

(2011) 04 MAD CK 0055

In the Madras High Court

Case No : Writ Petition No. 21635 of 2010 and M.P. No. 2 of 2010

Arcot Textile Mills Ltd.

APPELLANT

Vs

The Employees' Provident Fund Appellate Tribunal, The
Regional Provident Fund Commissioner and The Enforcement
Officer, EPF Organisation

RESPONDENT

Date of Decision : 29-04-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B,
7A, 7I, 7Q

Citation : (2011) 04 MAD CK 0055

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : T. Sai Krishnan, for Sai Bharath and Ilan, for the Appellant; K. Ramu,
for R2 and R3, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner is a Textile Mill. They have come forward to challenge an order passed by the Provident Fund Appellate

Tribunal in ATA No. 748(13)2003 dated 31.03.2010.

2. When the writ petition came up for admission on 22.09.2010, notice was directed to be served on the learned Standing Counsel for

Respondents 2 and 3. Accordingly, Mr. K. Ramu, learned Standing Counsel for the Provident Fund appears for Respondents 2 and 3. He also

filed a counter affidavit dated 28.04.2011 on behalf of the second Respondent which was adopted by the third Respondent. He also produced a

copy of the order passed u/s 7A, levying damages u/s 14B as well as penal interest u/s 7Q of the EPF & MP Act, 1952. The Annexure to the said

order contains the date of payment, delay caused in respect of the payment and

the consequential levy of damages.

3. The Petitioner challenging the said order filed an appeal u/s 7I of the Act before the EPF Tribunal, the first Respondent herein. The Tribunal

took up the case as ATA No. 748(13)2003. After hearing the parties, the appeal was dismissed by an order dated 31.03.2010. It is as against the

said order, the present writ petition came to be filed.

4. Pending the writ petition, this Court granted an interim stay of recovery of damages on condition that the Petitioner deposits Rs. 15 lakhs within

two weeks. Subsequently, an application was taken in M.P. No. 3 of 2010, seeking to extend the time granted for depositing the amount of Rs.

15,00,000/- and the same was granted by this Court on 22.12.2010. It is now stated by the learned Counsel for the Petitioner that the said

amount has been deposited.

5. The contention raised by the Petitioner in challenging the order of the Tribunal as reflected in the affidavit filed in support of the writ petition was

that there was non-application of mind and the levy of damages for the delay in payment of contribution was made after ten years. It was further

contended that the delay caused was not wilful and in the absence of any finding that the delay was wilful, no damages can be levied.

6. In the counter affidavit filed by the contesting Respondents, it was stated that the dues for the period from 1992-93 to 2001-02 were paid

belatedly, which itself is a ground for levying damages as provided u/s 14B of the Act as well as penal interest u/s 7Q of the Act. When the

Petitioner was issued with summons with reference to the show cause notice to appear on 10.06.2003, no one on the side of the Petitioner Mill

appeared and hence, the enquiry was adjourned to 24.06.2003. On 24.06.2003, the authorised representative of the Petitioner Mill appeared for

the enquiry and pleaded time to verify the records. Hence, the matter was further adjourned to 15.07.2003. On 15.07.2003, there was no

representation for the Petitioner Mill. Therefore, the earlier provisional order came to be confirmed by the second Respondent.

7. The Tribunal before which the appeal was filed recorded the argument of the Petitioner that the company has become sick under the provisions

of the Sick Industrial Companies (Special Provisions) Act and it was referred to BIFR was not a valid ground. After referring to the judgment of

the Kolkata High Court in *Vikram Poddar v. RPFC* reported in 2001 II 578 had held that a mere reference to BIFR is not a sufficient ground.

8. The learned Counsel for the Petitioner referred to the judgment of the Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*, for

contending that levy of penalty emphasis a statutory obligation as a result of quasi-criminal proceeding and penalty should not be ordinarily levied

unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious

disregard of its obligation. In that case, the Supreme Court was dealing with the provisions of the Sales Tax Act and after referring to Section

25(1)(a) read with 9(1) of the Orissa Sales Tax Act, 1947, the Court held that mere liability to pay penalty does not arise upon the proof of default

in registering the establishment as a dealer.

