
(1991) 10 P&H CK 0047
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 3644 of 1990

Avon Scale Company

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 28-10-1991

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B

Citation : (1993) 2 LLJ 226 : (1992) 101 PLR 408

Hon'ble Judges : V.K. Jhanji, J;M.S. Liberhan, J

Bench : Division Bench

Advocate : R.L. Sharma, for the Appellant; Ashok Aggarwal, Subhash Goyal and Manish Jain, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Jhanji, J.—The petitioner-firm is carrying on its business at Sonapat and is subject to the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act"). The petitioner-firm made a default in paying employees' provident fund, family pension fund contribution, insurance fund contributions and administrative charges/inspection charges for the period April 1979, to December, 1986. On account of this default, the respondent served a notice dated October 6, 1987 (Annexure P-1), u/s 14B of the Act calling upon the petitioner-firm to show cause as to why damages under different heads be not imposed and recovered from the petitioner-firm as the firm had defaulted to pay contributions in time. In response to the said notice, the petitioner firm submitted a detailed reply explaining the circumstances which prevented it from making deposit within the stipulated time. The respondent, after considering the reply, ordered that a sum of Rs.1,19,303 be recovered from the petitioner-firm. This amount also included a sum of Rs.4,296.99 due to the statutory fund on account of interest payable to the beneficiaries.

2. The petitioner-firm has impugned the order dated July 11, 1989 (Annexure P-3), passed by the respondent, by way of this writ petition

Mr. Roshan Lal Sharma, learned counsel for the petitioner-firm, has fairly conceded that opportunity of hearing was given to the petitioner-firm at the time of determination of the damages. He, therefore, does not challenge the impugned order on the ground that the petitioner was not given reasonable opportunity to show cause against such determination.

His first challenge to the impugned order is two-fold. Firstly, that the damages to be assessed by the Regional Provident Fund Commissioner (hereinafter referred to as "the Commissioner") must have some correlation with the loss suffered as a result of delayed payment. Secondly, damages have been mechanically assessed by applying the sliding formula without taking into consideration the explanation submitted by the petitioner-firm in reply to the show cause notice with regard to delay in payment into the respective funds.

3. On the other hand, learned counsel for the respondent has submitted that it was the statutory duty of the employer to deposit the contribution as provided under the Act and the Scheme framed thereunder on the date fixed for payment and the same having not been paid in time, the Commissioner was justified in levying the damages. He also submitted that the damages so ascertained by the authority under the Act need not have correlation with the loss suffered as a result of the delayed payment. In reply to the second challenge of learned counsel for the petitioner, he has contended that the sliding formula was only taken as a guideline and the assessment of damages was made only after taking into consideration the explanation submitted by the petitioner-firm.

4. We have heard learned counsel for the parties at considerable length. In order to determine the contentions of learned counsel for the petitioner, it would be relevant to refer to Section 14B of the Act which reads as follows:

" 14B. Power to recover damages: When an employer makes default in the payment of any contribution to the Fund, the Family 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 provisions 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, subject to such terms

and conditions as may be specified in the Scheme."

5. The power to be exercised by the authority u/s 14B of the Act came up for consideration before the Supreme Court in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, wherein it was held as under (at page 429):

"The imposition of damages u/s 14B serves both the purposes. It is meant to penalise defaulting employer as also to provide reparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements of Section 6, but at the same time it is meant to provide compensation or redress to the beneficiaries, i.e., to recompense the employees for the loss sustained by them. There is nothing in the section to show that the damages must bear relationship to the loss which is caused to the beneficiaries under the Scheme. The word "damages" in Section 14B is related to the word "default". The words used in Section 14B are "default in the payment of contribution" and, therefore, the word "default" must be construed in the light of para 38 of the Scheme which provides that the payment of contribution has got to be made by the 15th of the following month and, therefore, the word "default" in Section 14B must mean "failure in performance" or "failure to act". At the same time, the imposition of damages u/s 14B is to provide reparation for the amount of loss suffered by the employees."

6. A Division Bench of this Court, relying on the case of *Organic Chemical Industries, (supra)* considered the expression "damages" appearing in Section 14B of the Act in *T.C.M. Woollen Mills (P.) Ltd. v. Regional Provident Fund Commissioner (1980) 57 FJR 222*, and observed as under (at page 225):

"It is plain that the damages u/s 14B of the Act are penal in nature and not merely co-related with the loss of interest entailed by the delayed payments of contributions to the fund. Indeed, in this view of the situation, all learned counsel for the petitioners very fairly conceded their inability to raise this issue which admittedly stood concluded against them."

