

(2012) 03 PAT CK 0018
In the Patna High Court
Case No : CWJC No. 17412 of 2009

Assistant Provident Fund Commissioner, Sub-Regional Office,
Employees" Provident Fund Organisation

APPELLANT

Vs

Katihar Medical College and Others

RESPONDENT

Date of Decision : 19-03-2012

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 15, 17, 7A, 7B

Citation : (2013) 137 FLR 37 : (2012) 4 PLJR 137

Hon'ble Judges : Samarendra Pratap Singh, J

Bench : Single Bench

Advocate : Shailendra Kumar Sinha, Prashant Sinha, for the Appellant;

Judgement

Samarendra Pratap Singh, J.—In the instant writ application, the petitioner (Assistant Provident Fund Commissioner) prays for quashing the order dated 9th September, 2009, passed by the Employees" Provident Fund Appellate Tribunal (hereinafter referred to as "the EPFAT only) in A.T.A. No. 993(3) of 2005, whereby the Tribunal substantially slashed the damages from Rs. 30,20,467/- for the period January 1992 to December 2000 u/s 14B of the Employees" Provident Fund (petitioner) u/s 7A of the P.F. Act to the extent that the respondent no. 1 would be liable to pay the damage for 20 days for the period starting from 1992 to 15.9.2000 for non-payment of Provident Fund contribution. The petitioner states that respondent (sic) Provident Fund Scheme became applicable to the respondent Medical College in 1990 and a code was also assigned since the College came under the coverage of Provident Fund Scheme. In 1992, the College was affiliated to B.N. Mandal University. A proceeding u/s 7A was initiated for non-deposits of Employees" Provident Fund contribution for the period 1992-1994. Notices were issued in the year 1995. The case was heard on 30.1.1996 on which date the Administrator of respondent College submitted that the concerned respondent has paid all dues up to June 1993 and only employees" share of dues of July 1993 to June 1994 remains to be paid.

2. After taking into consideration the relevant materials the petitioner assessed the due amount against respondent no. 3 as Rs. 1,27,430/-. The respondent no. 3 paid the amount so directed by the petitioner in 1996 itself.

3. On 29.12.2000 and 7.2.2011, again for the period containing from January 1995 to August 2000, a proceeding u/s 7A was initiated for non-payment of Employees' Provident Fund due against the respondent college (respondent no. 1) u/s 7A and (sic) Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Scheme, 1952").

4. The respondent challenged the notice issued u/s 7A in C.W.J.C. No. 5159 of 2001. A learned Single Judge vide order dated 9.5.2001 granted liberty to raise the issue of maintainability before the Assistant Provident Fund Commissioner, Bhagalpur. The Assistant Provident Fund Commissioner vide order dated 30.7.2002 held that provisions of the Act would apply to the respondent college, which was challenged in C.W.J.C. No. 8717 of 2002 by respondent. This Court vide order dated 4.7.2003 permitted the respondent to avail the remedy of review u/s 7B against the order passed u/s 7A of the Act. The review petition was rejected by Assistant Provident Fund Commissioner vide order dated 8.1.2004 (Annexure-3). The respondent was thus required to pay Rs. 29,12,363/- towards contribution of E.P.F. and a sum of Rs. 13,78,237/- towards interest u/s 7Q. The petitioner promptly paid both the principal and interest amount on 29.1.2004.

5. Thereafter a proceeding for levying penalty and damage u/s 14B and para.-32(A) of 1952 Scheme was initiated on 11.2.2005. Copy of the notice is contained in Annexure-C Series filed by the College.

6. By order dated 21.9.2005, the damage was assessed at Rs. 30,20,247/- for the period 1992 to 2000 calculated at the rate of 37% as per the Scheme, 1952.

