CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL
NO.1 MUMBAI

Present

Justice Ravindra Nath Kakkar

CGIT-1/EPFA/101/2017

M/s. P.G. Garodia School ... Appellant

Vs

Assistant Provident Fund Commissioner ...Respondent

Thane

Presence:

For the Appellant : Mr.H.L.Chhedda (A.R)
For the Respondent : Mr. Suresh Kumar, Adv.

Mumbai, Dated 05/08/2021.

JUDGEMENT

1) This appeal is filed u/s 7-I of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'Act') against the order dated 30-12-2016 passed by Assistant Provident Fund Commissioner – Thane u/s 14-B and 7-Q of the Act for the period from 12/2000 to 02/2008 directing Appellant to pay

an amount of Rs. 1,72,566 towards damages u/s 14-B of the Act and Rs. 1,08,524 towards simple interest u/s 7-Q of the Act totaling to Rs. 2,81,090.

2) Brief facts of the case are as follows. The establishment M/s PG Garodia School (hereinafter referred to as 'Appellant') is an educational institution came into existence with the noble cause to provide education to the children of the families that cannot afford to educate their children in commercial educational institutions. The Appellant has been covered under the Act u/s 1(3)(b) with effect from 01-08-1982 whereas the employer in relation to the said establishment has failed to pay off the PF dues and the other allied charges within the stipulated time as prescribed under the said Act and Scheme.

3) Heard learned counsels for the parties at considerable length.

4) It is the case of the Appellant that due to circumstances and financial constraints the payments for the contribution were remitted with delay. In this regard, Appellant states that it provides benchmark education at affordable fees and when the gap between the income and expenditure started widening it did not compromise with the set goals causing it to postpone the disbursement of salaries to its employees further resulting in belated remittances to the Fund. Appellant contents that Assistant Provident Fund Commissioner, Thane invoked powers vested in him under Section 14-B and Section 7-Q simultaneously and ignored to consider the mitigating circumstances stated by the Appellant during the inquiry proceedings. Further contended that the aid provided by the Government cannot supplant the deficit arising in between the nominal school fees and expenditure at par with the commercial institutions. Also, it is stated that administrative Trust

even took the decision to close the school but with the donations by dwellers around Ghatkopar the Appellant deferred the plans to close the institutions.

5) Appellant appeared before the Respondent for inquiry proceeding after receiving summons vide no. TH/THA/0025146/000/Enf/Damages/1314 dated 10-05-2016. The Appellant contends that except for the month the months 02/2002, 05/2002, 05/2004, and 06/2007, all the dates of remittances were correctly mentioned and for these months it is contended that Appellant has presented cheques to State Bank of India within grace period of five days but their encashment were delayed. The written submission of the Appellant vide letter dated 20-07-2016 mentions several mitigating circumstances in detail especially that the delay occurred in remitting the monthly provident fund contributions was neither willful nor predetermined and intentional. Further, Appellant declared on oath that it has not gained any profits out of making belated remittances. It was further contended that not only the PF dues were remitted but also other statutory remittances were delayed due to acute financial crises.

6) Appellant states that legislature to its prudence has by enforcing the provisions of Section 7-Q with effect from 01-07-1997 has further made crystal clear that the loss incurred by the Fund due to belated remittances are made good from the date on which the amount has become so due till the actual date of payment. Further, it is submitted by the Appellant that it has not continuously made belated remittances for the entire enquiry period but it made timely remittances for 26 out of total 87 months between the period from 12/2000 to 02/2008. Also, submitted that out of 61 months for which remittances were delayed, 10 occasions were within 10 days post the prescribed limit, 13 occasions were within 30 days post the

prescribed limit, and on 13 occasions the remittances were within 40 days post the prescribed limit.

7) Further, it is submitted by the Appellant that records itself indicates that Appellant remitted the PF contributions without interference of either the compliance or recovery machinery attached to the respondent commissioner, seldom a willful defaulter, and has no intentions to make belated remittances and no scope to earn profits since Appellant is not a business entrepreneur. Appellant relied on the Circular No. C-III/4(25)2006/DL/NZ dated 02-11-2015 by EPFO in which it clarified all field offices that, *"In this connection you may note that interest under Section 7Q is towards making good the loss incurred by the Fund due to belated remittances while Penal Damages under Section 14B is a deterrent on employers from recurrence of belated remittances"* and further on decision of Hon'ble Delhi High Court in the matter between System and Stamping vs EPF Appellant Tribunal [2008 LLR 485 (Del)(DB)] based on which Government of India issued G.S.R. 689 (E) revising the Para 32-A of the Scheme.

