

(2012) 08 KAR CK 0379
In the Karnataka High Court
Case No : Writ Petition No. 588 of 2012 (L-PF)

The Regional Provident Fund Commissioner "Bhavishyanidhi Bhavan," 13, Raja Ram Mohan Roy Road, P B No. 2584, Bangalore - 560 025 and The Assistant Provident Fund Commissioner "Bhavishyanidhi Bhavan", 13 Raja Ram Mohan Roy Road, PB No. 2584 Bangalore - 560 025

APPELLANT

Vs

M/s. Kaytee Switchgear Ltd P B No. 5554 Malleswaram (West) Bangalore 560 055

RESPONDENT

Date of Decision : 21-08-2012

Acts Referred:

Constitution of India, 1950 — Article 14

Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 14 B, 15 (2), 17 (5), 85 B

Citation : (2013) LabIC 34

Hon'ble Judges : Subhash B. Adi, J

Bench : Single Bench

Advocate : Harikrishna S. Holla, in Writ Petition No. 588/2012, 13136/2012, 587/2012, 3547/2012, 3546/2012, 3545/2012, 9891/2012, 5151/2012 and A.R. Holla in Writ Petition No. 42631/2011, for the Appellant; Somashekar A/W Sri. S.N. Murthy, For M/S. S.N. Murthy Associates, in Writ Petition No. 588/2012 and 9891/2012, Sri. Harikrishna S. Holla in WP. No. 42631/2011, BYS RI. K.R. Anand in WP No. 587/2012 and 3545/2012, Sri. N. Suresha in WP No. 3546/2012, Sri. G.S. Kannur in WP No. 5151/2012, for the Respondent

Judgement

The Hon''ble Mr. Justice Subhash B. Adi

1. In Writ Petition No. 588/2012, petitioners have called in question an order of the Employees' Provident Fund Appellate Tribunal (in short Tribunal") dated 04.07.2011 produced at Annexure-D wherein the Tribunal has set aside the order of the original authority with a direction to the Provident Fund Organisation to levy the damages at the flat rate of 22%. It is against the said order of the Tribunal, the petitioner -Provident Fund Commissioner is before this court. In connected writ petitions also, similar orders are called in question. The issue

raised in these writ petitions is:

as to whether the Tribunal or the Authority can levy the damages at a flat rate of 22% contrary to paragraph 32-A of the Employees' Provident Funds Scheme, 1952 (in short referred to as "Scheme").

2. The facts, which are not in dispute are that,

The respondent- Establishment is covered under the Provident Funds Scheme, and had committed default in making the contribution.

It is also not in dispute that, the respondent - employer held liable to pay the damage u/s 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (in short "Act") and it is also not in dispute that the appeals were filed before the Tribunal challenging the quantum of damages imposed by the organisation against the petitioners. The respondents, who were the appellants before the Tribunal, had contended that the provisions of Section 14-B of the Act and paragraph 32-A of the Scheme do not make it mandatory to levy the damage as per the scale prescribed in para 32A of the Scheme. These provisions are directory in nature and the discretion vests with the authority or the Appellate Tribunal to award the damage by considering the mitigating circumstances. The Appellate Tribunal considering the circumstances, found that awarding damage at higher rate of 37% would be unreasonable and has awarded the damage at the rate of 22%. It is against the said orders, the Provident Fund Commissioner is in Writ Petition.

3. Sri. Harikrishna S Holla, learned Counsel appearing for the petitioners submitted that, under the provisions of the Act, the Central Government has notified a Scheme formulated for establishment of Provident Funds for employees or any class of employees by specifying the establishment or class of establishments to which the said Scheme shall apply. The Provident Fund contribution will vest with the administration constituted by the Central Government u/s 5-A of the Act. Each employer covered under the Scheme shall contribute towards the Provident Fund at the rate specified u/s 6 of the Act. However, the method of determination of the Provident Fund is contemplated u/s 7-A of the Act. If the contribution towards the Provident Fund is not made in time, the employer shall be liable to pay simple interest at the rate of 12% per annum or at such higher rate as specified in the Scheme on any amount due from him under the Act from the date on which amount had become due till the date of actual payment. However, the interest so levied shall not exceed the lending rate of interest charged by any scheduled bank. He further submitted that, in case of delayed contribution, the employer is liable to pay the penalty u/s 14 of the Act. Section 14 sub-section (1B) of the Act confers power on the organisation to levy the damage against the employer, and the employer who contravenes, or makes default in complying with the provisions of Section 6C or Section 17 sub-section (3A), shall be punishable with imprisonment for a term, which may extend to one year but shall not be less than six months and shall

