

(2011) 09 MAD CK 0347

In the Madras High Court

Case No : Writ Petition No. 16497 of 2011 and M.P. No. 1 of 2011

Solidaire India Limited and A.S. Ramana Prasad

APPELLANT

Vs

The Employees Provident Fund Appellate Tribunal and The
Assistant Provident Fund Commissioner (C and R)/Recovery
Officer, Employees Provident Fund Organisation

RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 14B,
19, 20, 7D

Citation : (2011) WritLR 897

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : R. Yashod Vardhan for M.R. Dharanichander, for the Appellant; K.
Gunasekar, for R2, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—The first Petitioner is M/S. Solidaire India Limited, represented by its Director and the second Petitioner is the Director of the company in his personal capacity. The writ petition is filed, challenging an order passed by the Employees Provident Fund Appellate Tribunal made in ATA.223(13)/2002 and the order of the second Respondent dated 11.02.2011 as well as the recovery notice dated 30.05.2011 and the consequential show cause notice dated 28.06.2011 for threatening the second Petitioner with a warrant of arrest. In the show cause notice dated 28.06.2011, it was show caused as to why the second Petitioner should not be arrested.

2. When the matter came up on 13.07.2011, this Court directed the Petitioner to give notice to the learned Standing counsel Mr. K. Gunasekar for the PF Department and pending further hearing, threat of arrest was stayed by this Court.

3. On notice from this Court, the second Respondent has filed a counter affidavit dated 28.07.2011.

4. Heard the arguments of Mr. R. Yashod Vardhan, learned Senior Counsel appearing for Mr. M.R. Dharanichander, counsel for the Petitioner and Mr. K. Gunasekar, learned Standing Counsel for the PF department.

5. It is seen from the records that the Petitioner filed an appeal u/s 7-I of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short EPF Act) before the first Respondent EPF Appellate Tribunal against an order dated 11.02.2011 imposing damages u/s 14-B of the EPF Act. The Tribunal held that inasmuch as the application of the EPF Act was not under challenge and the financial problem pleaded by them was common to industries and on that ground no interference can be called for. Merely because the company had become sick and being referred to BIFR cannot be an impediment for recovering the dues. In paragraph 7, it had recorded the following reasons for dismissing the appeal.

7. Thus, in view of the discussion held above, the financial problem and the establishment becoming sick is not a justifiable ground, hence, no infirmity is noticed in the order of the EPF Authority. Hence, ordered, the appeal is dismissed. Copy of order to be sent to both the parties. File be consigned to record room.

6. It was submitted by the learned Senior Counsel for the Petitioner that the company has become sick and the matter was referred to Board for Industrial and Financial Reconstruction (BIFR) for framing Rehabilitation Scheme. The BIFR by its order dated 01.10.1997 gave a direction to the company not to dispose of any fixed or current assets without the consent of the BIFR. In Paragraph 7(n), it was noted that the reliefs and concessions expected from State Government, PF and ESI authorities should be such are covered by the existing policy guidelines of concerned authorities. In paragraph 7(o), it was stated that the right of recompense in respect of sacrifices proposed to be undertaken by the Central Government, must be provided. The BIFR appointed ICIC Bank as Operating Agency.

7. Thereafter, on 03.04.2000, the company declared suspension of operations at their Seevaram Factory and on 25.04.2000 at their Perungudi Factory. In the meanwhile, the second Respondent Recovery Officer by his proceedings dated 28.03.2001 attached the factory at Perungudi and Seevaram. Subsequently, the attachment order was lifted on 02.04.2001. But the machineries in the premises at Perungudi was kept under attachment. Thereafter, the attached properties were left under the safe custody of the Management.

8. The BIFR by its order dated 13.08.2001 had recommended that there was no acceptable revival scheme and therefore, it was of the opinion that the winding up proposals should be forwarded to the High Court. As against the order of BIFR, the Petitioner filed an appeal before the AAIFR in Appeal No. 324 of 2001 and the appeal was dismissed on 26.02.2002 confirming the order of the BIFR.