8) In reply to the above arguments, learned counsel representing Respondent submitted that Appellant failed to remit the Provident Fund Contributions/ Pension Fund Contributions/Administrative Charges/Employees Deposit Linked Insurance Contributions/ Employees Deposit Linked Insurance Administrative charges within 15 days of the close of every month for the period 12/2000 to 02/2008 and thus an amount of Rs. 281090 was determined by order dated 27-12-2016 payable under Section 14-B and Section 7-Q of the Act. Respondent discards the reasons like financial crises, closure of the establishment, exigencies, and various other reasons as acceptable reason for not depositing the PF dues in time

and also stated that if Respondent accept such reasons then establishments will give many reasons to avoid timely deposit of the PF dues and other dues and ultimately the gullible employees would suffer. Further, it is submitted by the Respondent that the order dated 27-12-2016 is a well speaking and reasoned order with proper application of mind passed under Section 14-B and Section 7-Q of the Act.

9) Respondent did not deny the fact that out of 87 months between 12/2000 and 02/2008 the Appellant made the monthly contributions of 26 months within the time prescribed under the Act and thus the Respondent including only the period for which the Appellant failed to deposit the PF dues within the time prescribed under the Act. The contention of Appellant that these delays were due to financial difficulties is however rejected by the Respondent on the pretext that profits and losses are part and parcel of any business and Appellant cannot take shelter for evading the statutory liabilities.

10) Respondent further contends that rate of interest u/s 7-Q was notified with effect from 01-07-1997 @ 12% simple interest per annum and consequent upon issue of this notification, the matter whether interest u/s 7-Q is over and above the rate of damages was raised again by various quarters but it was only in the year 2008 when another amendment to Para 32-A of the EPF Scheme was brought out and the erstwhile prevailing rates of damages were slashed by 12% in each existing slab with effect from 26-09-2008 and hence the levy of damages up to 26-09-2009 has to be in keeping with the prevailing statutory rate. Also, Respondent defends the invoked damages u/s 14-B on the contention that under Section 14-B of the Act, the liability of the defaulter arises because of his delay in not depositing the PF

contributions of his employees on time and in meanwhile utilizing the same for his own gains. In this way, Respondent defended the impugned order and prayed for dismissal of appeal.

11) Needless to mention, the subject matter of this appeal is only the levied damages u/s 14-B of the act as Section 7-Q is not appealable.

12) Both parties have agreed that there has been default on the part of Appellant in remitting the PF dues for the period from 12/2000 to 02/2008. Also, it has been agreed by both the parties that default was not continuous for the entire period but sparsely spread across the period in question as the remittances for 26 months were within the prescribed time limit whereas that for 61 months were outside the prescribed time limit under the Act. Therefore, the issues involved in this Appeal is with respect to determine whether and to what extent imposing damages u/s 14-B for the stated period in question is legal, proper, and justified.

13) In this context, it would be most proper to rely on the judgment of Hon'ble Apex Court in Mcleod Russel India Limited vs Regional Provident Fund Commissioner, Jalpaiguri reported in (2014) 15 SCC 263 held that *"...to proceed on the premise that the levy of penalty under the Act was not a mere formality, a foregone conclusion or an inexorable imposition; and that the circumstances surrounding the failure to deposit the contribution of the employees concerned would also have to be cogitated upon"*. Moreover, Hon'ble Apex Court in Civil Appeal No. 96-97 Of 2017 [@ Special Leave Petition (C) Nos. 1879-1880 Of 2015] in the Assistant Provident Fund Commissioner, EPFO & Another v/s The Management of RSL Textiles India Pvt. Ltd. Through its Director reiterated its view in Mcleod Russel

India Limited (Supra) that *".....the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14-B, as also the quantum thereof since it is not inflexible that 100 per cent of the arrears have to be imposed in all the cases. Alternatively stated, if damages have been imposed under Section 14-B, it will be only logical that mens rea and/or actus reus was prevailing at the relevant time."*

14) In view of the above judgments delivered by Hon'ble Apex Court, this Tribunal is convinced beyond doubt that mitigating circumstances should be the most important elements in determining whether and to what quantum of prescribed rate limits should the penal damages u/s 14-B should be invoked on examination of the case of the Appellant.