7. The respondent moved the Appellate Tribunal being ATA No. 973(3)/2005 against the order dated 21.9.2005. The Tribunal observed that the liability to pay Provident Fund for the first time was decided on 8.1.2004, and the respondent College within 20 days thereof paid the entire assessed amount on 29.1.2004. The learned Tribunal held that the respondent no. 1 would be liable to pay damages u/s 14B only for a period of 20 days and not with effect from 1992 up till passing of order u/s 14B (21.9.2005), as assessed by petitioner u/s 7A of the Act. The Appellate Tribunal modified the amount of damage assessed by the petitioner accordingly.

8. The petitioner submits that the Tribunal erred in holding that the liability to pay Provident Fund was adjudicated on 8.1.2004 and as such it would be liable to pay only from the date of such determination.

9. The petitioner submits that if an establishment is liable to make contribution towards Employees Provident Fund Scheme, under the Scheme and provisions of the Act, the same would not become non-applicable for the period the

applicability of the Act was in challenge. The petitioner submits that thus it was held that the respondent College would also be further liable to pay interest 12% per annum from 16.9.2005 till the date of payment. Furthermore, the P.F. Scheme would be applicable to College from 1990 when P.F. code was assigned to it.

10. Counsel for the respondent college submits that the College was established in the year 1987 and it is an unaided private minority institution and the affiliation was granted only on 27.2.1996. Till 1996 respondent college was not liable to make contribution towards Provident Fund dues. The respondent submits that the enforceability of the Act was challenged before this Court as well as before the Provident Fund authorities and only on 8.1.2004 the issue of applicability was decided by the Assistant Provident Fund Commissioner. The petitioner within 20 days thereof on 29.1.2004 paid the assessed amount and as such the appellate tribunal rightly held that petitioner at the most would be liable to pay damages for 20 days.

11. Learned counsel for the respondent no. 2 next submitted that it would appear from notice dated 29.12.2000 and 7.2.2001 of the Provident Fund authorities as well as from submissions of the counsel appearing on behalf of Provident Fund that the provisions of the Act did not apply to the College. He submits that earlier the College deposited the Provident Fund contribution under coercion of the authorities.

12. I have heard the learned counsel for the petitioner as well as learned counsel for the respondent college. It appears that earlier a proceeding u/s 7A of the 1952 Act was initiated against the respondent college for default in contribution of Provident Fund dues for the period 1992 to 1994. The College paid the assessed amount in the year 1996 itself. The college did not challenge the notice issued u/s 7A initiating proceeding for payment of Provident Fund dues.

13. However, the petitioner challenged the applicability of the provisions of Provident Fund Act when a proceeding u/s 7A was initiated for default in making P.F. contribution for the period 1995-2000. The issue of applicability of the Act was finally decided against them on 8.1.2004 by Assistant Provident Fund Commissioner, Regional Office, Bhojpur. The plea of the college is that the provisions of the Act would apply only with effect from the date of adjudication of its applicability u/s 7A of the Act. The submission of the respondent college is misconceived and only to be rejected.

14. A Division Bench of this Court in case of Central Provident Fund Commissioner and Another vs. S.K. Nasiruddin Beddi Merchant Limited, disposed of on 12.12.1997 vide L.P.A. No. 403 of 1996 Ed.--Reported in 1998 (1) PLJR 687 observed that merely because an assessee has challenged the applicability of the Act, the liability would get extinguished, would be an absurd proposition. If such were the law, any liability imposed by law would be defeated by mere challenge to the enforcement/applicability of that liability. The learned Judges were of the

view that the liability would date back to the date of applicability of the Act and the Scheme, if it is held that establishment is liable to pay.

15. Thus, in my view, the appellate tribunal erred in holding that the Act became applicable from the date of decision in the proceeding u/s 7A of the Act. The date of the decision in a proceeding u/s 7A of Act would not be relevant date for deciding the applicability of date of the scheme. The provisions of the Act and Scheme would become applicable, as soon as the installation/establishment came within its ambit.

16. The default was for the period 1995 to 2000 and the proceeding for damages was initiated in the year 2005. In such circumstances, the damages would be calculated as per Section 14B read with para-32-A of 1952 Scheme, as it existed then at the relevant time.