9. It is after this order, the second Respondent issued the impugned proceedings dated 18.03.2002 imposing damages for the delay in payment of PF dues and also interest in terms of Section 7-Q of the EPF Act. The damages were quantified in terms of Paragraph 32-A of EPF Scheme and worked out to Rs. 7.96.560/- and the delay was calculated for the period from 2/1997 to 6/2000.

10. Challenging the levy of damages, the Petitioner Company moved the Tribunal with an appeal u/s 7-I of the EPF Act. In the appeal memo, they have also enclosed a List of Enclosures containing the proceedings of the BIFR, suspension of operation of the two factories, letter sent by the Deputy Commissioner of Labour to PF Commissioner, the pendency of the Industrial Dispute in I.D. Nos. 18 and 19 of 2001 and the counter statement filed by them together with annual report for the period from 1992-1993 to 1999-2000. In the grounds, they have stated that the company was regular in making PF Contribution upto April 1997 and the employees contribution have been paid fully upto April 2000 i.e. until the date of suspension of operations. The employer contribution have also been paid upto October 1998. The non-payment of dues is not due to any wilful default and it was due to circumstances beyond the control of the company. The company did not even have money to pay the salary to the staffs and executives. For levying penalty u/s 14-B of the EPF Act, there must be a misconduct on the part of the company and when the PF authorities have sealed the factory and freezed their bank account by orders dated 28.03.2001 and 10.11.1998, the company was further crippled and no job work was possible as the company was sealed by the PF Authorities and these facts were not taken into account in levying the damages.

11. The appeal filed by the Petitioner was taken on file as ATA 223(13)02 and notice was issued to the second Respondent. The second Respondent filed a counter statement. In the counter statement, it was stated that the sickness of the company cannot be a ground for the default. They did not state anything about the attachment made by the Department and that the company had declared suspension of operation.

12. In the meanwhile, a dispute in I.D. Nos. 18 and 19 of 2001 was raised before the Industrial Tribunal of Tamil Nadu. The Tribunal by its Award dated 15.05.2006 upheld the suspension of operation from 25.04.2000 and held that the workmen were not eligible for any relief. In paragraph 14 of the Award, it was stated as follows:

14. The Respondent has closed his production, since the Respondent product has ceased its demand in market, because of invasion multi national product in cheaper cost. The Respondent obtained job contract from other companies to provide work for workers, but because of the non cooperation of these workers, the Respondent is not in a position to complete the job work in stipulated time, so, the companies gave a job work with draw the same, and stopped to placing of job work. So virtually the Respondent has no work, hence he declared suspension of operation of the work. Even though, that the BIFR and AAIFR has

ordered for winding up, the Respondent has filed a Writ before the Hon'ble High Court of Delhi for the stay the proceedings. So, they are taking steps to revive the industry. Hence, this Tribunal concludes the Suspension of operation is justified.

13. Despite these facts, the Tribunal by a one paragraph order rejected the case of the Petitioner company. After the dismissal of the appeal by an order dated 30.08.2010, the second Respondent by an order dated 11.02.2011 demanded a sum of Rs. 25,20,767/- towards the penal damages and interest u/s 7-Q of the EPF Act. The Petitioner made an appeal to the Central Provident Fund Board seeking for intervention of the Board. The Board by an order dated 11.04.2011 informed the Petitioner that only when there is a scheme of Rehabilitation sanctioned by BIFR, the second proviso to Section 14-B will be attracted so as to enable the Central Provident Fund Board to consider the request of the Petitioner. Hence, they were unable to intervene. Subsequently, a notice of attachment attaching the properties of the company was issued by the PF authorities on 30.05.2011 and also a show cause notice was issued as to why the second Petitioner should not be arrested and made to undergo imprisonment. It is at this stage, the Petitioners have moved this Court.

