(2017) 02 MAD CK 0150

In the Madras High Court

Case No : W.P. (MD) No. 1498 of 2012 and M.P. (MD) Nos. 1 and 2 of 2012

Regional Provident Fund Commissioner APPELLANT

Vs

Presiding Officer, Employees Provident Fund Appellate Tribunal RESPONDENT

Date of Decision : 21-02-2017

Acts Referred:
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7L

Citation : (2017) 2 CLR 515 : (2017) LabLR 504

Hon'ble Judges : Mr. R. Suresh Kumar, J.

Bench : Single Bench

Advocate : Mr. V.S. Karthi, Advocate, for the Petitioner; Mr. V.O.S. Kalaiselvam, Advocate, for the Respondent No. 2

Final Decision : Disposed Off

Judgement

Mr. R. Suresh Kumar, J.—The prayer in the writ petition is for a writ of Certiorari to call for the records relating to the impugned order in ATA No. 92(13) 2010 dated 24.08.2011 issued by the 1st respondent and quash the same.

2. The 2nd respondent is an establishment covered under the Employees Provident Fund and Miscellaneous Provisions Act 1952 (hereinafter referred to as ''the Act''). On the alleged reason of belated payment of Provident Fund contribution by the 2nd respondent, the petitioner initiated proceedings against the 2nd respondent and by his proceedings, the petitioner, by order dated 06.01.2010, directed the 2nd respondent to pay a sum of Rs. 4,64,139/- as penal damages with 12% interest to be paid by the 2nd respondent within 15 days. According to the petitioner, since the 2nd respondent has not made the employer contribution and also family pension and family fund contribution as well as deposit linked insurance contribution, etc, as per the provisions of the Act, the 2nd respondent is liable to pay the penal damages with mandatory 12% interest. Therefore, the same had been calculated and by the said order dated 06.01.2010, the 2nd respondent was directed by the petitioner to pay the

amount within 15 days, otherwise, action would be initiated against the 2nd respondent under Section 7Q of the Act.

3. As against the said order passed by the petitioner, the 2nd respondent filed Appeal No. ATA 92(13) 2010. The first respondent appellate authority, after having considered the rival claim made by the 2nd respondent as well as the petitioner, has passed the final order in the appeal on 24.08.2011, whereby the first respondent has passed the following order:

"10. Thus, in view of the discussion held above, since the delay in depositing the contribution does not appear to be an intentional one but only due to the financial problem, the order of the authority cannot be sustained. Hence ordered, the matter is remanded back to the PF authority to assess the dues @ 22% (inclusive of interest). The appellant is also directed to appear before the PF authority within one month of receipt of this order. If the appellant fails to appear, the authority may decide the matter as per law. Copy of order be sent to the parties. File be consigned to record room."

As against the said order passed by the first respondent, the petitioner has filed the present writ petition challenging the very order of the first respondent dated 24.08.2011.

4. Heard both sides.

5. The learned counsel for the petitioner would submit that since the second respondent has delayed in making the contribution under various heads, as has been spelled out by the petitioner, in its order dated 06.01.2010, the petitioner, after having invoked the necessary provision, especially 14b of the Act read with Paragraph 32A of the Employees Provident Fund Scheme 1952 (hereinafter referred to as ''the Scheme''), passed the said order. The learned counsel for the petitioner would invite the attention of this Court at Paragraph 32A of the Scheme, which reads thus:

"32-A. Recovery of damages for default in payment of any contribution.-

(1) Where a employer makes default in the payment of any contribution to the 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 of the Act or in the payment of any charges payable under any other provisions of the Act or the Scheme or under any of the conditions specified under Section 17 of the Act, Central Provident Fund Commissioner or such 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, damages at the rates given in the table below:-

Sl. No.

Period of default

Rate of damages (percentage of arrears per annum)

-1

-2

-3

(a)

Less than 2 months

five

(b)

Two months and above but less than four months

ten

(c)

Four months and above but less than six months

fifteen

(d)

six months and above

twenty five

(2) The damages shall be calculated to the nearest rupees, 50 paise of more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored."