also be liable to fine which may extend to five thousand rupees. At the same time, the organisation is conferred with the power to recover the damage where an employer makes a default in making the contribution towards the Provident fund, the 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 of the conditions specified u/s 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.

4. He further submitted that, the Scheme has been defined u/s 2 clause (1) of the Act, which means the Employees Provident Fund Scheme framed u/s 5. It is further contended that, the Central Government by issuing a notification has framed the Scheme, which has come into effect from 2nd September 1952. Amongst other things, insofar as recovery of damages is concerned, para-32A of the Scheme provides for rates at which the damage could be levied. A tabular form has been prescribed under para-32A of the Scheme, providing for different rates for different delayed/defaulted payment and as such, the Scheme being part of the Act framed for the purpose of levy of damage, the levy of the damage has to be in consonance with para-32-A of the Scheme. He also relied on tabular form to submit that, very fact that different rates are prescribed itself indicates that, the levy of damage could be not less than the rate prescribed for different period.

5. In the alternative, he also submitted that, though discretion may vest with the organisation to levy the damage by taking into consideration different mitigating circumstances, however, it does not confer power on the Commissioner to completely absolve any employer from liability to pay the damage. In this regard, he also referred to second proviso to Section 14-B of the Act and submitted that, only in case where the establishment is a sick industrial Company and in respect of which, the Scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established u/s 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, the Central Board may reduce or waive the damages. Thus, by harmonious reading of these provisions, it is only in such cases, having regard to these circumstances, levy of damage either can be reduced or could be waived as against such industries, but not against other employers. He also submitted that, even assuming that the mitigating circumstances could be considered for the purpose of reducing the damages, but it does not empower to exempt any employer from the liability to pay the damage.

6. He relied on a decision of the Bombay High Court in Writ Petition No. 9453/2011 in the matter of Kiron B Dhingra -vs- Union of India and submitted that, though the Bombay High Court on interpretation of Section 14-B of the Act

and para 32-A of the Scheme has held that, para 32-A of the Scheme cannot be mechanically applied as the discretion vests with the Commissioner to levy damages of lesser rate, but that does not provide to waive the damage. He also relied on the decision reported in 2012 LAB.I.C. 1900 in the matter of M/s. Harrsons Malayalam Ltd. -vs- The Regional Provident Fund Commissioner, Kottayam and Others and submitted that, Kerala High Court also on interpretation of the provisions of Section 14-B of the Act read with para-32A of the Scheme has held that, it is permissible to impose lesser rate of damage than the one prescribed under para-32A of the Scheme while assessing the damages, but does not empower to waive off the damage or absolve the damage itself.

7. Learned Counsel for the petitioner, though did not dispute that the discretion vests with the Provident Fund Organisation to levy lesser rate of damage, however, he strongly contended that, the provisions of Section 14-B of the Act or under para-32A of the Scheme do not permit to waive off or absolve any employer from the liability of damages.

