in force since 01-07-1997.

6) On the basis of the alleged facts in appeal memo, authorized representative of the Appellant contended that the impugned order is cryptic and with non-application of mind. The PF authority is not justified in fixing the rates of damages and quantum thereof, and passed a non-speaking order. It is also the case of Appellant that the Respondent has calculated separate amounts as simple interest for the inquiry period u/s 7-Q and also levied damages u/s 14-B of the Act. Reliance has been placed vide CPFC letter no. PQ Cell/3(3) dated 29-05-1990 and decision of Hon'ble Delhi High Court in System and Stamping versus EPF



Appellant Tribunal [2008 LLR 485 (Del) (DB)]] wherein it was held "... Column 3 cannot be regarded as rate of damages after July 1, 1997, when interest became payable under Section 7-Q of the Act" and hence stated that it is the case of double jeopardy. Further stated that the benefit of exemption from paying damages as was conferred by the CL dated June 16, 2004 and the subsequent circular withdrawing the earlier circular prospectively with effect from February 16, 2009 cannot take away the benefit which was granted earlier. It is also contended that mitigating circumstances was not considered while passing the impugned order by the Respondent. Further, the determinative factors of mens rea / actus reus for levying penal damages has not been addressed in the impugned order. Lastly argued that impugned order is passed against the settled law on the subject.

- 7) In reply to the above submissions raised by the Appellant, learned counsel for the Respondent stated that the reasons offered by the Appellant such as retrospective coverage, pre-discovery period and subsequent waiver of damages, etc are improper. The Act has self-application code; once the condition satisfying coverage are met, a statutory obligation is cast upon the employer to suo-motto inform the RPFC about this fact to facilitate him towards registration of the employees of any particular establishment under the Act and as per Para 37 of the EPF Scheme. It is further stated that application of the Act is automatic and no notices are necessary to apply that. The Act can be enforced retrospectively for the pre-discovery period.

- 8) Respondent contended that it is a case of willful non-compliance with the statutory provisions hence existence of mens rea / actus reus has no relevance in



this case. Therefore, imposition of the damages u/s 14-B for the delayed payment is correct and impugned order cannot be said to be suffering from any legal defect. In support of his argument with regard to the imposition of damages u/s 14-B of the Act for the pre-discovery period reliance has been placed on the judgment of Hon'ble Bombay High Court in the case of Navnilal K. Shah (Dr.) vs Union of India And Another. Lastly, with regard to the contention of Appellant that it is doing noble cause, Respondent counsel stated that the Act does not make any distinction on the basis of same. Hence impugned order does not suffer from any illegality or irregularity and prayer has been made to dismiss the Appeal.

- 9) On the very onset, I would like to mention that this appeal is filed against the composite order passed u/s 7-Q and 14-B of the Act. Since, appeal against the order passed u/s 7-Q of the Act is not entertainable, therefore the only the portions of order passed u/s 14-B of the Act is the subject matter of this appeal.
- 10) The first issue involved in this appeal is whether damages u/s 14-B could be levied for the pre-discovery period. On this issue, it is pertinent to mention that it is the statutory obligation on the part of employer to discharge his duties as provided under the Act. The remittances of the PF and other allied dues are legally required to be deposited within the stipulated period under the Act and the Scheme. There is no specific provision with regard to the remittances of the statutory dues for the pre-discovery period otherwise. Moreover, there's important legal principle that "*ignorantia juris non excusat*" which means ignorance of law cannot be an excuse. Therefore, the plea of ignorance for the delayed remittances of the PF dues pleaded by the Appellant has no relevance.

11) In addition to it, I would like to refer Para 14 of the judgment rendered by Hon'ble Bombay High Court in the case of Navnilal K. Shah (Dr.) vs Union of India And Another on 11 July 2003 reported in (2004) ILJ 632 wherein it held,

"...it cannot be heard to contend that merely because the decision under Section 7-A of the said Act was taken after the date from which the Act was applicable to the establishment that it would automatically postpone the date for imposition of the damages under Section 14-B of the said Act. Certainly, it does not mean to say that in a given situation, the authorities should not exercise their discretion under Section 14B while imposing the penalty but it cannot be said that the authorities cannot impose damages for pre-discovery period. This conclusion is clearly revealed from the above referred two decisions of the Apex Court in relation to the powers of the authorities under Section 14-B of the said Act and at the same time it is also revealed that such-authorities are duty bound to consider the issue of imposition of damages under the said provisions of law in accordance with the statutory guidelines."

In view of the ratio of the above judgment and discussions, levying damages for the pre-discovery period can said to be proper and justified.

12) Subsequently, the next issue is to determine whether the imposed damages at maximum rates on the Appellant is proper and justified.

