

(2011) 09 CAL CK 0135
In the Calcutta High Court

Case No : W.P.No. 1610 of 2006 and G.A.No. 143 of 2011

Arambagh Hatcheries Ltd. and Another	APPELLANT
Vs	
Employees" Provident Fund Organisation Si Ors.	RESPONDENT

Date of Decision : 15-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 15, 17, 5, 7Q
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2012) 2 CALLT 376 : (2012) 134 FLR 312 : (2012) LLR 1086

Hon'ble Judges : Debasish Kar Gupta, J

Bench : Single Bench

Advocate : Soumya Majumdar and Mr. Sunny Nandy, for the Appellant; S.C. Prasad, for the Respondent

Judgement

Debasish Kar Gupta, J.—This writ application is directed against an order dated September 21, 2006 passed by the respondent No.2 levying damages u/s 14B of the Employees" Provident Fund (Miscellaneous Provisions) Act, 1952 (hereinafter referred to as the said Act) for belated payment of the contribution of the petitioner-company under the Employees" Provident Fund Scheme. 1952 for the period from June, 2002 to August, 2005. Apart from assessing damages under the provisions of section 14B of the said Act, the interest has also been levied u/s 7Q of the said Act which is not the subject-matter of scrutiny of this Court in this writ application.

2. The respondent No.2 issued a show-cause notice dated August 7, 2007 to the petitioner-company for levying damages u/s 14B of the said Act for belated payment of its contribution under the Employees" Provident Fund Scheme. 1952 (hereinafter referred to as the said Scheme). The petitioner submitted its representation dated August 17, 2006 praying for exemption from payment of the above damages. The respondent No.3 passed the impugned order dated September 21, 2006 levying a sum of Rs.25.61,671/- towards damages upon the

petitioner-company u/s 14B of the said Act for belated payment of its contribution towards the said Scheme.

3. It is submitted by Mr. Soumya Majumdar, learned Counsel appearing for the petitioner, that after amendment of the provisions of section 14B of the said Act, levying of damages is a penalty. According to him, the authority is under obligation to form an opinion in view of the language used by the Legislature in the above provision. According to him, the word "may" used in the above section does not mean or purport "shall" because a penal provision is to be interpreted strictly.

4. Drawing attention of this Court towards the impugned order, it is submitted by Mr. Majumdar that it is an outcome of non-application of mind. The reason for rejecting the prayer of the petitioner to exempt levying damages was of having no power in view of the provisions of second proviso to section 14B of the said Act. According to him the prayer of the petitioner was not considered applying mind on its proper perspective.

5. Mr. Majumdar relies upon the decisions of P.T. Rajan Vs. T.P.M. Sahir and Others, Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, , The Assistant Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd. and Others, and an unreported decision of a Single Bench of this Court of October 30, 2009 in the matter of Crystal Cable Industries Ltd. & Anr. v. Union of India & Ors. (In Re: WP 2571(W) of 2006).

6. On the other hand it is submitted by Mr. Shiv Chandra Prasad that this writ application is not maintainable on the ground of availability of alternative forum under the provisions of the said Act. It is also submitted by Mr. Prasad that on a harmonious reading of the provisions of section 14B of the said Act and 32A of the said Scheme it appears that the levy of damages is a mandatory provision and the same can only be exempted in accordance with the provisions of second proviso to section 14B of the said Act.

7. Drawing attention of this Court towards the impugned order it is submitted by Mr. Prasad that the prayer of the petitioner was rejected taking into consideration the provisions of second proviso to section 14B of the said Act. Mr. Prasad further submits that financial constraints cannot be considered as a ground for granting exemption in view of the settled principles of law.

8. Mr. Prasad relies upon the decisions of Asstt. P.F. Commissioner, Employees' Provident Fund Organisation Vs. Pawan Kumar Agarwala and Others, , Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others, , Dalgaon Agro Industries Ltd. (Now known as Tasati Tea Ltd.) Vs. Union of India (UOI) and Others, and M/s. Hindustan Times Ltd. v. Union of India and Ors. reported in AIR 1998 SC 688.

9. I have heard the learned Counsel for the respective parties carefully and I have given my thoughtful consideration to the facts and circumstances of this

case. Admittedly the respondent authority rejected the prayer of the petitioner for granting exemption from levying damages u/s 14B of the said Act taking into "consideration the second proviso to the above provision. It is also not in dispute that according to the petitioner the authority is to form an opinion before levying damages. The prayer of the petitioner was not to consider his case under second proviso to section 14B of the above provision. Therefore, the interpretation of the provision of section 14B of the said Act is the subject matter involved in this writ application. In view of the above, judicial review under Article 226 of the Constitution of India is permissible.

10. In the decision of Pawan Kumar Agarwala a Division Bench held that in case of availability of adequate alternative remedy an application under Article 226 of the Constitution of India is not maintainable on the basis of the facts and circumstances involved in that case. As discussed hereinabove since the interpretation of the provision of section 14B is the subject matter involved in this writ application the above decision has no manner of application in this case. So, I reject the submissions made by Mr. Prasad with regard to maintainability of this writ application.