6. Since the delay on the part of the 2nd respondent in making the contribution is more than six months, the minimum percentage of penalty, damages as per the said paragraph 32A is to be levied on the 2nd respondent with 25%. Therefore, based on the said table given in Paragraph 32A of the Scheme, the order was passed by the petitioner. If at all the 2nd respondent is aggrieved with the order of the petitioner, he can very well prefer an appeal before the Central Government, who alone is empowered to reduce or waive the damages levied under Section 14b of the Act, such appeal, if filed by the 2nd respondent under 2nd proviso to 14b of the Act. Admittedly, there is no such appeal from the 2nd respondent, instead, the 2nd respondent straight away had approached the first respondent by filing an appeal and in that appeal, the first respondent Tribunal has interfered with the orders of the petitioner. Even though the first respondent in the order impugned has remitted the matter back to the petitioner for reconsideration, it has fixed that the Provident Fund authority has to assess the dues at 22% inclusive of interest. Such kind of lesser fixation inclusive of interest, as has been made by the first respondent through the impugned order, is without jurisdiction, as the power to reduce or waive the interest or penalty or damages imposed on the employer is only vested with the Central Government

and in the absence of any such appeal before the Central Government being preferred by the 2nd respondent, the present impugned order ought not to have been passed by the first respondent. Therefore, the same is totally unjustifiable and without jurisdiction. Therefore, the impugned order is liable to be interfered with.

7. Per contra, the learned counsel for the 2nd respondent would invite the attention of this Court to, two judgments of this Court, where the very same 2nd respondent had been the party, where a similar issue was raised in respect of the very same Provident Fund contribution, in earlier occasion.

8. The learned counsel for the 2nd respondent would first rely upon a decision of this Court dated 16.04.2012 made in W.P.No.13036 of 2009 in the matter of the Assistant Provident Fund Commissioner v. the Employer Provident Fund Appellate Tribunal and another, wherein, the learned Judge, after having considered exhaustively the import of the various provisions of the Act, especially, provisions 14b and 7L has given his findings, which reads as follows:

"7. The learned counsel for the department sought to argue that the Tribunal has no power to interfere in the matter of reducing the levy of damages. The learned counsel relies the second proviso of Section 14(b) of the Act.

8. In my view, the submission of the learned counsel for the department has no substance. As per section 7(L) of the Act, the appellate authority has power to confirm or modify or annul the order appealed against. The Tribunal took note of the circumstances and reduced the penalty, exercising the discretion. I have gone through the order passed by the Tribunal. Para 9 of the order is extracted hereunder:

"9. A perusal of the impugned order indicates that the officer conducting enquiry under Section 14B of the Act has not followed the law laid down by the Apex Court and the High Court in its correct perspective. There is no enquiry or finding of fact that the appellant has wilfully and deliberately withheld the PF contribution and also the Enquiry Officer has not exercise its discretion vis-a-vis the actual reasons for delays in remittance of PF dues. Accordingly, the impugned order suffers from legal infirmities. However, keeping in view the reasons and circumstances in which the default in remittance of PF dues occurred, ends of justice be met by restricting the damages upto 05% per annum ie., 05% of the actual amount of damages assessed under section 14B of the Act in each case. In terms of the above, the appeals are disposed of. Files be consigned to the record room. Copy of the order be sent to both the parties."

In such circumstances, I am of the view that the Tribunal has exercised its discretion vested under Section 7L of the Act and reduced the damages. The second proviso of section 14(B) of the Act is besides the power of the Tribunal. Without even preferring an appeal, the Mill could have approached the Central Board pointing out the difficulty and also could ask for relief under the second proviso. The power under the second proviso of Section 14(B) of the Act could not take away the power of the appellate authority under Section 7(L) of the Act.

9. In view of the same, the writ petition deserves to be dismissed and accordingly, the same is dismissed. As already stated, the learned counsel for the Mill has no objection for confirming the order though the writ petition was preferred questioning the levying of damages. No costs. Consequently, connected miscellaneous petitions are also dismissed."

9. The learned counsel for the 2nd respondent would also submit that as against the said order of the learned Judge, the Assistant Provident Fund Commissioner concerned had appealed by way of intra Court appeal before this Court in W.A. (MD) No. 441/2013, wherein, a final order was passed by a Division Bench of this Court on 03.06.2013, wherein also, the Division bench, after having considered the order of the learned Judge, has passed the following order:

"4. The learned single Judge considered the said issues and gave a finding that the Tribunal, taking note of the fact that BIFR proceedings were pending at the relevant time against the second respondent and the Mill being a sick company, thought fit to reduce the damages from 25% to 5% based on facts, in exercise of the discretion vested under Section 7-L of the Employees'' Provident Funds and Miscellaneous provisions Act, 1952 and upheld the order of the Tribunal. It is also stated in the order of the learned single Judge that unless there is wilful and deliberate withholding of provident fund contribution payable, damages cannot be ordered as there was financial difficulties faced by the 2nd respondent. The direction regarding payment of damages is compensatory as well as penal in nature and unlike claim of interest for the belated remittance while ordering damages, facts and circumstances of the case should be considered. The Tribunal considered the facts and circumstances, which is in terms of Section 7-L of the Act, i.e., the Tribunal is vested with the power to confirm, modify or annul the order appealed against, unlike interest payable under Section 7-Q of the Act. The said decision rendered by the Tribunal was upheld by the learned single Judge based on facts, which are not disputed before us. Hence, we are not inclined to interfere with the said decision of the Tribunal, confirmed by the order of the learned single Judge."