15) A lot has been argued in this appeal on the subject of purpose of Section 14-B. To the mind of this Tribunal, there has significant shift in the purpose of invoking damages under section 14-B of the Act from time to time which can be broadly categorized in three eras. The first era is the period prior to 01-07-1997 when Section 14-B had not only to act as a deterrence for the employer to avoid their default in future but also compensate the ultimate beneficiaries who are employees; second era being between 01-07-1997 and 25-09-2008 when Section 7-Q was inserted with the purpose of compensating the ultimate beneficiaries by charging fixed interest at the rate of 12% whereas rate of damages under Section 14-B remaining unchanged left to the wisdom of Fund Commissioners with maximum rates capped at 37%; and the third era is post 26-09-2008 which is prevailing even today where compensation for loss of interest is charged on employer at the fixed rate of 12% under Section 7-Q while along with that Fund

Commissioners can impose damages under Section 14-B with the maximum rate capped at 25% under Section 14-B. The complete duration in question in this appeal i.e. from 12/2000 to 02/2008 belongs to the second category when both simple interest @ 12% and pre-amended Para 32-A were co-existing.

16) Further, it would be noteworthy to place reliance on the verdict of Hon'ble Delhi High Court in System and Stamping versus EPF Appellate Tribunal [2008 LLR 485 (Del) (DB)])] wherein it was held *"... Column 3 cannot be regarded as rate of damages after July 1, 1997, when interest became payable under Section 7-Q of the Act"* against which the SLP was dismissed by the Hon'ble Apex Court vide order dated 16.07.2009 and moreover Government of India modified the duration wise maximum rates of damage in Para 32-A of the Scheme. Though this notification was made effective prospectively from 26-09-2008 but that still holds circumstantial value in favor of the Appellant and on the basis of which this Tribunal finds it appropriate to adopt a lenient view for the calculation of damages under section 14-B in the light of it

17) Further, in this case, the periods of default of various months stretched sparsely from 12/2000 to 02/2008 suggests that financial situation of the Appellant was fluctuating and any direct mens rea or the actus reus in the mind of establishment to redirect the fund in any profit making activity does not really emerge. Though silently yet the delay in disbursement of salaries speaks about the mitigating circumstances due to which payments could have been delayed. However, at the same time, the objective of the Act needs to be preserved and damages needs to be imposed for the delayed remittances as that impacts the ultimate beneficiaries and this social welfare legislation as a whole.

राष्ट्रीय औद्योगिक अधिकरण NATIONAL INDUSTRIAL TRIBUNAL MUMBAI मुम्बई

18) In the view of all aforesaid discussions and reasons, and taking an indulgent outlook in order to maintain justice between both the parties considering the amount of assessed damage involved and the way this social legislation has evolved, this Tribunal reduces the damages originally assessed at maximum rates as per pre-amended Para 32-A of Scheme to 20% of the original amount and hereby pass the following orders:

a. Impugned order is set-aside to a partial extent.
b. Originally assessed damage at maximum rates is hereby reduced to 20% (twenty percent).
c. If any amount has already been deposited by the Appellant for staying the execution of impugned order, the same shall be adjusted against the final amount.
d. Parties are left to bear their own costs.

19) Office is directed to furnish copy of this order to both the parties and upload it over the official web-portal of this Tribunal. Further, file is to be consigned to the record room after the compliance.

राष्ट्रीय औद्योगिक अधिकरण NATIONAL INDUSTRIAL TRIBUNAL MUMBAI मुंबई

सही TRUE COPY

Secretary to the Court
Central Government Industrial
Tribunal-cum-Labour Court No. I
Mumbai

Sd/-
(JUSTICE R.N. KAKKAR)
PRESIDING OFFICER