11. With regard to the merits of this case I find that it is not in dispute that an amendment took place in the provision section 14B of the said Act with effect from September 1, 1991 empowering the provident fund authority to realise damages by way of penalty from the employer. So the above provision was converted to a penal measure. For the purpose of interpretation the above provision is set out below:

"14B Power to recover damages.-Where an employer makes default in the payment of any contribution to the 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 other provision of this Act or of [any scheme or Insurance Scheme] or 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:]

[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:]

[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 u/s 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. It appears from the above provision that damages under the above provision

by way of penalty may be recovered from the employer for delayed payment of contribution under the said scheme. It is the settled principles of law that a penal provision has to be interpreted strictly. Reference may be made to the decision of P. T. Rajan (supra) and the relevant portion of the above decision is quoted below:

"Furthermore, a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused. (See Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur, State Bank of Patiala v. S. K. Sharma, Venkataswamappa v. Special Dy. Commr. (Revenue) and Rai Vimal Krishna v.. State of Bihar.)"

In view of the above settled principles of law the term "may" used in the above provision cannot be construed as "shall".

13. In the above circumstances, the authority was under obligation to apply its mind before imposing damages by way of penalty under the above provisions. If the power to levy damages is discretionary then, in a fit case, it is open to the respondent authority to waive the damages. For that purpose the authority is to form an opinion applying its mind on the ground on which prayer is made for waiving the same. Upon consideration of the impugned order I find that the grounds taken in the representation dated August 17, 2006 of the petitioner company were not at all considered in case of rejecting the prayer of waiving the levy of damages. Therefore, the impugned order suffers from violation of the provisions of section 14B of the said Act on the basis of the settled principles of law when a law authorises an authority to act in a certain manner, he is to do the same in that manner or not at all and other mode of compliance is forbidden. Reference may be made to the Rule decided in the decision of Nazir Ahmad v. King Emperor reported In AIR 36 PC 253. The above rule has been accepted as a settled principle of law by the Apex Court of our country in a series of decisions. Reference may be made to the decision of Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, and the relevant portion of the above decision is quoted below:

27. Then it is to be seen that the Act requires the Board to exercise the power u/s 119 in a particular manner i.e. by way of issuance of orders, instructions and directions. These orders, instructions and directions are meant to be issued to other income tax authorities for proper administration of the Act. The Commission while exercising its quasi-judicial power of arriving at a settlement u/s 245-D cannot have the administrative power of issuing directions to other income tax authorities. It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. If that be so. since the Commission cannot exercise the power of relaxation found in section 119(2) (a) in the manner provided therein it cannot invoke that power u/s 119(2) (a) to exercise the same in its judicial proceedings by following a procedure contrary to that provided in subsection (2) of section 119."

(Emphasis supplied)

14. I do not find any substance in the submissions made by Mr. Prasad that there was no scope for granting exemption u/s 14B of the said Act save and except the provisions of second proviso of the above provision. I cannot accept the submissions of Mr. Prasad that under the provision of paragraph 32A of the said Scheme the rate of damage is fixed or that there is no scope to grant exemption. The said scheme is a subordinate legislation made in exercise of power conferred by section 5 of the said Act. Any provision of a subordinate legislation cannot subplant the provisions of the legislation made by the legislature. It can only supplement the provisions of the legislation made by the legislature. Therefore, the interpretation given by Mr. Prasad with regard to paragraph 32A of the said scheme cannot be accepted by this Court.

15. I do not find that the decision of Regional Provident Fund Commissioner (supra) has no manner of application in this case because the interpretation of the word "may" used in Section 14B was not under consideration of the Apex Court in the above matter. This Court cannot ignore the settled principles of law that treating the words of judgment as they are words in legislative enactment and disposal of the cases placing reliance on them without indicating its applicability is improper. Reference may be made to the decision of Punjab National Bank Vs. R.L. Vaid and Others, and the relevant portion of the above decision is set out below:

"5. We find that the High Court has merely referred to the decision in R. K. Jain's case (supra) without even indicating as to applicability of the said decision and as to how it has any relevance to the facts of the case. It would have been proper for the High Court to indicate the reasons and also to spell out clearly as to the applicability of the decision to the facts of the case. There is always peril in treating the words of a judgment as though they are words in a Legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a difference between conclusions in two cases. Disposal of cases by merely placing reliance on a decision is not proper. Precedent should be followed only so far as it marks the path of justice, but you must cut out the dead wood and trim off the side branches else you will find yourself lost in thickets and branches, said Lord Denning, while speaking in the matter of applying precedents. The impugned order is certainly vague."

For the same reason the decisions of Dalgaon Agra Industries Ltd. (supra) and M/s. Hindustan Times Ltd. (supra) are not applicable in this case.

16. In view of the discussions and observations made hereinabove the impugned order so far as the assessment of damages u/s 14B is concerned is quashed and set aside.

17. However, this will not prevent the authority from considering the question of levy of damages upon the petitioner company for delayed payment of its

contribution for the period from June, 2002 to August, 2005 afresh in the light of the observations made hereinabove.

18. This writ application is thus disposed of. There will be, however, no order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.