9. In the present case, Section 14B of the EPF Act clearly stipulates that if an employer defaults in the payment of any contribution, the Authorised

Officer can recover from the Employer by way of penalty such as damages, not exceeding the amount of arrears, as may be specified in the

Scheme. Further, u/s 7-Q, an Employer is liable to pay simple interest at the rate of 12% per annum as specified in the Scheme on any amount due

from him under the Act from the date on which the amount has become payable. Under the Employees' Provident Funds Scheme, part 32A

clearly gives a tabular column, within which, it was stated the rate of damages to be paid with reference to delay and in respect of different period

of delay, different rates have been prescribed. The second proviso to Section 14B provides power to the Central Board to reduce or waive

damages only in case where there is a Scheme for rehabilitation framed by the BIFR or by the AAFIR as the case may be. In the present case, it is

fairly admitted that though a reference was made to the BIFR, no Scheme has been framed till date. Therefore, the question of the Petitioner

relying upon the judgment of the Supreme Court in *Hindustan Steel Ltd* case (cited supra) which arose under the Commercial Tax Act has no

relevance to the present case.

10. The learned Counsel also placed reliance upon the judgment of this Court in *South India Flour Mills (P) Ltd. Vs. Regional P.F. Commissioner*,

for contending that even if the liability to pay contribution may be statutory, but

merely on account of delay, automatic levy of damages will not follow.

11. On the contrary, a reference was made to the judgment of the Supreme Court in *M/s. Hindustan Times Limited Vs. Union of India and Others*,

. The Supreme Court after analysing the relevant provisions relating to levy of damages in paragraphs 25,26 and 29 held as follows:

25. The Gujarat High Court in *Gandhidham Spg. & Mfg. Co. Ltd. v. R.P.F. Commr.* (to which one of us Majmudar, J. was a party), laid down a

principle that ""prejudice"" on account of delay could arise if it was proved that it was ""irretrievable"". There it was observed that for purposes of

Section 14B, there is no period of limitation prescribed and that for any negligence on the part of the Department in taking proceedings the

employees, who are third parties, cannot suffer. It was further observed:

The only question that would really survive is the one whether on the facts and circumstances of a given case, the show-cause notice issued after

lapse of time can be said to be issued beyond reasonable time. The test whether lapse of time is reasonable or not will depend upon the further fact

whether the employer in the meantime has changed his position to his detriment and is likely to be irretrievably prejudiced by the belated issuance

of such a show-cause notice.

(Emphasis supplied)

It was also stated that such a defence of irretrievable prejudice on account of delay, was to be pleaded and proved in the reply to the show-cause

notice. We may add that if such a plea is rejected by the Department, it cannot be raised in the High Court unless specifically pleaded. The above

principle of prejudice laid down by the Gujarat High Court in *Gandhidham Spg. & Mfg. Co. Ltd.*¹⁷ (Guj) has been followed by the Bombay High

Court in *Saoner Taluka Ginning, Pressing and Dal Mill Prakriya v. R.P.F. Commr.; Super Processors v. Union of India*.

26. A different aspect of prejudice was referred to in *Sushma Fabrics (P) Ltd. v. Union of India* by a learned Single Judge of the Bombay High

Court. It was stated that in some cases there could be serious prejudice on account of abnormal delay in taking proceedings u/s 14B, either

because the records or accounts of the defaulter are lost or on account of the personnel concerned acquainted with the facts of a bygone period no

longer being available for unearthing the facts. But such pleas must be raised before the Department and strictly proved. In case such facts are

proved it is possible in some cases that there is irretrievable prejudice.

29. From the aforesaid decisions, the following principles can be summarised: The authority u/s 14B has to apply his mind to the facts of the case

and the reply to the show-cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity

of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the

frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other

indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability;

there is no period of limitation prescribed by the legislature for initiating action for recovery of damages u/s 14B. The fact that proceedings are

initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer

was lulled into a belief that no proceedings u/s 14B would be taken; mere delay in initiating action u/s 14B cannot amount to prejudice inasmuch as

the delay on the part of the Department, would have only allowed the employer to use the monies for his own purposes or for his business

especially when there is no additional provision for charging interest. However, the employer can claim prejudice if there is proof that between the

period of default and the date of initiation of action u/s 14B, he has changed his position to his detriment to such an extent that if the recovery is

made after a large number of years, the prejudice to him is of an "irretrievable" nature; he might also claim prejudice upon proof of loss of all the

relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further

establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to

"irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defence in the reply to the

show cause notice and must satisfy the authority concerned with acceptable material; if those pleas are rejected, he cannot raise them in the High

Court unless there is a clear pleading in the writ petition to that effect.

12. If it is seen in this angle and also on the reference made to the second proviso, certainly, the ingredients for either waiving or reduction of the

damages do not arise merely because a reference was made to the BIFR. In the present case, the Petitioner was given sufficient opportunities to

appear before the Department and they were at default. As held by the Supreme Court, if the authorities are not satisfied with the explanation

offered by the Petitioner, this Court cannot order either reduction or waiver of such damages.

13. In the light of the above, there is no case made out by the Petitioner. Accordingly, the writ petition stands dismissed. No costs. Consequently,

connected miscellaneous petition stands closed.