M/s. Sankar Chemical Lime and Mr. K.S. Raman Vs The Assistant Provident Fund Commissioner, Sub-Regional Office, Bhavishya Nidhi Bhawan, NGO 'B' Colony, Tirunelveli-627007 and The Enforcement Officer, Compliance Circle II, Sub-Regional Office, Bhavishya Nidhi Bhawan, NGO 'B' Colony, Tirunelveli-627007

Writ Petition (MD) No''s. 4522 and 4523 of 2008 and M.P. (MD) No''s. 1, 2, 1, 2 of 2008, 1, 2, 1 and 2 of 2010

Court: Madras High Court (Madurai Bench)

Date of Decision: Nov. 12, 2011

Acts Referred:
Constitution of India, 1950 â€" Article 226#Employees Provident Funds and Miscellaneous Provisions Act, 1952 â€" Section 14B, 7I, 7Q

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: R. Yashod Vardhan and Mr. M. Aravind Subramaniam, for the Appellant; K. Murali Shankar, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Honourable Mr. Justice K. Chandru

1. In these two Writ Petitions, the petitioner is the same Company represented by its Managing Partner Mr. K.S. Raman. In the first Writ Petition,

the challenge is to the order dated 28.04.2008 passed by the first respondent, the Assistant Provident Fund Commissioner, Tirunelveli. In the

order, the petitioner was directed to pay interest u/s 7-Q of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 [hereinafter

referred to as ""the Act""], in view of the default in payment towards provident fund dues for the period from 03/98 to 02/01 and they were directed

to pay simple interest on the defaulted amount, in terms of Section 7-Q of the Act. Challenging the same, the first Writ Petition came to be filed.

2. In the second Writ Petition, the petitioner challenges the order passed u/s 14-B of the Act, dated 28.04.2008. By the said order, the petitioner-

employer was directed to pay a sum of Rs.19,17,517/-towards damages for the default in payment of provident fund dues for the period from

03/98 to 02/01.

3. When the said two Writ Petitions came up for admission, notice of admission was made. Pending the notice, an interim injunction was granted

by this Court on 14.05.2008. Aggrieved by the grant of interim injunction, the respondents have filed M.P.(MD)Nos.1 and 2 of 2010, seeking to

vacate the interim order in both the Writ Petitions. Though the applications were filed in the year 2010, the matters were not taken up for hearing.

4. When these two matters came up today, Mr. R. Yashod Vardhan, learned Senior Counsel leading Mr. M. Aravind Subramaniam, counsel

appearing for the petitioner submitted that the orders have been passed in a mechanical fashion and even in the matter of levy of damages, the

authorities have discretion to levy damages and they cannot merely describe the petitioner as a chronic defaulter. The contention made by the

authorities that under the Second Proviso to 14-B, it is only the Central Board, which has power to modify or waive the damages, that too, on a

specified reason and, therefore, the authorities are bound to levy the maximum damages cannot be accepted. The damages are always relate to the

conduct of the parties and in some cases, the Courts have held that there is an application of mens rea to the said provision. Therefore, the order

will have to be set aside.

5. On the question of interest, the contention raised by the petitioner was that any interest claimed will only make the financial position of the Firm

perverse and detrimental to the interest of the employer and employee and the firm had incurred loss successively for the year 1997 -1998 and for

the year 2002-2003. It is further contended that the first respondent has also not given any break up for the details of the interest claimed u/s 7-Q

and no prior notice was given. In answer to those allegations, the counter-affidavit dated-Nil was filed in support of the vacate stay applications,

wherein it was stated that the financial problem faced by the employer cannot take a bearing in the matter of levy of damages and if the amounts

are withheld deliberately by the employer, certainly the damages can be levied in terms of Section 14-B r/w Para 32A of the Employees''

Provident Funds Scheme, 1952. Till the rates are specified under the Act, the authorities are empowered to levy damages. It was also stated that

when the statute provides for a remedy by way of an appeal u/s 7-I, the petitioner cannot come to this Court by way of a Writ Petition under

Article 226 of the Constitution of India.

6. The learned Senior Counsel also produced an additional typed-set to show the profit and loss account of the firm to convince that there was a

real crisis in the Company. In any event, this Court is not inclined to accept the statement made by the learned Senior Counsel for the petitioner. In

the present case, so far as the levy of interest is concerned, the Supreme Court, while dealing with the similar provision under the ESI Act, has held

that there cannot be any private arrangement in the matter of levy of interest and the employer is statutorily to pay interest, in case of any default or

delay in payment of dues, vide its judgment in Goetze (India) Limited Vs. Employees State Insurance Corporation, , wherein the Supreme Court in

paragraph Nos.8 and 9, has held as follows:

8. In order to appreciate rival submissions it would be necessary to take note of few provisions; Section 39 and Regulations 31 and 31-A read as

follows:

39. Contributions.-(5)(a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution

has become due, he shall be liable to pay simple interest at the rate of 12 per cent per annum or at such higher rate as may be specified in the

regulations till the date of its actual payment:

31. Time for payment of contribution.-An employer who is liable to pay contributions in respect of any employee shall pay those contributions

within 21 days of the last day of the calendar month in which the contributions fall due:

Provided that where a factory/establishment is permanently closed, the employer shall pay contribution on the last day of its closure:

31-A. Interest on contribution due, but not paid in time.-An employer who fails to pay contribution within the periods specified in Regulation 31,

shall be liable to pay interest at the rate of 12 per cent per annum in respect of each day of default or delay in payment of contribution.

