
(2014) 04 MAD CK 0113

In the Madras High Court

Case No : W.P. Nos. 13213, 13214, 28629 and 13316 and 13416 of 2011

Assistant Provident Fund Commissioner

APPELLANT

Vs

The Coimbatore District Consumers Co-Op. Wholesale Stores
Ltd. and Employees Provident Fund Appellate Tribunal

The Coimbatore District Consumers Co-Op. Wholesale
Stores Ltd. Vs Presiding Officer Employees Provident Fund
Appellate Tribunal, Scope Minar Core II and Assistant
Provident Fund Commissioner

RESPONDENT

Date of Decision : 10-04-2014

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B,
17(1)(a), 17(1A), 17(3), 6

Citation : (2014) 142 FLR 602 : (2014) LLR 838

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

T.S. Sivagnanam, J.—Since the legal issue raised in these Writ Petitions are identical and the challenge is to the orders passed by the Employees Provident Fund Appellate Tribunal, New Delhi, and the orders passed by the second respondent, EPF Organisation, by both the petitioner society as well as the EPF Organisation, they were heard together and are disposed by this common order. W.P. NO. 3213 of 2011, has been filed by the petitioner society, challenging the order passed by the Tribunal, in ATA No. 546(13/2010), 8.3.2011, and the order of the second respondent dated 30.7.2010, in so far as it relates to the levy of damages u/s 14B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (Act). W.P. 13216 of 2011 has been filed by the EPF Organisation, challenging the very same order passed by the Tribunal dated 8.3.2011, reducing the damages and interest.

2. W.P. No. 13214 of 2011, has been filed by the petitioner society, challenging the order passed by the Tribunal, in ATA No. 356(13/2007), 2.2.2011, and the

order of the second respondent dated 15.12.2006, in so far as it relates to the levy of damages u/s 14B Act. W.P. 13316 of 2011 has been filed by the EPF Organisation, challenging the very same order passed by the Tribunal dated 2.2.2011, reducing the damages and interest.

3. W.P. No. 28629 of 2011, has been filed by the petitioner society, challenging the order passed by the Tribunal, in ATA No. 407(13/2011), 21.11.2009, and the order of the second respondent dated 01.09.2005, in so far as it relates to the levy of damages u/s 14B of the Act. The EPF Organisation has not challenged the order passed by the Tribunal in the Appeal in ATA No. 407(13/2011)

4. The petitioner society is a registered society under the provisions of the Tamil Nadu Co-operative societies Act, known as "Chinthamani". They were running Ration shops, Supermarkets, kerosene bunk, petrol bunk, besides, being distributors of Indane gas. Since the impugned order has been challenged on legal grounds, both the learned counsel for the petitioner Society as well as the Standing counsel for the Employees Organisation did not venture much into the factual scenario.

5. In all these cases the petitioner society, were issued an order by the second respondent levying damages u/s 14B of the Act and interest u/s 7Q of the Act.

6. The second respondent intimated the petitioner society stating that they are an establishment exempted u/s 17(1)(a) of the Act, And by virtue of section 17(1A) of the Act, the provisions of section 6, 7A, 8, and 14B are applicable, to the employer of the exempted establishment in addition to other conditions as has been specified while granting the exemptions. Therefore it was stated that the petitioner society was required to pay the provident fund contribution u/s 6 of the Act read with the provisions of the approved provident fund scheme, pension fund contributions u/s 6A of the Act, read with para 3 of the Employees Pension Scheme, 1995, inspection charges u/s 17(3) and deposit linked insurance fund contribution/administrative charges, u/s 6(c) of the Act. It is further stated that the petitioner society failed to pay in time, the provident fund contributions; inspection charges; pension fund contributions; deposit linked insurance fund contributions and EDLI administrative charges, they were issued notice claiming for the said amount along with penal damages, as envisaged u/s 14B and interest u/s 7Q of the Act. The only reason assigned by the petitioner society is by pleading financial crisis and requested for waiver of damages. The second respondent, by referring to section 14B and the proviso there under held that the petitioner society does not fall within the ambit of the proviso and the request made for waiver of damages cannot be entertained. It was further observed that the provisions of the Act is a social welfare legislation and the successful working of the social security scheme depends on the prompt compliance made by the employer. It was further stated the damages are levied as a measure of penalty for the failure to promptly comply the remittances of dues under the Act/schemes. Therefore, damages were levied against the petitioner society apart from demanding interest u/s 7Q of the Act.