8. Sri. S.N. Murthy, leaned Senior Counsel appearing for the respondent submitted that, the employer of every establishment, which is covered under the Provident Fund Scheme is required to make contribution towards Provident Fund. Sometime due to reason beyond his control, the contribution gets delayed, in such event, the employer is liable to pay the interest as stipulated u/s 7Q of the Act. However, Section 14B of the Act apart from the levy of the interest, authorises levy of damages, however, levy of damages is not mandatory, it is dependent on the circumstances under which the default is committed. When there is enough protection of the interest of the employee, by imposing the interest, the levy of the damage only in a circumstance where the employer has willfully defaulted, or misrepresented or committed fraud. Though the levy of damage is penal in nature, but it is not mandatory but is directory in nature. Though the legislation is a Social legislation, but balance has to be made between the employees" and employers" interest. The object of the penal provisions of the Act is to punish the guilty, i.e., one who commit default by illegal means. Reading of the provisions of Section 14-B of the Act itself makes it clear that, legislation had not intended to make it mandatory to levy damage. The legislation has rightly used the word "may", which explicitly makes it clear that, it is intended to levy damage only in such cases where the default is deliberate and willful, but if the circumstance justifies the delay in making contribution, the default was unintentional, the circumstances were such that, the employer could not have made contribution, in such circumstances, the levy of damage is not mandatory, as the employer is liable to pay the interest for the delayed period.

9. To support his contention, he relied on the decision of the Apex Court reported in Organo Chemical Industries and Another Vs. Union of India (UOI) and Others, and submitted that, on interpretation of the provisions of Section 14-B and the relevant Scheme, though the Apex Court has held that, Section 14-B is not

unguided, however, it being a quasi judicial function, the discretion to award damages could be exercised within the limits fixed by the Statute. Having regard to the punitive nature of the provision, the power exercised and an order u/s 14-B requires a speaking order supported by the reasons, the Commissioner for Provident Fund has to take into consideration various factors viz., number of default, period of delay, frequency of default, amount involved, etc., for the purpose of levy of damage. The scheme at para-32A only prescribes the procedure, does not become mandatory. The said para being formulated u/s 14B of the Act, it must be in conformity with the provisions of Section 14B and in derogation. It is not mandatory to levy the damage as per the rates prescribed in para 32A of the Scheme. Such levy is dependent on the mitigating circumstances.

10. He further relied on the provisions of Section 85-B of the Employees' State Insurance Act, 1948 and submitted that, the provisions of Section 85-B of the said Act and the provisions of Section 14-B of the Act are *pari materia* and on interpretation of Section 85-B and the Regulation 31-C of the Employees' State Insurance (General) Regulations, 1950, the Apex Court in a judgment reported in *Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another*, has held that, the principle of law that a subordinate legislation must conform to the provisions of the legislative Act. Section 85-B of the Employees' State Insurance Act provides for an enabling provision, it does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages in the matter prescribed under the Regulations. An employer is bound to make his part of contribution, but same does not mean the levy of damage in all situation would be imperative. Levy of damage thereunder is by way of penalty. The Legislature limited the jurisdiction of the authority to levy penalty by using the word "may" instead of "shall". Therefore, the Scheme must be construed as not mandatory.

11. He also submitted that, even this Court in a judgment reported in *The Regional Provident Fund Commissioner Vs. Jamiyyatul Falah, Mr. Hazdullah Ismail and Employees' Provident Fund Appellate Tribunal*, referred to by the learned Counsel for the petitioners also suggest that, the Scheme is not *de hors* to the provisions of the Act and it is not mandatory to levy the damage at the rate at which it is specified in para 32-A of the Scheme. He also referred to the earliest judgment of this Court reported in FLR 1973 (26) page 87 in the matter of *M/s Mysore Bangle Works -vs- State of Mysore and Another* and submitted that, the discretionary power is conferred on the authority u/s 14B of the Act. Learned Senior Counsel further submitted that, neither Section 14-B of the Act nor para-32-A of the Scheme, mandate that the Commissioner for the Organisation shall levy damages, but it only confers discretionary power on the Commissioner to levy damage and if there are mitigating circumstances not to levy.

12. Sri. K.R. Anand, learned Counsel also supported the contentions of the learned Senior Counsel and submitted that, very fact that there is a reference to the word "may" u/s 14-B and in identical circumstances on interpretation of Section 85-B of the Employees' State Insurance Act, the Apex Court has held

that it is not imperative to levy damages. It is clear that, if there are mitigating circumstances, the discretion vests with the Commissioner of the Organisation to levy the damages at a lesser rate or absolve.