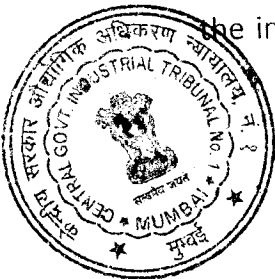
13) To address this issue, it would be relevant to mention that Hon'ble Apex Court in Mcleod Russel India Limited vs Regional Provident Fund Commissioner, Jalpaiguri reported in (2014) 15 SCC 263 held that *"...to proceed on the premise that the*



levy of penalty under the Act was not a mere formality, a foregone conclusion or an inexorable imposition; and that the circumstances surrounding the failure to deposit the contribution of the employees concerned would also have to be cogitated upon". Moreover, Hon'ble Apex Court in Civil Appeal No. 96-97 Of 2017 [Special Leave Petition (C) Nos. 1879-1880 Of 2015] in the Assistant Provident Fund Commissioner, EPFO & Another v/s The Management of RSL Textiles India Pvt. Ltd. Through its Director reiterated its view in Mcleod Russel India Limited (Supra) that ".....the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14-B, as also the quantum thereof since it is not inflexible that 100 per cent of the arrears have to be imposed in all the cases. Alternatively stated, if damages have been imposed under Section 14-B, it will be only logical that mens rea and/or actus reus was prevailing at the relevant time."

14) In the light of the judgments referred above, this Tribunal finds that imposing damages at maximum rates should not be mechanical but supported with causes especially with regard to the determinative elements of mens-rea and/or actus-reus in the actions of Appellant and also void of any such element in the mitigating circumstances which indicates that action of the Appellant was willful and deliberate.

15) Perusal of the impugned order and records suggests that though the PF code number was allotted to Appellant on 29-07-2008, the revised date of coverage being preponed to 21-06-2004 was communicated to the Appellant on 23-01-2009. Upon examination of the copies of challans submitted by Appellant during the inquiry it appears that the Appellant immediately remitted the accumulated



dues for extended period of coverage on 13-02-2009. Furthermore, it reveals from the records that the Appellant deposited both the shares of PF contributions i.e. its own share as an employer as well as share of the employees without seeking any exemption to which it could have been entitled. This action of the Appellant suggests that Appellant is a responsible employer and considers about future of its employees. And lastly, since allotment of PF code number, Appellant has been regularly remitting the PF dues except for minor defaults done between 09/2014 and 02/2016 for which damage amount to Rs. 606 and interest amounting to Rs. 1459 under the provisions of the Act were immediately remitted by it during the inquiry proceeding which was taken on record by the inquiry officer. Also, this Tribunal doesn't find impugned order speaking of any act of mens rea and/or actus reus on the part of Appellant or any rationale to not accept the mitigating reasons stated by the Appellant to defend itself against the imposition of maximum rates of damages.

16) Being convinced in the light of mitigating circumstances and absence of determinative elements to levy the maximum penal damages, this Tribunal is of the view that Appellant deserves leniency in terms of rates of damages that should be levied u/s 14-B of the Act. Therefore, the last issue to be addressed in this appeal is determining the percentage reduction of the damages originally calculated at the maximum rates by the Respondent. In order to address this issue precisely, this Tribunal would like to count in two other factors. Firstly, that the major portion of the damages calculated belongs to the pre-discovery period and that too the period in which EPFO has itself been lenient towards employers as evident in various circulars brought in notice of this Tribunal by the Appellant. And secondly, that the major part of the default period belongs to the years when both higher rates of damages as prescribed in pre-amended Para 32-A of



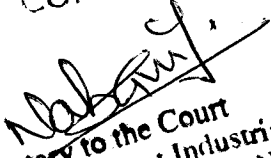
the Scheme and imposition of simple interests u/s 7-Q were co-existing. In view of these two factors and also relying on the findings with respect to mitigating circumstances and absence of mens rea/ actus reus, the amount of assessed damages involved, and in order to secure substantial justice between the parties, this Tribunal finds it proper to reduce the damages imposed on the Appellant to 20% (Twenty percent) of the original amount.

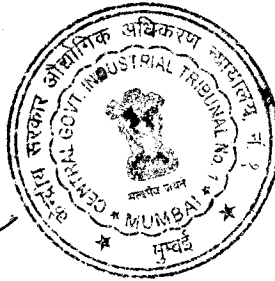
17) Hence, I pass the following orders:

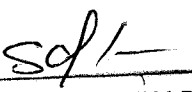
- a. Impugned order dated 16-02-2018 is set-aside to a partial extent of reducing the damages imposed on the Appellant.
- b. Penal damages assessed u/s 14-B of the Act is reduced to 20% (Twenty percent) of the original assessment.
- c. If any amount of damages has been deposited during proceedings of this appeal, the same is to be adjusted against the final amount.
- d. No order as to cost

18) Office is directed to furnish copy of this order to both the parties and upload it over the official web-portal of this Tribunal as well. Further, file is to be consigned to the record room after the compliance.

सही प्रतिलिपि
TRUE COPY


Secretary to the Court
Central Government Industrial
Tribunal-cum-Labour Court No. 1
Mumbai




(JUSTICE R.N. KAKKAR)
PRESIDING OFFICER