(2018) 07 CAL CK 0170

In the Calcutta High Court

Case No : Writ Petition No. 8527 (W) of 2015

Tirrihannah Company Ltd. APPELLANT

Vs

Regional Provident Fund Commissioner & Anr. RESPONDENT

Date of Decision : 31-07-2018

Acts Referred:

Employees' Provident Fund and Miscellaneous Provisions Act, 1952 — Section 14B
Employees' State Insurance Act, 1948 — Section 85B
Constitution of India 1950 — Article 226, 227

Citation : (2018) 07 CAL CK 0170

Hon'ble Judges : ARINDAM SINHA, J

Bench : Single Bench

Advocate : Soumya Majumder, victor Chatterjee, P. S. Bose, Mihir Kundu

Final Decision : Disposed Off

Judgement

Petitioner establishment has impugned order dated 26th February, 2015 made by Regional Provident Fund Commissioner-II SRO, Siliguri by which an

amount of Rs.51,61,015/- was determined as penal damages payable by it. Mr. Majumder, learned advocate appears on behalf of petitioner and relies

on section 14B of Employeesâ?? Provident Fund and Miscellaneous Provisions Act, 1952. He emphasizes from the provision, recovery of penalty not

exceeding amount of arrears is discretionary. Employer is mandated to be given a reasonable opportunity of being heard. Referring to impugned order

he submits, representatives of his client had appeared before the Authority and agreed on revised statement regarding accumulation of arrears and

delayed payment of provident fund dues by the establishment.

That formed basis of a determination, at the discretion of the Authority, to impose penalty. He submits, it would appear from impugned order, no opportunity of hearing was granted to his client in the matter of determination of penalty. Simply because statement regarding accumulation of arrears

and delayed payment was agreed as correctly drawn up, penalty was imposed. He submits, present management of the company is transferee

management. His client upon obtaining transfer has cleared, inter alia, provident fund dues. He relies on judgement of Supreme Court in

Employeesâ?? State Insurance Corporation Vs. HMT Ltd. & Anr. reported in (2008) 3 Supreme Court Cases 35, to paragraphs 21 and 26 therein.

Said paragraphs are reproduced below:

â??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.

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.â??

He refers to section 85B in Employeesâ?? State Insurance Act, 1948 where similar power has been conferred on the corporation to, at its discretion,

recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations. He submits,

the difference is, under section 14B (1952 Act) prescribed authority has been conferred with discretion to recover by way of penalty such damages,

not exceeding the amount of arrears, as may be specified in the scheme. It is his further submission that there has been denial of hearing amounting of

violation of principles of natural justice. Non application of mind is writ large on impugned order and there should be interference.

Mr. Bose, learned senior advocate appears on behalf of Provident Fund Authority and relies on judgement of a Division Bench of this Court in

Assistant Provident Fund Commissioner Vs. Pawan Kumar Agarwala & Ors. reported in 2008(1) CHN 469, in particular to paragraph 8 therein to submit, the writ petition is not maintainable by reason of statutory remedy in appeal being efficacious remedy available to petitioner. On merits he

relies on Special Bench judgement of this Court in Dalgaon Agro Industries Ltd. Vs. Union of India reported in 2005(3) CHN 428, to inter alia,

paragraphs 6.1 to 6.4 and 7.3. Relying on those paragraphs he submits, view taken was transferor and transferee are liable jointly and severally.

Transferee cannot claim immunity from liability accrued under any provision of the Act on the date of transfer. Damages imposable under section 14B

is not a personal liability but liability of the establishment.

A liability under section 14B accrues immediately on default and subsequent quantification or late quantification cannot be construed to mean the

liability did not exist even though the default had been committed and the amount being capable of being quantified. He submits further, when

representatives of petitioner had agreed to the statement, petitioner cannot now turn around and challenge the demand. Relevant portion from

impugned order is extracted below:

â??Therefore, having admitted the delayed remittances, I am of the opinion that the establishment is liable for levy of Penal Damages under section

14B of the EPF & MP Act 1952 as per the rates of Damages at rates specified in Para 32A of the EPF Scheme 1952, Para 5 of EPS 1995 and 8A of

EDLI Scheme 1976. Now, I, MHONTHUNG NGULLIE, REGIONAL P.F. COMMISSIONER-II in exercise of the powers conferred on me under

section 14B of the Employeesâ?? Provident Funds & Miscellaneous Provisions Act, 1952, hereby determine an amount of Rs.51,61,015.00 (Rupees

Fifty One Lakh Sixty One Thousand Fifteen only) for the period 10/2002 to 02/2014.â??

It appears the Authority upon having agreement on part of petitioner regarding delayed payment was of opinion the establishment is liable for levy of

penal damages under section 14B as per rates of damages specified in the schemes. The Authority proceeded to exercise power under section 14B

and determine amount at Rs.51,61,015/-. There is nothing to show opportunity of hearing was given to the establishment regarding determination on

levying such damages. What weighed with the Authority to impose penal damages in exercise of discretion is also not evident from impugned order.

In Pawan Kumar Agarwala (supra) Division Bench said, inter alia, it is a settled position of law High Courts ought not to entertain a writ petition under

Article 226/227 of the Constitution of India when an adequate alternative remedy of appeal is provided in the statute itself. Law governing exercise of

jurisdiction by the High Court under said Articles when remedy of statutory appeal is available had been settled by Supreme Court in U.P States

Spinning Company Ltd. Vs. R. S. Panday reported in (2005) 8 SCC 264 from which judgement, inter alia, paragraph 16 had been extracted therein.

Supreme Court said in paragraph 16 that when impugned order has been made in violation of the principles of natural justice, it is a situation where the

doctrine would not apply.

In HMT Ltd. (supra) Supreme Court declared, conferment of discretionary jurisdiction on statutory authority to levy penal damages by reason of

enabling provision cannot be construed as imperative. Existence of mens rea to contravene a statutory provision must also be held to be a necessary

ingredient for levy of damages and quantum there of.

In view of law declared in HMT (supra), which came after Dalgaon (supra) this Court finds no application of the view that liability under section 14B

accrues immediately on default for there to be subsequent or late quantification. Impugned order having omitted to provide illumination regarding why

it was thought fit to exercise discretion to impose penal damages, corresponding to omission to record opportunity given regarding a defence against

imposition of penal damages or mitigation, makes it an order which violates of principles of natural justice. As such impugned order is set aside. The

Authority will give opportunity to the establishment, hear out its contention regarding imposition of penal damages or mitigation and make appropriate

order. Writ petition is disposed of.