7. In respect of the demand dated 3.12.2003, the petitioner society filed a writ petition in W.P. NO. 3051 of 2004, challenging the demand. This Court by order dated 8.10.2009, allowed the writ petition holding that the second respondent has passed the order mechanically without discharging the duties of adjudication and that the existence of mens rea and actus reus to contravene a statutory provision must also be considered while levying damages and/or the quantum thereof. The demand was quashed and the matter was remitted to the authority for fresh consideration.

8. Thereupon the second respondent passed an order after affording an opportunity to the petitioner society, it was held that the petitioner society did not dispute the delay in remittances of the P.F. Contributions, and by not remitting the same in time, or not remitting the P.F. dues deducted from the employees, they would be committing breach of trust. The petitioner society, challenged the order passed by the second respondent by filing an appeal to the first respondent Tribunal, contending that mere delayed payment of contribution does not ipso facto invite levy of damages if the employer furnishes sufficient cause for the delay. It was further contended that there was no element of mens rea on the part of the petitioner society to contravene the statutory provisions, therefore the levy of damages should be set aside. The Appellate Tribunal after taking into consideration the decision of this Court in the case of Shanthi Garments Pvt. Ltd. Vs. Regional Provident Fund, Commissioner Employees Provident Fund Organisation, , held that when the default is found but no apparent fault the quantum of damages should be compensatory rather than penal. The plea raised by the petitioner society stating that they were facing financial crunch and therefore the damages should be waived was rejected by the Tribunal by relying on the decision of the Hon"ble Supreme Court in the case in M/s. Hindustan Times Limited Vs. Union of India and Others, , wherein it was held that financial problem relating to other indebtedness or delay in realisation of amount paid by cheque are not relevant explanation to avoid the liability for payment of dues. Ultimately the Tribunal reduced the liability to 22% inclusive of interest. The petitioner society, challenges the order passed by the Tribunal stating that the Tribunal should have granted complete waiver of damages and interest.

9. Mr. P. Anbarasan, learned counsel for the petitioner, raised three contentions viz. that the petitioner society is an exempted establishment and therefore damages cannot be levied u/s 14B of the Act; that there was no mens rea or actus reus on part of the petitioner society to contravene the statutory provisions and therefore, damages ought not to have been levied. By referring to the decision of the Calcutta High Court in the Hooghly Mills Company Limited and Another Vs. Regional Provident Fund Commissioner and Another, , submitted that the petitioner society being exempted establishment cannot be imposed with damages u/s 14B of the Act.

10. Mrs. R. Meenakshi learned counsel appearing for the EPF Organisation,

submitted that the decision of the Calcutta High Court in the case of HOOGHLY MILLS CO. LTD. (supra), has been overruled by the Hon''ble Supreme Court in Civil Appeal No. 655 of 2012, dated 18.1.2012, and the petitioner society cannot rely upon the decision of the Calcutta High Court. It is further submitted that financial crises, or delay in realisation of the amount paid by the petitioner society cannot be a justifiable ground for the employer to escape liability. By relying upon the decision in the case of Vellore District CO-OP. Spinning Mills Ltd. v. Central Board OF Trustees and Others in W.P. Nos. 10190 and 10197 of 2007 dated 8.3.2007, it is contended that though an organisation is declared as an relief undertaking by the State Government, cannot be considered as an establishment who are under a scheme of rehabilitation as sanctioned by the BIFR. To that extent, the learned counsel for the EPF Organisation seeks to sustain the order of Tribunal.

