

(2021) 11 UK CK 0178

In the Uttarakhand High Court

Case No : Writ Petition No. 1851 (MS) Of 2011

M/s ASP Sealing Products Ltd

APPELLANT

Vs

Employee Provident Fund Organization And Another

RESPONDENT

Date of Decision : 24-11-2021

Acts Referred:

Sick Industries Companies (Special Provisions) Act, 1985 — Section 4
Employees' Provident Funds And Miscellaneous Provisions Act, 1952 — Section 7I, 7Q,
14B, 15(2), 17, 17(5), 32B
Employees' State Insurance Corporation Act, 1948 — Section 85B

Citation : (2021) 11 UK CK 0178

Hon'ble Judges : S.K. Mishra, J

Bench : Single Bench

Advocate : T.A. Khan, Vinay Bhatt, Bhupendra Singh Bisht

Final Decision : Disposed Of

Judgement

S.K. Mishra, J

1. Heard Shri T.A. Khan, Sr. Advocate assisted by Shri Vinay Bhatt, Advocate for the petitioner and Shri Bhupendra Singh Bisht, Advocate for the respondents.

2. In this writ petition, the petitioner, being a company incorporated under the Companies Act, has prayed to issue a writ of Certiorari quashing the order dated 26.03.2009 and order dated 28.10.2009 passed by Regional Provident Fund Commissioner - respondent no. 2 and further to quash the order dated 02.05.2011 passed by Appellate Tribunal, Employees Provident Fund, Delhi.

3. Petitioner Company was suffering heavy financial loss to the tune of Rs. 420.86 lakhs in 2000-01. Hence, the matter was referred to Board for Industrial and Financial Reconstruction (for short "BIFR") established under Section 4 of the Sick Industries Companies (Special Provisions) Act, 1985 (for short "the Act, 1985"). Because of the financial loss sustained by the Petitioner - Company, it was declared sick industry on 21.07.2004. In that proceedings, the Provident

Commissioner was also a party. On 09.06.2003, respondent no. 2 issued a demand for payment of interest on delayed contribution of provident fund under Section 7Q and damages under Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "the Act, 1952"). On 05.05.2004, a review order was passed and impugned amount was reduced to Rs. 3,42,153. On 18.11.2008, again, another order was passed by respondent no. 2 showing the interest and damages for the period of August, 1997 to December 2002 to the tune of Rs. 22,85,019/-. On 26.03.2009, another order was passed by the respondent no. 2 for recovery of interest and damages to the tune of Rs. 4,02,832/-. Orders dated 18.11.2008 and 26.03.2009 were reviewed and after adjusting Rs. 3,42,153/-, which were deposited by the petitioner, as per first review order, the amount of Rs. 15,37,061 was shown as outstanding against the petitioner. An appeal was filed under Section 7-I of the Act, which was dismissed on 02.05.2011. Such orders have been assailed in this writ petition.

4. Shri T.A. Khan, learned Senior Counsel appearing for the petitioner submits that the finding recorded by Regional Provident Fund Commissioner as well as by the Appellate Tribunal are erroneous in the sense that they have considered the Employees' Provident Funds Scheme, 1952 (for short "the Scheme") superior to the Act and that as per the provisions of Section 14-B of the Act, 1952, it is mandatory on the part of the Prescribed Authority to impose damages. He further submits that in an appropriate situation, if there is no criminal intent or mens rea, on the part of the employer, in delaying the deposit of the employees' contribution to the Provident Fund or there are mitigating circumstances, like in the present one that the Company is under financial duress and bankruptcy, the Authority has jurisdiction to waive the damages. However, as far as the interest part is concerned, it cannot be waived by the Authority.

5. In order to understand the controversy involved in the present case properly and appreciate the arguments, it would be necessary to look into the various provisions of the Act, 1952. Section 7Q provides for interest payable by the employer, which reads as under:

"7-Q Interest payable by the employer - The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment.