10. Therefore, the learned counsel for the 2nd respondent would submit that the issue raised herein by the petitioner has already been raised in respect of the very same 2nd respondent for the alleged delayed payment of Provident Fund contribution by the 2nd respondent Mill and all these issues raised herein has also been answered in favour of the 2nd respondent. Therefore, absolutely, there is no infirmity in the order passed by the first respondent Tribunal, which is impugned herein and therefore, according to him, no interference is required from this Court.

11. This Court had considered the rival submissions.

12. As has been rightly pointed out by the learned counsel for the 2nd respondent, the issue as to whether the first respondent Tribunal has got a

power to entertain the appeal to pass an order modifying the order passed by the original authority with regard to the penalty damages or the interest concerned and in that case, where the Tribunal has got the power, has also been discussed and decided. As has been held in the said judgment cited supra, merely because the second proviso to Section 14b empowers the Central Government for waiver of damages or reduction or waiver of damages levied under Section 14b that will not ipso facto take away or abrogate the power vested with the Tribunal under Section 7L of the Act. According to the learned Judge, the power of the Tribunal under 7L has not denuded and it has got every power to pass orders, as it thinks fit either confirming, modifying or annulling the order appeal against or made referring the case back to the authorities, which passed such order with such direction as the Tribunal as may think fit for a fresh adjudication.

13. In view of the said power under Section 7(L)(1) of the Act, such a vast power has been vested in the authority of the Tribunal. Therefore, in exercising of such power under Section 7L, the present order also has been passed by the first respondent, wherein, the order of the petitioner has got interfered with and the matter was remitted back for reconsideration to the petitioner. In the impugned order, the first respondent has given its own reasons at Paragraph No. 9, which reads thus:

"9.The document filed by the appellant show that the appellant was depositing the contribution regularly till it sustained financial problem. The point to be seen is whether the delay is a chronic and intentional one or not. In the case in hand, since the appellant was paying the contribution regularly till it sustained financial loss shows that the delay in depositing the contribution is not an intentional one. In the case of M/s. Shanti Garments v. Regional PF Commissioner reported in 2003 Vol. 1 CLR Page 228, the Hon''ble High Court of Madras held that, "where default is found but no apparent fault the quantum of damage should be compensatory rather than penal in nature." since, the default does not appear to be intentional one the assessment on the higher side does not appear to be proper one."

14. When the first respondent Tribunal, after having found that there are sufficient reasons on the part of the 2nd respondent to make the payment belatedly and it was also found by the appellate authority that such a delayed payment was not intentional, then, certainly, the Tribunal has got every power under Section 7(L)(1) of the Act, as has been held by the learned Judge in the judgment cited supra, which has also been confirmed by a Division Bench of this Court in the judgment referred to above.

15. In view of the law, which has already been settled by this Court as above and in fact the said judgments were between the very same parties, the law settled therein is not only judgment in personam but also judgment in rem and at any cost, since the very same parties are before this Court, already in the said two decisions, the facts pertaining to the 2nd respondent Mill, which was prevailing,

that would also be applied here also, as the very same position of financial sickness on the part of the 2nd respondent Mill was still continued during the relevant point of time, for which, the present controversy was arisen. Therefore, this Court is of the considered view that the first respondent Tribunal in exercising of its function and power under Section 7(L)(1) of the Act has passed the very reasoned order, whereby the matter was remitted back to the petitioner for reconsideration. Therefore, the petitioner in the light of the order of remand, which is impugned herein passed by the first respondent, can reappraise the issue and decide the same afresh, of course, after giving an opportunity of being heard to the 2nd respondent. Hence, in the circumstances, this Court finds absolutely there is no infirmity in the order impugned and therefore, the same is liable to be sustained. Accordingly, the writ petition fails and therefore, the same is dismissed. However, there is no order as to costs. Consequently connected Miscellaneous Petitions are closed.