11. The EPF organisation has filed a separate writ petition in W.P. No. 13416 of 2011, challenging that portion of the order passed by the Appellate Tribunal reducing the damages to 22% inclusive of interest. This according to the learned counsel is without jurisdiction.

12. As noticed above, the contention raised by the learned counsel for the petition that the petitioner society being an exempted establishment u/s 17(1)(a) of the Act, cannot be imposed damages, u/s 14B of the Act, has to be rejected in the light of the decision of Hon''ble Supreme Court in Regional Provident Fund Commissioner v. TH Hooghly Mills CO. Ltd. & ORS. Civil Appeal No. 655 of 2012, dated 18.1.2012. Accordingly, the contention raised stands rejected.

13. The next question which would fall for consideration is as to whether the Tribunal should have granted complete waiver, and whether the Tribunal was competent to interfere with the order passed by the second respondent by interfering with the quantum of damages and interest levied and demanded from the petitioner society.

14. The Hon''ble Supreme Court in the case of Hindustan Times Ltd. (supra), pointed out that the authority u/s 14B of the Act, has to apply its mind to the facts of the case and the reply to the show cause notice and pass a reasoned order. In the case of the petitioner society this Court in W.P. No. 3051 of 2004, by order dated 8.10.2009, set aside the demand dated 3.12.2003 and remanded the matter for fresh consideration to take note of the whether there was mens rea on the part of the petitioner Society in not paying the dues or belatedly paying the dues. Even after remand, when the order dated 30.7.2010 was passed, no such specific finding was recorded by the second respondent as regards the conduct of the petitioner society. It is to be borne in mind that the petitioner society is registered under the provisions of the Tamil Nadu Co-operative Societies Act and they have pleaded genuine difficulties and being driven to an irretrievable position. Thus, the Tribunal taking note of these factors and the observation of this Court in the case of SHANTHI GARMENTS held that the damages should be compensatory rather than penal. Thus, by exercising

discretion reduced the amount to 22% inclusive of interest.

15. The proceedings before the Appellate Tribunal u/s 7J of the Act, are deemed to be judicial proceedings in which the Tribunal is entitled to consider the evidence placed before it to arrive at a right decision. The Tribunal has not absolved the petitioner society from its liability to pay damages and interest rather taking into consideration the facts has made a slight reduction by fixing the same at 22% inclusive of interest. The Tribunal being the last fact finding authority exercised discretion in the matter and assigned reasons for exercise of such power which satisfies the legal test. Hence, the respondent organisation has not made out a case for interference with the order of the Tribunal.

16. In W.P. No. 13214 of 2001, the petitioner challenged the order of the Appellate Tribunal dated 2.2.2011 on identical grounds as in W.P. No. 13213 of 2011. In this case, earlier when the petitioner society challenged the impugned demand date 15.12.2006, by filing a writ petition before this Court in W.P. 3156 of 2006, the same was dismissed by order dated 3.5.2007 giving liberty to file appeal before the Appellate Tribunal. Except for this distinction the facts are identical and the impugned order passed by the Tribunal in the same as in the case in W.P. No. 13213 of 2011. Similarly, the writ petition by the EPF organisation in W.P. 13316 of 2011 challenging the order date 2.2.2011 is also on identical grounds as raised in W.P. No. 13416 of 2011. Similarly, the petitioner Society, has challenged the order passed by the Appellate Tribunal dated 21.9.2011, relating to the levy of damages under 14 B of the Act on the same grounds as in the earlier two writ petitions.

17. In the light of the above discussion this Court is of the view that the order passed by the Appellate Tribunal, impugned in these writ petitions are just, fair and reasonable and within the scope and power of the Tribunal. In the result, both the petitioner society as well as the EPF organisation have not made out any grounds to interfere with the impugned orders.

Accordingly, all the Writ Petitions fail and they are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.