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank."

6. Section 14-B of the Act, 1952 provides for power to recover damages. It reads as follows:

"Section 14-B Power to recover damages - Where an employer makes default in the payment of any contribution to the Fund 2[, the 3[Pension] Fund or the

Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme].

[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:]

[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]

7. In pursuance to the powers conferred by this Section, the Central Board has power to reduce or waive the damages levied under this Section. The terms and conditions for reduction or waiver of damages are provided under Section 32-B of the Scheme, 1952, which reads as under:

"32-B. Terms and conditions for reduction or waiver of damages.--

The Central Board may reduce or waive the damages levied under Section 14-B of the Act in relation to an establishment specified in the second proviso to Section 14-B, subject to the following terms and conditions, namely:

(a) in case of a change of management including transfer of the undertaking to workers' co-operative and in case of merger or amalgamation of the sick industrial company with any other industrial company, complete waiver of damages may be allowed;

(b) in cases where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its schemes, in this behalf recommends, waiver of damages upto 100 per cent may be allowed;

(c) in other cases, depending on merits, reduction of damages upto 50 per cent may be allowed."

8. In view of these provisions, the Authorities came to the conclusion that under the Scheme, only the Central Board is empowered to waive the damages levied under Section 14-B of the Act and the Prescribed Authority or the Tribunal do not have power or jurisdiction to do so.

9. Shri T.A. Khan, learned senior counsel for the petitioner, in this connection cited several reported judgments. In the case of Regional Provident Fund

Commissioner, Meerut Vs. Presiding Officer, Employees' Provident Fund Appellate Tribunal, New Delhi and another reported in 2013(2) ADJ 270, the learned Single Judge of the Allahabad High Court in paragraph 13 has held as under:-

"13. As regards the contention of counsel for the petitioner that power of reduction and waiver can only be exercised, where specific conditions provided under the second proviso to Section 14-B are specified, suffice it to say that it deals with establishments which are industrial companies and it recognizes and gives due weightage to the scheme for rehabilitation, which has been sanctioned by the Board for Industrial and Financial Reconstruction establishment under Section 4, of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in the Scheme. It cannot be invoked or pressed into service to contend that it is the only exception under which waiver and reduction in the rate of damages can be exercised. Accordingly, this contention of the counsel for the petitioner also cannot be accepted".

10. Accordingly, the Allahabad High Court held that the use of word "may" in paragraph 13-A indicates that the imposition of damages is not mandatory and it only prescribes the highest rate of damages. In another similar case, in the case of the Regional Provident Fund Commissioner, Sub Regional Office, Mangalore Vs. M/s Jamiyyatul Falah, Mangalore and another reported in 2010 1 AIR (Kar) (R) 812, the learned Single Judge of Hon'ble High Court of the Karnataka in paragraphs 11 to 15 has held as follows:-

"11. A perusal of the aforesaid provisions of statute, what emanates is that, Section 14-B provides for recovery of damages with the use of the words "may recover". The petitioner-Organization is empowered to recover damages in the event the employer fails to make payment of the amount due in respect of contribution; subject however to the condition that the amount thereof would not exceed the amount of arrears as specified in the EPF Scheme, 1952. The proviso thereto incorporates the principles of natural justice.

12 The obligation on the part of the respondent-employer to deposit the contributions of both employer and employees is not in dispute. What is in dispute is as to whether the amount of damages specified in Paragraphs 32-A of the EPF Scheme, 1952 is imperative in character or not?"

13. Applying the aforesaid principles of law, Section 14-B does not envisage mandatory levy of damages. It does not contemplate computation of quantum of damages in a manner prescribed under Para 32-A of the EPF Scheme, 1952. Though the statutory liability of the employer cannot be in dispute, but levy of damages in all circumstances is not imperative. The use of the words "may recover" in Section 14-B of the Act, identical to the very words in Section 85-B of the Employees' State Insurance Corporation Act, 1948, in the matter of recovery of damages and levy of penalty, in my opinion, the levy of damages under Section 14-B of the Act is by way of penalty. The Legislature having limited the

jurisdiction of the authority to levy penalty not exceeding the amount referred to in Paragraph 32-A of the EPF Scheme, 1952, must be construed, keeping in view the language deployed in the legislative act and not de hors the same.