17. Para-32-A which relates rates of recovery of damages for default in payment of contribution under the Act is quoted herein below:--

[32-A. Recovery of damages for default in payment of any contribution.--

(1) Where an employer makes default in the payment of any contribution to the 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 of the Act or in the payment of any charges payable under any other provisions of the Act or Scheme or under any of the conditions specified u/s 17 of the Act, the Central Provident Fund Commissioner or such 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, damages at the rates given below:--

Period of default	Rate of damages (percentage of arrears per annum)
(a) Less than two months	17
(b) Two months and above but less than four months	22
(c) Four months and above but less than six months	27
(d) Six months and above	37

as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored.

18. In the instant case, there has been a delay of more than six months in making contributions of Provident fund. As such, the Provident Fund Department was within its right to impose penalty at the rate of 37%, as in vogue there. It is relevant to state that the rate of penalty/damages has been reduced to 25% only vide 2005 amendment in para-32-A of 1952 Scheme. The Provident Fund Department estimated damage of Rs. 39,20,427/- for the period January, 1992 to December, 2000 at the rate the penalty was applicable then.

19. The case of the respondent is that the petitioner would not be liable to levy penalty u/s 14B of the Act after delay of 9 years. The respondent submitted that penalty for default in payment of Provident Fund contributions u/s 7A of the Act for the period January 1992 to December, 1994 was already paid in the year 1995 alongwith interest and as such levy of penalty for that period alongwith default for the period 1995 to 2000 is not permissible.

20 I cannot agree with the submission of learned counsel for the respondent. The Provident Fund Act does not prescribe any period of limitation. The money, which ought to have been deposited for the benefit of the employees in fact have been used by the employees themselves. In this context, learned counsel for the petitioner placed reliance in case of M/s. Hindustan Times Limited Vs. Union of India and Others, , which was seized with issue of limitation vis-a-vis applicability of Section 14B. The Hon"ble Apex Court held therein that the Act does not prescribe any period of limitation for recovering damages u/s 14B in case of default in payment of money, which was due to the employees.

21. Still the other aspect would be whether the Provident Fund Department can levy damages u/s 14B of the Act for the period January 1992 to December 1994 without giving an opportunity of hearing.

22. It appears that though pursuant to subsequent proceeding u/s 7A of the Act for default for the period 1995 to 2000, a show-cause notice u/s 14B for imposing damage was issued but no such notice was issued for levying damages for the period 1992 to 1994.

23. In the circumstances, the Provident Fund Department would not be entitled to levy penalty u/s 14B of the Act for the period 1992 to 1994 in absence of any prior notice for the period in question. The composite damages calculated for the period 1992 to 1994 necessarily have to be deducted from the penalty amount of Rs. 39,20,427/-.

24. The Hon"ble Apex Court though observed that there is no period of limitation in initiating action u/s 14B of the Act, as the employer, who defaulted in making over contribution had used money, which did not belong to him. Nonetheless the Hon"ble Apex Court in paragraph-29 of the same judgment observed that there is no additional provision for charging interest on damages. The relevant provisions is quoted herein below for reference:--

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.

25. In case of Organo Chemical Industries and Another Vs. Union of India (UOI) and Others, observed that the provision of damages u/s 14B are not penal in nature and not unreasonable and the damages so recovered would not go into the account of the State revenue, but also would be credited for the benefit of the employees.

26. In the backdrop of the aforesaid discussions, I hold that the respondent College is liable to pay damages for the period 1995 to 2000 and the Department has rightly calculated the same at the rate of 37% under 32A of the Scheme, as it was prevalent then. Only in the year 2008, the quantum of damages have been revised and if there is default in making contribution there would be for more than six months 25% but this scheme has been made effective only with effect from 2008 and the respondent college cannot take any benefit of the same as the period in question of the year 1995 to 2000. In the result, the writ application is partly allowed with modification indicated above.