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**(2022) 09 BOM CK 0055**

**In the Bombay High Court**

**Case No :** Writ Petition No.2922 Of 2019

M/s Kishan Venkaiah & Co — APPELLANT

Vs

Asstt. Provident Fund Commissioner — RESPONDENT

**Date of Decision :** 15-09-2022

**Acts Referred:**
Constitution Of India, 1950 — Article 226, 227

**Citation :** (2022) 09 BOM CK 0055

**Hon'ble Judges :** Nitin B. Suryawanshi, J

**Bench :** Single Bench

**Advocate :** Harshad H. Padalkar, Harshad H. Padalkar, K.B.Choudhar

**Final Decision :** Dismissed

## Judgement

Nitin B. Suryawanshi, J

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.

2. This petition, filed under Article 226 and 227 of the Constitution of India, impugns order dated 14th October, 2016 passed by the respondent - Assistant Provident Fund Commissioner.

3. The petitioner is a partnership firm registered under the Partnership Act, 1952 and conducts business of manufacturing of Beedi. Due to the late payment of Provident Fund dues, respondent - Assistant Provident Fund Commissioner issued a show cause notice dated 17th December, 2015 to the petitioner for leavying interest and damages under sections 7Q and 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter for short "the said Act") for the period between 1st April, 1996 and 30th September, 2010 and 1st October, 2020 and 30th September, 2015. The respondent, thereafter passed an order under section 7Q of the said Act, thereby imposing liability of Rs.59,18,006/- and Rs. 1,23,45,906/- under section 14B of the said Act, on the petitioner.

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4. The petitioner claims to have deposited, so far, Rs.50,10,000/-. Since the petitioner failed to deposit the due amount, the respondent, on 23rd January, 2019, issued a proclamation of sale of the immovable property of the petitioner, situated at Mangal Bazar Road and Ramnagar, Jalna bearing City Survey and Sheet No. 4896 admeasuring 912.5 square meter. This proclamation is impugned in the present writ petition along with the assessment order dated 14th October, 2016.

5. Heard learned advocate for the petitioner and the learned advocate for the respondent.

6. Learned advocate for the petitioner submits that by way of amendment section 7Q (interest) was introduced in the said Act, in the year 1988 but was made effective only from 1st July, 1997. However, the respondent has charged interest from April, 1996, which is not permissible. He further submits that the table prescribing / governing rate of damages which was operating since 1988 continued to operate till 26th September, 2008, meaning thereby the element of interest was included in component of damages and from 26th September, 2008 onwards, the two are segregated. According to him, the damages are charged in overlapping manner. The damages under section 14B of the said Act are levied from 1st April, 1996 to 26th September, 2008. Therefore, almost for 12 years period, interest is charged by imposing damages under section 14B of the said Act. He claims that the petitioner has remitted interest for the period 1996 to 2008, which was in addition to the damages, which is contrary to para 32A of the scheme. Therefore, the petitioner is entitled for adjustment of the same, along with interest. According to him, the impugned action of the respondent suffers from non application of mind. The interest is calculated at the double rate. He submits that the petitioner has already deposited the actual conribution (principal amount) and the interest with the respondent. He, therefore, claims that the impugned order and the impugned action of the respondent is liable to be quashed and set aside, by allowing the writ petition. In support of his submissions, he placed reliance on "Bhatkuli Taluka Co-operative Agricultural Sale and Purchase Society Ltd., Amravati V/s Regional Provident Fund Commissioner" 2007 (2) Mh.L.J. 810 and "Roma Henny Security Services Pvt. Ltd,. V/s Central Board of Trustees, EPF Organization through Asst. P.F. Commissioner, Delhi (North)" 2012 (135) FLR 799.

7. Learned advocate for the respondent, on the other hand, questions the maintainability of the petition. He submits that the petitioner has challenged the order dated 14th October, 2016 passed under section 14B of the said Act, which can be challenged by filing appeal under section 7I of the said Act and this Appeal has to be filed within 120 days from of passing of the order, which is not filed by the petitioner and after delay of three years, present writ petition is filed challenging the impugned order, which is not maintainable. He submits that the petitioner has admitted delay in the averments made in the petition. He submits that if there is delay in payment due under section 7A of the said Act, then the

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petitioner is bound to pay interest and face consequences. By relying on "Arcot Textile Mills Limited V/s Regional Provident Fund Commissioner and Others" (2013) 16 SCC 1, he submits that there is limited scope in the challenge to the order passed under section 7Q of the said Act. From the impugned order, he points out that the Accountant, who appeared on behalf of the petitioner, before the respondent, on 28th September, 2016, has stated that the petitioner has no objection on the amount of damages and interest, a per the summons dated 17th December, 2015 and, therefore, the case was closed for final order. Refuting the arguments of the petitioner that payment was already made during the period 1st April, 1996 to 30th September, 2010, he submits that the amount due on 15th April, 1997 was paid by the petitioner on 3rd April, 1999. In reply to the submission of the petitioner that damages were doubly charged, he submits that the payments were made by the petitioner belatedly and hence for the delayed payment, damages were charged. He further submits that the reliance by the petitioner on the judgment of the Delhi High Court is misplaced, as the said decision is set aside by the Supreme Court in Civil Appeal No. 6592 of 2014, copy of which is placed on record. In the said decision, the Supreme Court has held that interest component has to be separated from damages. He, therefore, submits that there is no substance in the petition and the petition deserves to be dismissed. In support of his submissions, he relied on "Assistant Commissioner (CT) LTU, Kakinada and Others V/s Glaxo Smith Kline Consumer Health Care Limited" 2020 SCC Online SC 440 and "Horticulture Experiment Station Gonikoppal, Coorg V/s Regional Provident Fund Organizatino" (2022) 4 SCC 516.

