Central Board of Trusties vs M/S. Kerala Electrical and Allied Engineering Co. Ltd.,

Central Board of Trusties vs M/S. Kerala Electrical and Allied Engineering Co. Ltd.,

SooperKanoon Citation : sooperkanoon.com/1444794

Court : Kerala

Decided On : Nov-30-2022

Judge : Honourable Mr. Justice Amit Rawal

Appeal No. : WP(C)/1851/2021

Appellant : Central Board of Trusties

Respondent : M/S. Kerala Electrical and Allied Engineering Co. Ltd.,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE AMIT RAWAL WEDNESDAY, THE 30TH DAY OF NOVEMBER 2022 / 9TH AGRAHAYANA, 1944 WP(C) NO. 26065 OF 2020 PETITIONER/S: THE KERALA ELECTRICAL AND ALLIED ENGINEERING CO.LTD., POST BOX NO.8, KUNDARA, KOLLAM-691 501 REPRESENTED BY ITS MANAGER (F AND A) MR. SUBRAMANIAN R.R. BY ADVS. P.BENNY THOMAS SRI.D.PREM KAMATH SRI.TOM THOMAS (KAKKUZHIYIL) SHRI.ABEL TOM BENNY SHRI.JYOTHISH KRISHNA SMT.MEENAKSHY S DEV SHRI.AHAMMAD SACHIN K.

RESPONDENT/S: 1 REGIONAL PROVIDENT FUND COMMISSIONER EMPLOYEES PROVIDENT FUND ORGANIZATION, SUB REGIONAL OFFICE, PONNAMMA CHAMBERS-1, PARAMESWARA NAGAR, OPP. ARCHANA-ARADHANA THEATRE, KOLLAM-691 001. 2 CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT 016. BY ADV SRI.PIRAPPANCODE V.S.SUDHIR THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 30.11.2022, ALONG WITH WP(C).1851/2021, 22267/2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE AMIT RAWAL WEDNESDAY, THE 30TH DAY OF NOVEMBER 2022 / 9TH AGRAHAYANA, WP(C) NO. 1851 OF 2021 PETITIONER/S: CENTRAL BOARD OF TRUSTIES EPF THROUGH THE REGIONAL PROVIDENT FUND COMMISSIONER, EMPLOYEES PROVIDENT FUND ORGANISATION, REGIONAL OFFICE, PARAMESWAR NAGAR, PONNAMMA CHAMBERS, KOLLAM - 691 001. BY ADVS. PIRAPPANCODE V.S.SUDHIR SHRI. AKASH S. SMT.A.MEGHA RESPONDENT/S: M/S. KERALA ELECTRICAL AND ALLIED ENGINEERING CO. LTD., KUNDARA, KOLLAM - 695 001, REPRESENTED BY ITS MANAGER (F AND A). BY ADV SRI.M.K.THANKAPPAN THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 30.11.2022, ALONG WITH WP(C).26065/2020 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE AMIT RAWAL WEDNESDAY, THE 30TH DAY OF NOVEMBER 2022 / 9TH AGRAHAYANA, WP(C) NO. 22267 OF 2020 PETITIONER/S: THE KERALA ELECTRICAL AND ALLIED ENGINEERING CO. LTD., POST BOX NO.8, KUNDARA, KOLLAM-691 501 REPRESENTED BY ITS

MANAGER (F AND A), MR. SUBRAMANIAN R.R. BY ADVS. P.BENNY THOMAS SRI.D.PREM KAMATH SRI.TOM THOMAS (KAKKUZHIYIL) SHRI.ABEL TOM BENNY SHRI.JYOTHISH KRISHNA SMT.MEENAKSHY S DEV SHRI.AHAMMAD SACHIN K. SHRI.KURIAN OOMMEN THERAKATH RESPONDENT/S: 1 REGIONAL PROVIDENT FUND COMMISSIONER EMPLOYEES PROVIDENT FUND ORGANIZATION, SUB REGIONAL OFFICE, PONNAMMA CHAMBERS-1, PARAMESWARA NAGAR, OPP. ARCHANA-ARADHANA THEATRE, KOLLAM-691 001. 2 CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT COCHIN-682 016. BY ADV SRI.PIRAPPANCODE V.S.SUDHIR THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 30.11.2022, ALONG WITH WP(C).26065/2020 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

This order of mine shall dispose of three writ

petitions; W.P.(C) No.22267 of 2020 (Kerala Electrical and Allied Engineering v. Regional Provident Fund Commissioner and anr.) hereinafter called 'first writ petition', W.P.(C) No. 26065 of 2020 (Kerala Electrical and Allied Engineering v. Regional Provident Fund Commissioner and anr.) hereinafter called 'second writ petition' and W.P.(C) No.1851 of 2021 (Central Board of Trusties, EPF through the Assistant Provident Fund Commissioner, Kollam

v. M/s Kerala Electrical and Allied Engineering Co.Ltd., Kundara) herein after called 'third writ petition' as the common question of facts and law involved.