9. As there was delay in making the payment of the contribution the Corporation had issued notice on 29.06.1990 at the first instance and

thereafter the order was passed u/s 45-A of the Act on 23.07.1992. The same was challenged before the ESI Court in which an interim stay was

granted on 09.10.1992. During the pendency of the matter there was reverification and the quantum payable by the appellant was worked out.

The liability to pay interest is statutory. There is no power of waiver. The question of any compromise or settlement does not really arise. Even

otherwise the order of the ESI Court referred to and relied upon by the appellant is of no assistance to the appellant. It only noted statement of the

appellant that he had deposited the contribution payable. The reference to ""no further dues"" is obviously relatable to the contribution payable and

nothing beyond that.

7. The contention raised that the firm lost money for the year 1997-1998 cannot be a ground for escaping from the statutory liability and this

Court, in the matter relating to ESI and the similar provision in ESIC vs. Jaipur Spinning and Weaving Mills Limited reported in 1987 (72) FJR 57,

has held that the Company incurring loss on account of various reasons cannot be a ground to deny the liability for paying interest. Therefore, this

Court does not find any ground to interfere with W.P.(MD)No.4522 of 2008 and hence, the same is liable to be dismissed.

8. With reference to the levy of damages, the learned Senior Counsel submitted that the order has been passed in a mechanical fashion and unless

there are compelling reasons to levy damages, the authorities cannot impose damages on a uniformed rate, based upon the Scheme framed under

Para 32A of the Employees'' Provident Funds Scheme, 1952. Though the learned Senior Counsel attempted to submit that there are no reasons in

the present case, the authorities found that only the Central Board has power u/s 14-B, to reduce or modify the damages on the contingency set

out in the second proviso and in other aspects, even the orders passed by the authorities are invalid or illegal, the Act provides for an appeal by

way of Section 7-I of the Act before the Appellate Tribunal and the stand taken by the respondents that it is a matter for filing an appeal and the

Writ Petition is not maintainable is clearly well founded.

9. This Court, in more than one Writ Petitions, has rejected the challenge of levy of damages directly before this Court and directed the employer

to file appropriate appeal before the EPF Appellate Tribunal. Though the learned Senior Counsel, on instructions, contended that at the relevant

time, the EPF Tribunal was not functioning due to certain fire accident, no details were mentioned in the affidavit filed in support of the Writ

Petition. On the other hand, the very admission of the Writ Petitions was secured on the premises that some other Writ Petitions were pending in

W.P(MD).Nos. 2318 and 2319 of 2008 and the interim orders were granted. That cannot be a reason for the successive Writ Petitions to be filed

before this Court, as if the Appellate Tribunal do not exist. The averment made in the affidavit is that the impugned order came to be passed

violating the principles of natural justice. Even the ground that the impugned order came to be passed improperly can be raised in a regular appeal

filed u/s 7-I of the Act.

10. In this context, it is necessary to refer to a judgment of the Supreme Court in Raj Kumar Shivhare Vs. Assistant Director, Directorate of

Enforcement and Another, , wherein the Supreme Court, while dealing with an alternative remedy available under the FEMA Act, held that the Act

cannot be bypassed and the jurisdiction under Article 226 of the Constitution of India cannot be invoked. In the following passages found in

paragraphs 31 and 32, the Supreme Court had observed as follows:

31.When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained

ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated

and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great

respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of

territorial jurisdiction.

32. No reason could be assigned by the appellant''s counsel to demonstrate why the appellate jurisdiction of the High Court u/s 35 of FEMA does

not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

11. In the light of the above, the petitioner is given four weeks time to prefer an appeal from the date of receipt of a copy of this order, after

compliance with the legal requirement for filing an appeal. Until the period of four weeks, the status quo as on date will continue. It is for the

petitioner to seek appropriate interim orders before the Tribunal. In case any appeal is filed u/s 7-I of the Act, the Tribunal itself has power to grant

appropriate relief.

12. In the result,

(i) W.P(MD).No.4522 of 2008 stands dismissed. Consequently, the connected miscellaneous petitions are closed. No costs.

(ii) W.P(MD).No.4523 of 2008 stands disposed of with a direction referred to above. Consequently, the connected miscellaneous petitions are

closed. No costs.