14. Even in Paragraph 32-A of the EPF Scheme, 1952 prescribes general guidelines as to the limits to which the imposition of damages could be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and is bound to mechanically apply the uppermost or the lowermost table as the limit.

15. In the instant case, the Appellate Tribunal, having given its anxious consideration over the plea advanced of the respondent regarding the delay in payment of contributions, as satisfactory explanation for not having paid the contributions within the time frame, the rejection of the explanation without either application of mind or recording reasons as to why the grounds for delayed payment were not acceptable, interfered with the order Annexure-A of the Regional Provident Fund Commissioner. Regard being had to the fact that the respondent was a charitable organization imparting education to children in a remote locality, dependent upon donations by way of contributions to carry on its activity, fell in favour with the Appellate Tribunal as mitigating circumstances, in the matter of imposition and recovery of damages under Section 14-B read with Paragraph 32-A of the EPF Scheme, 1952. The Appellate Tribunal having restricted the damages to 15% per annum on the arrears of contribution, to meet the ends of justice, in my opinion, in the facts and circumstances of the case, cannot be found fault with".

11. A similar view is taken by the Hon'ble Supreme Court in the case of Employees' State Insurance Corporation Vs. H.M.T. Ltd. and another reported in 2008 (3) SCC 35.

12. Keeping in view the aforesaid judgments, this Court is of the opinion that there is an apparent conflict between the provisions of an enactment made by the Parliament of India and delegated legislation like the Employers Provident Fund Scheme, 1952 formulated by the Central Government. If there is such a conflict, then the provisions in enactment will prevail and in this case, Section 14-B provides that the Authority may recover damages, which leads to obvious conclusions that there are certain discretion with the Authorities in this aspect. However, paragraph 32-A of the Scheme provides that it is only the Central Board which can waive or reduce the damages levied under Section 14-B, therefore, as per the principles cited above, it has to be held that the Authorities have also jurisdiction and discretion to reduce the damages or to charge the maximum damages permissible. They may reduce the damages, if the facts and circumstances of the case, so require. They may also not levy damages at all. However, levying of interest is compulsory. While deciding whether to recover damages at the highest possible rate or at a lower rate, or not at all, other factors like intention of the party concerned, other mitigating circumstances may also be taken into consideration for arriving at a just and proper conclusion.

13. In this case, it is clear that the petitioner company was facing financial hardships between 2000 and 2001 and ultimately, it was declared as bankrupt on 21.07.2004, so the petitioner company has neither criminal intent nor denying the benefits towards employees' contribution with an ulterior motive. In other words, in the present case, there mitigating circumstances, so we are inclined to allow the writ petition with a direction to the authorities to re-consider the matter.

14. Hence, the writ petition is allowed and the impugned orders are quashed. Original matter is remitted back to respondent no. 2 to re-consider the matter afresh, after giving reasonable opportunity of hearing to the parties concerned. Petitioner is directed to file a certified copy of this order before respondent no. 2 on 22.12.2021. On such an event, the respondent no. 2 shall call for the original record for rehearing. After giving opportunity of hearing to the petitioner and opposite party or its authorized officer representing the Employees Provident Fund Organization or its counsel, shall take a decision strictly accordance with law keeping in view observations made in this judgment and observations made by the different High Courts and the Supreme Court in different cases, which are cited by us in the preceding paragraphs. With such observations, the writ petition is disposed of.

15. There shall be no order as to costs. Urgent certified copy of this order be supplied to the learned counsel for the parties, as per Rules.