14. In the counter affidavit filed on behalf of the second Respondent, it was claimed that merely because the company was a sick company and was referred for a scheme to be framed by BIFR cannot be an impediment for recovering the dues of the PF Department. It was stated if there are any belated payment, Section 14-B and 7-Q of the EPF Act will be automatically attracted and the fact that the ESI authorities have introduced a New Amnesty Scheme in 2010 waiving 100% damages has no relevance to the PF Department as no such scheme is available. Notwithstanding the fact that BIFR has recommended winding up of the company, it has no relevance for waiver of damages and interest. With reference to the actual levy of damages, the steps undertaken by them is set out in paragraph 7 of the counter, which is as follows:

7. ... The enquiry authority proceeded with the levy of damages u/s 14B of the Act read with para 32-A of the EPF Scheme, 1952 and levied damages varying from 17% to 37% per annum depending upon the delay not exceeding the amount in arrears."

15. Mr. R. Yashod Vardhan, learned Senior Counsel for the Petitioners contended that the levy of damages requires contravention of the statutory provision and should have mens rea and levy of penal provision should be construed strictly and only because there is a provision for levy of penalty, it does not lead to the conclusion that the penalty must be levied in all situations. The authority is not bound to act mechanically by applying the uppermost limit found in the table u/s 32-A of the EPF Scheme.

16. The learned Senior Counsel referred to the judgment of the Supreme Court in *M/s. Prestolite of India Ltd. Vs. The Regional Director and another*, and

referred to the following passage found in paragraph 5, which is as follows:

5. ... Even if the Regulations have prescribed general guidelines and the upper limits at which the imposition of damages can 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 it is bound to act mechanically in applying the uppermost limit of the table. In the instant case, it appears to us that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment were not to be accepted. There is no indication as to why the imposition of damages at the rate specified in the order was required to be made. Simply because the Appellant did not appear in person and produce materials to support the objections, the employee's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits.

17. The learned Senior Counsel also referred to the judgment rendered under the ESI Act which is having the provisions *pari materia* to the PF Act regarding levy of damages and interest. In this context, reference was made to the judgment of the Supreme Court in *Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another*, . In paragraphs 21, 25 and 26, it was observed as follows:

21. A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85-B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an endeavour should be made to construe such penal provisions as discretionary, unless the statute is held to be mandatory in character.

25. The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with no direction. The legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinarily, even such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance with the principles of natural justice is necessary thereunder.

26. Existence of *mens rea* or *actus reus* to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.

18. The learned Senior Counsel further submitted that that consideration by the Central Provident Fund Board to decide the waiver or reduction of damages as found under second proviso to Section 14 is entirely different from the power vested on the EPF Appellate Tribunal u/s 7I of the EPF Act to deal with the levy of

damages u/s 14-B. The Tribunal undoubtedly has discretion to grant relief in case of levy of damages were unreasonable or has been made in a mechanical fashion. In case the Tribunal do not grant relief, this Court under Article 226 of the Constitution can grant such relief. For this purpose, he referred to the judgment of the Supreme Court in *M/s. K. Streetlite Electric Corporation Vs. Regional Provident Fund Commissioner, Haryana*, . In that case, the Supreme Court did not remand the matter for fresh consideration. It held that the direction issued by the Central Government u/s 20 cannot be binding on the department in assessing the damages. In the matter of imposition of damages, the authorities must levy damages commensurate with the situation on hand. In paragraph 5, it was observed as follows:

5. The second contention need not be examined in the view we propose to take in the matter. Even if we hold that the Central Government instructions issued u/s 20 of the Act are not binding on the Respondent, still in assessing the damages it will be necessary for us to take note of the manner in which the amounts of damages have been levied and appropriately consider as to what would be the correct rate of damages to be imposed u/s 14-B of the Act. The statement of calculation prepared by the Respondent regarding delay in payments discloses that the Respondent has imposed damages at different rates, for example, for the month of July 1976 the rate of damages is 50% whereas the period of default is over a month, while in case of December 1976 the damages imposed upon the Appellant are at the rate of 20% though the period of delay is over two months, in the case of delay for April 1988 damages imposed are at the rate of 30% though the period of delay is only one month. In certain cases, even for a delay of below 15 days, like October 1977, damages at the rate of 85% have been imposed, while for another period though the delay is for six months 65% damages have been levied. Therefore, it is not possible to discern the rationale adopted by the Respondent in the matter of imposition of penalty. In the circumstances, therefore, it would have been appropriate for us to set aside the order and remit the matter to the Respondent, but we do not think that such an exercise is necessary after such a long period. In this case, the amount due towards provident fund has already been deposited and this Court, by order dated 18-12-1998, granted an interim relief to the extent of 75% of the amount of damages sought to be recovered, while out of the disputed amount of damages (that is, Rs. 88,731.25) 25% had already been directed to be deposited. In that view of the matter, we think, it is appropriate to confine the damages leviable in this case on an overall consideration to the extent of 25% of the total damages imposed.

19. The learned Senior Counsel also submitted that it is not as if the EPF Tribunal has no power to grant relief in an appeal u/s 7-I of the EPF Act. The Tribunal after rejecting the request of the Petitioners on 30.08.2010 on the very next day in respect of another company (*M/S. Hivelm Industries, Chennai*) in ATA No. 351 (13) 2001 granted relief even after holding that financial position of the company was not sound and it was not proper to grant relief, yet it reduced the penalty by

assessing the liability at 22% including interest per annum vide order dated 31.08.2010.

20. This Court in a batch of writ petitions in W.P. No. 17518 to 17521 of 2004 and etc batch dated 21.06.2011 (Assistant Provident Fund Commissioner v. Employees Provident Fund Appellate Tribunal, Ministry of Labour and Employment, Government of India) has held that the Tribunal while hearing appeal u/s 7-I of the EPF Act is entitled to grant relief with reasons of fair play and justice and it is not trapped by the limitation prescribed under Second Proviso to Section 14-B of the EPF Act. In that case, this Court upheld the order of the Tribunal in reducing the quantum of damages imposed by the department.

21. In the present case, the Tribunal did not exercise its power in terms of the power vested on the Tribunal and miserably failed to discharge its statutory powers. It is rather a sad state of affairs that the Tribunal, when several grounds are raised and supported by documents which are enclosed along with the appeal did not even care to refer to any one of the documents and see the effect of those documents in relation to the claim made by the Petitioners, who are Appellants before the Tribunal. The Tribunal had made a mechanical application and reduced the appellate power into one of farce, wherein, it has got two stereo typed orders, one for allowing the appeals and the other for dismissing the appeals. In both cases, the orders do not exceed more than 10 sentences. The Tribunals are not constituted for passing such stereo-typed orders. The Tribunal must function within the four corners of law and cannot exceed its jurisdiction. Being the appellate authority, it is entitled to go into both questions of law and facts and it must consider the grounds raised in the appeal and how far the documents annexed supports the ground raised as well as whether the case involves grant of any relief in the exercise of appellate power. In this context, arguments addressed by the learned Senior Counsel that the Tribunal had passed order impugned in the writ petition on 30.08.2010 and the very next day in the M/s. Hivelm Industries, it had granted relief by passing a different order. One can understand if the Tribunal discuss the situation of each case and in such circumstances, the relief granted to one party cannot be automatically extended to another party, but as has been noted in the past few months, the Tribunal seems to be passing mechanical orders without application of mind thereby increasing litigations before this Court.