2. Order dated 11.2.2020 of the Appellate Tribunal modifying the order of RPF under Section 14B of the EPF & MP Act has been assailed by the petitioner in the first and third

writ petition whereas the second writ petition has been preferred by an assessee against the order dated 5.10.2020 passed under Section 7A of the EPF & MP Act assessing the dues as Rs.1,22,51,731/- for the period from 11/2013 to 05/2015.

3. In the first and second writ petition, Petitioner, Kerala

Electrical and Allied Engineering Co. Ltd is a Kerala Government Undertaking registered under the Companies Act, who is engaged in manufacturing and marketing of brushless alternators and distribution transformers. The company owns 3 units in Kerala and the one unit at Kundara in Kollam District is covered under the provisions of the Employees Provident Fund

and Miscellaneous Provisions Act, 1952 with Code No.K4/KLM/37. The petitioner has been duly remitting the contributions without any default or delay. However due to the lack of orders from Indian Railways and delay in getting the bills passed, the Kundara Unit had been facing financial constraints, particularly, for the period upto 2016 as evident from the balance sheet of 2008-09 to 2018-19, Ext.P1 to P11. The petitioner was paying higher contribution at the rate of 12% of the total basic pay and Dearness Allowance in respect of every employee without any ceiling of Rs.6,500/- or Rs.15,000/-.

4. CAG conducted an audit and subsequently, the

Government of Kerala issued order dated 25.1.2013 directing the petitioner to confine the employer's contribution to Rs.6,500/-. The unions challenged the order and this Hon'ble Court stayed the implementation of the said order. In the month of November 2013 due to financial crisis the contribution was not paid in full.

5. The enforcement officer finding the delay in the

contribution raised demand for payment of Rs.2,41,21,774/- and out of that Rs.1,18,70,043/- was paid. An enquiry under Section 7A was conducted and order of assessment dated 21.4.2016 was passed directing the the petitioner to pay the difference in contribution of Rs.1,22,51,731/-.

6. The aforementioned order was assailed by preferring

a statutory appeal before the Tribunal in Bangalore and said appeal was admitted and there was an interim order staying the operation of the order on the condition of deposit of 25% of the amount. The appeal was transferred to the 2 nd respondent and at the time of hearing, it was contended on behalf of the RPF that the petitioner had not taken the specific contention regarding the higher contribution in 7A proceedings.

7. The learned Tribunal vide order dated 5.10.2020

dismissed the appeal. It is contended that the petitioner had been contributing 12% of the actual salary as employer's share of contribution but due to financial constraints, the employer's share of provident fund contribution could not be paid during the

period from November 2013 to May 2015. The appeal should not have been dismissed on the premise that the petitioner did not take the plea of challenging the higher rate of contribution then being agitated whereas the Appellate Authority ought to have accepted the statutory liability of the employer on the salary upto Rs.6,500/- till 1.9.2014 and up to Rs.15,000/- after 1.9.2014.

8. In the third writ petition, the consequential act of non payment of the contribution resulted in initiation of the penal

proceedings under Section 14B. Though assessing authority determined the damages to the extent of 100% but the appellate authorities, as stated above, reduced to 70%.

9. Both the petitioner and the RPF have agitated that

there was no ground for the appellate authority to reduce or it should have been reduced to, more in view of the losses being suffered, as reflected from the various balance sheets for the period from 2008-09 to 2017-18. The Company had been giving the salary but for the reasons best known did not deposit the contribution and thus faulted in performing the duties which was not on account of financial liabilities but mismanagement. Even if there is no mens rea that cannot be a ground to ward off the damages in view of the judgment of the Supreme Court in Horticulture Experiment Station Gonikoppal, Coorg v. The Regional Provident Fund Organization [2022 LiveLaw SC 202].

10. I have heard the learned counsel for the parties and

appraised the paperbook and of the view that the second writ petition bearing No. W.P.(C) No. 26065 of 2020 preferred against the order of the Tribunal dated 5.10.2022 assessing the contribution from 11/2013 to 05/2015 do not call for any interference for the reason that the objection raised by the petitioner during the proceedings under Section 7A was with regard to non accounting of certain payments already made by

way of the contribution. The establishments had been contributing 12% of the actual salary of the employer share of

the contribution. The reliance to the Government order

restricting the contribution to Rs.6,500/- was already under stay by this Court in W.P.(C) No.5639 of 2013. Thus the petitioner could not get the benefit of the said Government order and was liable to make the contribution. The summons were issued on

13.1.2016 directing the Company to produce the record and appear in person or through the duly appointed representatives. The respondent had taken into consideration the account based on the ECR challans which was acknowledged the balance dues. Except that no other objection was raised by the employer. It is the duty of the employer to deposit the provident fund and not to be reminded at the time when they had been faulted and the employers need not be waiting for issuance of an order under Section 7A for remittance of the regular dues. Despite having availed number of opportunity of hearing no sufficient material was placed on record to overrule the demand of enforcement officer much less not before the Appellate authority or before

this Court as well. Accordingly, the second writ petition (W.P.