13. Sri. G.S. Kannur, learned Counsel appearing for the employer relied on a judgment of this Court reported in *Ratna Polypack (India) Limited Vs. Union of India (UOI) and Others*, and submitted that, the Division Bench of this Court has held that, if the employer is able to give convincing explanation for the delayed payment, employer is not liable to pay damages in which event, the argument that the liability u/s 14-B and Section 7-Q of the Act would amount to double jeopardy, fails. He also relied on an unreported judgment of this Court in *I.T. Referred Case No.14/1989 dated 11.9.1991* in the matter of *Commissioner of income tax -vs-A.Albuquerque and Sons* and submitted that, this Court has held that there is no compulsion that, in each and every case of default, there should be a levy u/s 14-B of the Act and a judicial discretion has been conferred on the statutory authorities. Similarly, he also referred to another Division Bench decision of this Court in *W.A. No. 17394/2011 dated 01.08.2012*, wherein the Division Bench has dismissed the appeal filed by the Provident Fund Organisation, questioning the levy of 22% of damage inclusive of interest, by accepting the argument of the employer that he was in financial difficulty and also accepting the view taken by the Madras High Court wherein it was held that, it is permissible to levy at a lesser rate of damages or flat rate of damages inclusive of interest.

14. Having regard to the rival contentions, the points that arise for consideration in these writ petitions are:

(1) Whether the Commissioner for Provident Fund Organisation is vested with discretionary power u/s 14-B of the Act read with paragraph No. 32-A of the Scheme to levy lesser rate of damages than one prescribed in the tabular form under para-32-A of the Scheme?

(2) Whether the discretion could be exercised not to levy damages, having regard to the mitigating circumstances?

15. Before the adverting to these points, it may be necessary to refer few of the provisions of the Act. Section 5 confers power on the Central Government to notify in official Gazette a Scheme framed called "Employees" Provident Funds Scheme" for the establishment of Provident Fund under the Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall and there shall be established, the scheme shall apply.

16. It is not in dispute that, all the respondents - employers are covered under the provisions of the Act and the Scheme. It is mandatory for the employer to make contribution towards the Provident Fund from time to time as contemplated u/s 6 at the rate of 10% of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the

employees whether employed by him directly or by or through a contractor and the employees" contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding 10% of the basic wages, dearness allowance and retaining allowance (if any) subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the said Section.

17. u/s 7A of the Act, in case of dispute, power is conferred on the Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner or any Assistant Provident Fund Commissioner, to determine the amount due from the employer under any of the provisions of the Act, Scheme or Pension Scheme or Insurance Scheme. Section 7B also confers power to any aggrieved party to seek review of the order u/s 7A where no appeal has been preferred. Section 7-Q makes it mandatory that the employer shall be liable to pay simple interest at the rate of 12% per annum, or even higher rate of interest, as may be prescribed by the Scheme, but such higher rate of interest shall not be exceeding the lending rate of interest charged by any scheduled bank in case of delayed contributions.

18. Thus, from these provisions, it is clear that every employer covered under the Scheme, shall make contribution towards the Provident Fund within time stipulated, in case of delay in making such payment, the employer is liable to pay the interest at the rate of 12% or even higher rate of interest, but not exceeding the lending rate prescribed by scheduled bank. In order to protect the interest of the employees, it is made mandatory to contribute the Provident Fund regularly, and in case of delay, to pay the interest. As such, if there is a delay in making contribution, as the employer will contribute delayed contribution along with the interest. In addition to this, Section 14 and Section 14-B also confer power on the Commissioner to levy penalty, impose punishment of imprisonment and further to charge damages for the default in making the contribution. The object behind Section 14 and 14B, is to punish the guilty, who intentionally commits default or tries to avoid the contribution.

19. Insofar as the penalties are concerned, it is leviable only where it is found that, whoever, for the purpose of avoiding any payment to be made by himself under the Act or the Scheme, or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation, is liable to be punished. Section 14 deals with the defaulter, who intentionally tried to avoid the contribution or makes false statement or false representation. The scope and ambit of the provisions of Section 14, 14A and 14B of the Act is different, though they are penal in nature.