22. In fact, it will not be out of place to mention that there has been increasing criticism against such tribunalisation leading to trivializing and demeaning judicial powers of the Courts. The increased display of such attitude by the present EPF Tribunal is only proving the said point. It is not as if the parliament constituted the Tribunal only to deal with appeals in a bureaucratic fashion and to exhibit itself as an extension of South or North block in New Delhi. The Tribunal is undoubtedly a judicial Tribunal and must deal with the submission of the aggrieved Appellants in consistence with the principles of fair play, equity and relevant provisions. The Tribunal in passing such contradictory orders within a

time gap of 24 hours had given rise to not only Petitioners accusing the Tribunal of showing bias and discrimination but even the Department had come up against the order passed on 31st August, 2010 raising similar grounds like the private parties. This approach of the Tribunal must be stopped immediately and the Tribunal must pass appropriate orders keeping in mind that it is exercising judicial power over the action of the Respondent Department and the valuable rights of parties are at stake if such callous orders are passed besides giving rise to increased docket explosion before the High Court.

23. Perhaps the Tribunal may not be aware that before the amendments were made by Amendment Act 33/1988, there was no provision under the Act for questioning the action of the PF Authorities and matters were only taken to the Central Government invoking its powers u/s 19 of the PF Act or in the alternative challenging such actions before this Court under Article 226 of the Constitution. When the Central Government found there was increasing challenge to the actions of the authorities and many times directions were issued by the High Courts to the Central Government to deal with the grievance projected by the Employers as well as by the Employees, it was decided on right time to provide for a appellate remedy within the provisions of the Act. In that context, the Tribunal was constituted in terms of Section 7D of the EPF Act. The Tribunal was directed to be presided by a person who is qualified to be a Judge of High Court or a District Judge. Therefore, the Tribunal provided with judicial power, in deciding the lis between the parties must advert to every contentions raised in the appeal memo and refer to every document that was necessary for dealing with such grounds of appeal as well as the oral contentions pleaded by the parties before the Tribunal and must write a speaking order.

24. If the present trend of the Tribunal passing similar orders to the impugned order is continued, then this Court will have no hesitation to call for appropriate remarks from the Presiding Officers and if necessary to write to the government for taking action against such Presiding Officers who are flouting the laws of the land.

25. In the light of the above discussion, this Court has no hesitation to set aside the impugned order of the Tribunal as well as the order passed by the Respondent PF Authorities. This Court finds that the Petitioner company was a sick company and the matter was referred to BIFR for framing a Scheme for revival and when that was not possible, it was recommended for winding up the company. The company also declared suspension of operations in its two factories and that suspension of operation was held to be valid by the Tribunal in its Award. The suspension of operation was necessitated due to the attachment made by the PF Department and the company had suffered even on that action. These factors cannot be merely labelled as financial crisis. During the pendency of the proceedings, the dues collected from the employees have been paid in its entirety and the dues of the Petitioner company has also paid to the extent of Rs. 18,25,555/- starting from November 1998 to August 2000 was also paid. The

imposition of penalty was made mechanically and as per the admission in the counter affidavit Para 32A of the EPF Scheme was simply reproduced for levy of damages without taking into account that it was penal and it should not be mechanically applied as held by the supreme Court in the decision cited above. When the company has specifically pleaded that they have no funds and they become sick and suspension operation were also necessitated, the department should have made some consideration towards the levy of damages as the Supreme Court held it was not automatic and there must be mens rea in the default. When these facts were pointed out, the Tribunal also did not apply its mind and exercised its jurisdiction which obliges this Court to interfere with the impugned order.

26. Hence, for the reasons stated above, the order of the Tribunal as well as the PF authorities is set aside, but at the same time, this Court is not inclined to remand the matter for any fresh disposal by either of the authorities. In the light of the relief granted by the Supreme Court in *Streetlite Electric Case* (cited supra), this Court fixes the damages on an overall circumstances of the case to the extent of 25% together with interest as the only amount to be paid by the Petitioner company.

27. The writ petition is allowed accordingly. However, parties are directed to bear their own costs. Consequently, connected miscellaneous petition is closed.