(C) No. 26065 of 2020) is dismissed.

11. As regards the challenge to the damages under Section 14B, it is a consequential Act. Section 14 B of the Act reads as follows:

14B. Power to recover damages.-Where an employer makes default in the payment of any contribution to the Fund 46 [, the 47 [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 4[or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of 5[any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, 6[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 7[from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:] 8[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:] 9[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]

12. From the reading of the aforementioned provisions, it is evident that power is vested with the assessing authority to assess the damages. It does not have a mandate to assess 100%

but it is a discretion. The balance sheets placed on record reflects that the Company had been in losses. There cannot be any excuse for losses in not depositing the contribution but such point can always be looked into for the purpose consequential action contemplated under Section 14 B and 7Q of the Act. The appellate Tribunal by noticing the contentions found that there was actual losses and gave relief to the extent of 70% instead of 100%. I am of the view that the damages are further liable to be reduced to the extent of 25% only by granting the benefit of 75% for the reason that the balance sheets for the period 2008-09 to

2017-18 showed the perpetual losses. Thus there was no men

rea on the part of the petitioner. Judgment of the Supreme Court relied upon by the Counsel representing the RPF would not be applicable in this case. Even if it had been an intentional delay, the Company actually was running in losses. Order of the appellate authority is modified. The damages assessed are quantified to the extent of 25%. Accordingly, first writ petition bearing No. W.P.(C) No.22267 of 2020 is partly allowed. The writ petition preferred by the Central Board of Trusties, third writ petition, W.P.(C) No.1851 of 2021 is dismissed. SD/- sab AMIT RAWAL JUDGE APPENDIX OF WP(C) 1851/2021 PETITIONER EXHIBITS EXHIBIT P1 TRUE COPY OF THE MEMORANDUM OF APPEAL NO.249/2018 FILED BY THE RESPONDENT BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, ERNAKULAM. EXHIBIT P2 TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE PETITIONER BEFORE THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL IN APPEAL NO.249/2018. EXHIBIT P3 TRUE COPY OF THE ORDER DATED 11/02/2020 IN APPEAL NO.249/2018 OF THE CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, ERNAKULAM. APPENDIX OF WP(C) 22267/2020

PETITIONER EXHIBITS EXHIBIT P1 TRUE COPY OF THE PROFT & LOSS ACCOUNT 2008-2009. EXHIBIT P2 TRUE COPY OF THE PROFIT & LOSS ACCOUNT 2009-2010. EXHIBIT P3 TRUE COPY OF THE PROFIT & LOSS ACCOUNT 2010-2011. EXHIBIT P4 TRUE COPY OF THE PROFIT & LOSS ACCOUNT 2011-2012. EXHIBIT P5 TRUE COPY OF THE PROFIT & LOSS ACCOUNT 2013-2014. EXHIBIT P6 TRUE COPY OF THE PROFIT & LOSS ACCOUNT 2014-2015. EXHIBIT P7 TRUE COPY OF THE PROFIT & LOSS ACCOUNT 2015-2016. EXHIBIT P8 TRUE COPY OF THE PROFIT & LOSS ACCOUNT 2016-2017. EXHIBIT P9 TRUE COPY OF THE PROFIT & LOSS ACCOUNT 2017-2018. EXHIBIT P10 TRUE COPY OF THE ORDER DATED 13.2.2017 ISSUED BY THE IST RESPONDENT. EXHIBIT P11 TRUE COPY OF THE ORDER DATED 11.2.2020 ISSUED BY THE 2ND RESPONDENT. APPENDIX OF WP(C) 26065/2020 PETITIONER EXHIBITS EXHIBIT P1 TRUE COPY OF THE PROFIT & LOSS ACCOUNT 2008-2009. EXHIBIT P2 TRUE COPY OF THE PROFIT & LOSS ACCOUNT 2009-2010. EXHIBIT P3 TRUE

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RESPONDENTS EXHIBITS: R1(a) TRUE COPY OF THE INSPECTION REPORT PART -II SERVED BY THE ENFORCEMENT OFFICER. R1(b) TRUE COPY OF THE LETTER DATED 1.10.2015 RECEIVED FROM THE EMPLOYER R1(c) TRUE COPY OF THE DAILY PROCEEDING SHEET WITH RESPECT TO THE ENQUIRY HELD ON 10.2.2016