20. Section 14-B of the Act confers power on the Commissioner to levy the damages by way of penalty not exceeding the arrears as may be specified under the Scheme. The limitation has been prescribed in levy of the damage and in

case of sick industries, under second proviso to Section 14-B, the power is also conferred on the Central Board to impose lesser rate of damage or waive off the damage. The language of Section 14B does not make it mandatory to levy of damage as per the rate stipulated in para 32-A of the Scheme. Paragraph No. 32-A of the Scheme reads as under:

32A. 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 u/s 17 of the Act, the 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 Rates 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

The provisions of Section 14-B fell for consideration before the Apex Court in the case of Organo Chemical Industries (supra) wherein on interpretation of Section 14-B, the Apex Court has observed as under:

38. The contention that Section 14-B confers unguided and uncontrolled discretion upon the Regional Provident Fund Commissioner to impose such damages as he may think fit" is, therefore, violative of Article 14 of the Constitution, cannot be accepted. Nor can it be accepted that there are no guidelines provided for fixing the quantum of damages. The power of the Regional Provident Fund Commissioner to impose damages u/s 14-B is a quasi-judicial function. It must be exercised after notice to the defaulter and after giving him a reasonable opportunity of being heard. The discretion to award damages could be exercised within the limits fixed by the Statute. Having regard to the punitive nature of the power exercisable u/s 14-B and the consequences that ensue therefrom, an order u/s 14-B must be a "speaking order" containing the reasons in support of it. The guidelines are provided in the Act and its various provisions, particularly in the word "damages" the liability for which in Section 14-B arises on the "making of default". While fixing the amount of damages, the Regional Provident Fund Commissioner usually takes into consideration, as he has done here. Various factors viz. The number of defaults, the period of delay,

the frequency of defaults and the amounts involved. The word "damages" in Section 14-B lays down sufficient guidelines for him to levy damages.

39. Learned counsel for the petitioners, however, contends that in the instant case the period of arrears varies from less than one month to more than 12 months and therefore the imposition of damages at the flat rate of hundred percent for all the defaults irrespective of their duration, is not only capricious but arbitrary. The submission is that if the intention of the Legislature was to make good the loss caused by default of an employer, there could be no rational basis to quantify the damages at hundred percent in case of default for a period less than one month and those for a period more than 12 months. It is urged that the fixation of upper limit at hundred percent is no guideline. If the object of the Legislation is to be achieved, the guidelines must specify a uniform method to quantify damages after considering all essentials like loss or injury sustained, the circumstances under which the default occurred, negligence, if any, etc., It is said that the damages u/s 14-B, which is the pecuniary reparation due must be correlated to all these factors. In support of his contention, he drew our attention to Section 10-F of the Coal Mines Provident Fund and Bonus Schemes act, 1958, which uses the words damages not exceeding twenty five percent like Section 14-B of the Act, and also to a tabular chart provided under that Act itself showing that the amount of damages was correlated to the period of arrears. We regret, we cannot appreciate this line of reasoning. Section 10-F of the Act of 1958 came up for consideration before this Court in *The Commissioner of Coal Mines Provident Fund, Dhanbad and Others Vs. J.P. Lalla and Sons*, This Court observed, firstly, that the determination of damages is not "an inflexible application of the rigid formula", and secondly, the words "as it may think fit to impose" show that the authority is required to apply its mind to the facts and circumstances of the case. The contention that in the absence of any guidelines for the quantification of damages, Section 14-B is violative of Article 14 of the Constitution, must, therefore fail.

21. From the observations of the Apex Court, it is clear that, apart from that, Section 14-B does not suffer from lack of guidelines but levy of damage being punitive in nature, the exercise of power u/s 14-B must be reasonable and the order made therein must be a speaking order supported by reasons. While levying the damage, the authority must take into consideration the various factors viz., number of defaults, period of delay, frequency of default, amount involved. If there are mitigating circumstances, the determination of damage is not an inflexible application of a rigid formula. No doubt, there is an amendment to Section 14-B, but even amended Section 14-B also refers to "may recover". The legislation did not intend to make it mandatory to impose the damage as prescribed under the Scheme, i.e., at the rates prescribed under para-32-A. The levy of damage u/s 14B of the Act read with para 32-A of the Scheme is dependent on the various circumstances, and such levy must be by speaking order.