8. Admittedly, the petitioner has challenged order dated 14th October, 2016, for the first time, by filing this writ petition on 18th February, 2019. The delay is not at all explained by the petitioner in the entire petition. Belated compliance of the provisions of the said Act is admitted by the petitioner in para 6 of the petition, which reads thus –

"6. The petitioner though is one of the major manufacturer of the Beedi in the Marathwada Region, due to the non realization of the debts / outstandings in the market, acute differences amongst the partners and litigation due to the same and also due to the other factors was caught in the financial crisis. However, it continued to comply with the provisions, though in a belated manner."

9. The Accountant of the petitioner, who appeared for the petitioner establishment before the respondent, has admitted that the petitioner has no objection on the amount of damages and interest as per summons dated 17th December, 2015.

10. In "Bhatkuli Taluka Co-operative Agriculture Society" (supra), learned Single Judge of this Court has held that discretion is given to the authority while passing order imposing damages and while assessing damages under section 14B of the said Act read with para 32-A of the Provident Fund Scheme, the authority is obliged to point out actual damages and also damages imposed as penalty. In this ruling it is held that the impugned order nowhere speaks about

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damages or its penal part and maximum rate stiplated in paragraph No. 32-A has been mechanically applied. In the facts and circumstances of the present case, this ruling will not assist the case of the petitioner.

11. In “Horticulture Experiment Station Gonikoppal” (supra), the Supreme Court has held that failure of the establishment to deposit contribution is sufficient for imposition of penalty or damages and, there is no further requirement on the authority concerned to examine the existence of element of actus reus / mens rea or to examine the issue of justification for imposing damages.

12. In “Arcot Textile Mills Limited” (supra), the Apex Court has held thus -

“28. The issue that falls for consideration in this case is when the employer volunteers may be after delay to pay the dues, can he claim any right to object pertaining to the interest component. On certain occasions the authority on its own may issue a demand notice under Section 7-Q after a long lapse of time by computing the delay committed by the employer in payment of the dues. We repeate at the cost of repetition that it is a matter of computation but sometimes computation is done when the main order is passed and at times an interest component is demanded separately by the competent authority. To say that there cannot be any error at any point of time will be an absolute proposition. There can be errors in computation. It is difficult to hold that when a demand of this nature is made in unilateral manner and the affected person is visited with some adverse comsequences no prejudice is caused.

34. Regard being had to the discussion made and the law stated in the field, we are of the considered opinion that natural justice has many facets. Sometimes, the said doctrine applied in a broad way, sometimes in a limited or narrow manner. Therefore, there has to be a limited enquiry only to the realm of computation which is statutorily provided regard being had to the range of delay. Beyond that nothing is permissible. We are disposed to think so, for when an independent order is passed making a demand, the employer cannot be totally remediless and would have no right even to file an objection pertaining to computation. Hence, we hold that an objection can be filed challenging the computation in a limited spectrum which shall be dealt with in a summary manner by the competent authority.”

13. According to the learned advocate for the respondent, the exercise contemplated in para 34 of the above citation is already carried out by the respondent, which is reflected in the order passed under section 7Q of the said Act. Perusal of the order passed under section 7Q of the said Act reveals that indeed said exercise has been conducted by the respondents.

14. Admittedly, the petitioner has not challenged the order passed under section 14B of the said Act, by filing appeal under section 7I of the said Act and, therefore, this Court is not inclined to entertain the challenge belatedly raised by the petitioner to the said order, in exercise of extraordinary writ jurisdiction.

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15. The record indicates that the petitioner has belatedly made payment for which liability to pay interest and damages is imposed on the petitioner, which cannot be faulted with. There is also no substance in the arguments of the petitioner that the damages are doubly charged. The calculations done by the respondent in this behalf were proper. The petitioner has failed to point out from record that calculations are wrong.

16. Learned advocate for the respondent is justified in submitting that reliance of the petitioner in Delhi High Court judgment is misplaced and misconceived as the said order is set aside by the Apex Court in Civil Appeal No. 6592 of 2014. By the said judgment, the Apex Court has remitted the matter back to the High Court holding that,

"....whether the circular of 1990 issued by the Central Provident Fund Commissioner would hold the field in view of the statutory provisions of Clause 32-A of the Scheme indtorudced in 1991. The High Court has also not taken into consideration whenther Clause 32-A of the Scehme can be taken to include interest when provision for interest 7Q was not in force. It has also not gone into the question whether the circular of 1990 can prevail upon the statutory provisions contained in Clause 32-A of the Scheme which prescribes the rate of damages. Question is whether damages so specified include the component of interest. May be that 1990 Circular included the component of interst in rate of damages, but that was not so provided under the statutory provisions of Clause 32-A of the Scheme. The effect of provisions of section 7Q as inserted in 1997 is also required to be considered.

We have no hesitation to set aside the judgment and order of the High Court and remit the case to the High Court to consider the effect of Clause 32-A and also consider various questions afresh and decide the case in accodance with law."

17. For the aforesaid reasons, no merit is found in the challenge raised by the petitioner to the order dated 14th October, 2016 and the action of issuing proclamation for sale of immovable property of the petitioner for recovery provident fund dues. The writ petition being devoid of substance is dismissed. No costs. Rule discharged.

18. The amount of Rs.25,00,000/- deposited by the petitioner pursuant to the order dated 27th February, 2019, shall be appropriated towards dues of the petitioner.

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