22. The provisions of Section 85-B of the Employees' State Insurance Act, 1948 is *pari materia* to the provisions of Section 14-B of the Act. No doubt, Regulation 31-C of the Employees' State Insurance (General) Regulations, 1950, there is bar of recovery of damage not exceeding the rate prescribed therein. However, the Apex Court in the case of HMT Limited (*supra*) at paragraphs-15 to 19 has observed that, levy of damages in all situation would not be imperative. It is useful to refer to those observations, which read as under:

15. Obligation on the part of the employer to deposit the contributions of both the "employer" and the "employee " is not in dispute. What is in dispute is as to whether the amount of damages specified in Regulation 31-C of the Regulations is imperative in character or not.

16. It is a well-known principle of law that a subordinate legislation must conform to the provisions of the legislative Act. Section 85-B of the Act provides for an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages in the manner prescribed under the Regulations.

17. The statutory liability of the employer is not in dispute. An employee being required to be compulsorily insured, the employer is bound to make his part of the contribution. An employee is also bound to make his contribution under the Act. But the same does not mean that levy of damages in all situations would be imperative.

18. Section 85-B of the Act uses the words "may recover"". Levy of damages thereunder is by way of penalty. The legislature limited the jurisdiction of the authority to levy penalty i.e. not exceeding the amount of arrears. Regulation 31-C of the Regulations, therefore, in our opinion, must be construed keeping in view the language used in the legislative Act and not *dehors* the same.

19. Our attention, however, has been drawn to a decision of this Court in *Hindustan Times Ltd., v. Union of India* where in it has been laid down: (SCC pp. 254-55 para 29)

29. From the aforesaid decisions, the following principles can be summarised:

The authority u/s 14-B has to apply his mind to the facts of the case and the reply tot he show-cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amount involved; default on the part of the employer based on plea of powercut, financial problems relating to other indebtedness or the delay inrealisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages u/s 14-B.

23. Having regard to the observation of the Apex Court in the said decision, if the

employer is able to convince that, the circumstances were such he could not have made contribution in time and the delay was not willful, deliberate or intentional, further levy of damage would result in irretrievable prejudice, the Commissioner can use his discretion to levy the damage.

24. Even the judgments referred to by the learned Counsel for the petitioners viz., the judgment of the Kerala High Court reported in 2012 LAB.I.C. 1900 (supra), the Kerala High Court referring to several decisions, relying on the decision of the Apex Court reported in Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others, has held that, u/s 14-B of the Act, authority has no power to waive the damage, but it has discretion to impose damage depending upon the facts and circumstances of each case not exceeding the default amount i.e., any amount less than the rate prescribed in para-32A of the Scheme.

25. The Apex Court in a judgment reported in Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others, in the matter of Regional Provident Fund Commissioner -vs- S.D. College, Hoshiarpur and others, at para-10 and 12 has observed that, the Act is a beneficial welfare legislation to ensure health and other benefits to the employees. The employer under the Act is under a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and matching contribution, the entire amount is required to be deposited in the fund within 15 days after the date of collection and the contention urged for waiver of the damages was negated by observing that:

There is no discretion left to the Commissioner to totally waive the penalty. What was left to his discretion is the rate at which it is to be computed by way of penalty.

26. No doubt, the Division Bench of this Court in a judgment reported in Ratna Polypack (India) Limited Vs. Union of India (UOI) and Others, has observed that, if the employer is able to give a convincing explanation for the belated payment, employer is not liable to pay damages, but that is negated insofar as it amounts to double jeopardy, as the interest is levied for the same period u/s 7Q of the Act. However, a judicial discretion is vested with the Commissioner in the matter of levy of damage. Since the Commissioner exercises the quasi judicial power and levy of damage is for the default period, the Apex Court though has held that the provisions of Section 14-B of the Act does not suffer from unguided exercise of power, but has held that the Commissioner exercising the power u/s 14-B shall have to have a regard for the circumstances under which the default has been caused. There may be circumstances where the industry might have been non-functioning, there may be circumstances of layoff, there may be circumstances of recession, natural calamities, loss, strike, unprecedented debt, etc., in addition to the circumstances that the employer might not have defaulted earlier and might have been very sincere and if the circumstances could be established that the default or delay by the employer was beyond his control and

no prudent employer could have made default, but for the unwarranted circumstances. If such circumstances are established before the Commissioner, Commissioner exercising quasi judicial power is required to consider such circumstances in the matter of levy of damages.

27. Just because that different rates are prescribed in para 32-A of the Scheme, it is not mandatory to levy the damage at such rate. For the delayed period, Section 7Q itself makes the employer liable to pay interest not less than 12% per annum or at such higher rate of interest. As such, the employees' interest is protected by way of contribution and even in case of delayed contribution, by way of interest. As far as damage is concerned, it is by way of penalty and it is in these circumstances, the legislation has conferred a discretion on the Commissioner by using the word "may recover" both u/s 14-B of the Act and also para-32-A of the Scheme and on interpretation of these provisions, even the Apex Court has observed that, the discretion vests with the Commissioner to consider the mitigating circumstances and pass speaking order supported by reason, it makes absolutely clear that the commissioner is conferred with discretionary power to levy the damages.

28. Plain and harmonious reading of the provisions do indicate that, the Commissioner has the discretion to levy the damages taking into account the relevant circumstances, but does not confer power to waive off the damages.

29. Having regard to the decision of the Apex Court and also having regard to the provisions of Section 14-B of the Act, I am of the opinion that, the Commissioner of the Provident Fund in the matter of levy of damages has a discretion to levy lesser rate of damage, depending upon the mitigating circumstances placed by the employer before the Commissioner. However, discretion does not extend to waive off the damages.

30. In this case, the Tribunal has reduced the damage to 22% and as against which, these writ petitions have been fled. Having held that the power is vested with the Commissioner to levy lesser rate of damages, the Tribunal having regard to the circumstances and also having regard to the position of the employer has reduced the damage and the reduction of damage is also not arbitrary and unreasonable, as such, I do not find there is any error in reducing the damage to 22% at flat rate. In these circumstances, I find no reason to interfere with the orders passed by the Tribunal. Insofar as the petitioner in W.P. No. 42631/2011 is concerned, the petitioner is an employer and the Tribunal has dismissed the appeal wherein it has confirmed the levy of damages @ 37% p.a. with interest as contemplated u/s 7Q of the Act. Since I have held that the discretion vests with the Commissioner and the said discretion must be exercised judiciously based upon the mitigating circumstances. Since the Tribunal and the Commissioner have not considered the case of the petitioner under which there was a default in making contribution, this matter requires reconsideration by the Commissioner for Provident Fund Organization, insofar as levy of damage is concerned.

Accordingly, the W.P. No. 42631/2011 is partly allowed. The impugned orders at Annexure-A dated 30.5.2008 and Annexure-B dated 30.5.1008 passed by the respondent - the Regional Provident Fund Commissioner-II, Employees' Provident Fund Organization and Annexure-D dated 4.7.2011 passed by the Tribunal, are hereby quashed. The matter is remitted to the Commissioner for Employees' Provident Fund Organization, however, the enquiry before the Commissioner for Employees' Provident Fund Organization is limited only to the damages u/s 14-B of the Act is concerned, as far as levy of interest is concerned, it stands confirmed, but insofar as damage is concerned, the Commissioner shall consider the case of the petitioner and pass appropriate order. The amount already in deposit before the Commissioner shall be subject to the final order that may be passed in this case.

Accordingly, the other W.P. Nos. 588/2012, 13136/2012, 587/2012, 3547/2012, 3546/2012, 3545/2012, 9891/2012 and 5151/2012 fail and are dismissed.