7. In view of the authoritative pronouncement of the Supreme Court in *Organic Chemical Industries, (supra)*, damages assessed u/s 14B of the Act have no co-relation with the loss suffered as a result of delayed payment because damages levied and recovered u/s 14B of the Act go to the general account of the fund and not into the accounts of the employees. The provisions of the Act and the Scheme do not provide for assessing the loss suffered by the department or by an employee on account of the non-contribution towards the fund of the employees by the employer. Damages referred to u/s 14B of the Act are not by way of compensation but by way of penalty. u/s 6 of the Act as well as under the provisions framed thereunder, contribution has to be made by the employer at the rate of 8.25 per cent, of the basic wages payable to the employees. In case the employer makes default in making deposit of the contribution to the fund, the Commissioner u/s 14B of the Act, can levy and recover from the employer

such damages, as may be deemed fit, not exceeding the amount of arrears. However, before levying and recovering any damages, the employer has to be given an opportunity of hearing as the power conferred on the Commissioner is a quasi-judicial function and it has to be exercised after notice to the employer and after giving him an opportunity of putting forward his explanation for not making the payment of contribution within the time allowed under the Act.

8. Admittedly, in the present case, the petitioner firm vide notice dated October 6, 1987 (Annexure P-1), was asked not only to submit reply to the notice but also to be present in person with necessary documents and explain its case. Thus, we find no force in the first contention of the learned counsel for the petitioner.

9. In support of his second contention, the learned counsel for the petitioner, relied upon the following observations made by the Supreme Court in *Coal Mines P.F.Commr. v. J.P. Lalla*, 1976 II LLJ 94

"The words of importance in Section 10F of the Act are "such damages not exceeding 25 per cent of the amount of arrears as it may think fit to impose". Here the two important features are these. First, the words of importance are "damages not exceeding 25 per cent". These words show that the determination of damages is not an inflexible application of a rigid formula. Second, the words "as it may think fit to impose" in Section 10F of the Act show that the authorities are required to apply their mind to the facts and circumstances of the case."

He also relied upon the observations made by R.N. Mittal J. in *H.R. Gandhi v. State of Haryana*, (1981 59 FJR 274, wherein the learned Judge observed (at page 280):

"If in reply to the show-cause notice, the employer gives reasons for not depositing the provident fund in time and the assessing authority feels that the reasons are good, it need not apply the sliding scale for penalties and may reduce the damages in its discretion but in case no reasons or insufficient reasons have been given by him, the proper course for it will be to determine damages according to the sliding scale. However, it should pass a speaking order when it rejects the explanation given by him."

10. The short question for consideration is whether the discretion of the Commissioner to levy damages u/s 14B of the Act can be controlled by administrative direction. It is not in dispute that Government has provided the Table to levy damages in case the employer fails to pay contribution within the stipulated period as provided under the Act.

11. The Court in *International Electricals v. Regional Provident Fund Commissioner* (1980) 57 FJR 94, considered the application of the Table framed by the Government for determination of damages. This court agreed with the reasoning adopted by a Division Bench of the Delhi High Court in *Atlantic Engineering Services (P) Ltd. Vs. Union of India and Another*, :

"Framing of the table of damages by the Government was a salutary measure for the guidance of the officers of the Government who act u/s 14B of the Act; that under the Table the amount of damages related to the delay in payment of the contributions; and that method for determining damages was entirely reasonable and showed that no officer acting u/s 14B of the Act could act arbitrarily but had to follow the reasonable guidelines of the Government contained in the aforesaid table."

12. We are of the view that the table of damages provided by the Government for determination of damages, though it is a salutary measure for the guidance of the Commissioner u/s 14B of the Act, but nevertheless it is only a guideline. It is not a determination. The actual decision as to what damages should be imposed is to be made only after hearing the employer and taking into consideration the facts of each case. The Commissioner, who is a statutory authority, cannot be controlled by administrative directions. If such directions are given by the Government, then the same have to be treated only as guidelines and the discretion has to be exercised by the authority within the framework of the Act and the Scheme framed thereunder. For this, we find support from the observations made by the Supreme Court in the case of Coal Mines Provident Fund Commissioner, (supra). In that case, the Supreme Court, while considering a similar provision contained in Section 10F of the Coal Mines Provident Fund and Bonus Schemes Act, 1948, has clearly ruled that the words "damages not exceeding 25 per cent." show that the determination of damages is not an inflexible application of a rigid formula. Rather, the authorities are required to apply their mind to the facts and circumstances of the case.

13. The Supreme Court in Organic Chemical Industries, (supra) while repelling the contention that Section 14B of the Act is violative of (Article 14 of the Constitution as Section 14B of the Act confers unguided and uncontrolled discretion upon the Commissioner to impose such damages "as he may think fit", held that the guidelines are provided in the Act and its various provisions particularly in the word "damages", the liability for which in Section 14B of the Act arises on the making of the default. While fixing the amount of damages, the Commissioner shall take into consideration various factors, i.e., number of defaults, period of delay, frequency of default and the amount involved. The word "damages" in Section 14B of the Act envisages the guidelines to levy damages.

14. The contention of learned counsel for the respondent is that the Government has framed the Table for determining damages only to avoid the authority acting u/s 14B of the Act, arbitrarily and to ensure that uniform procedure is followed all over the country. He further contended that where the Commissioner wants to depart from the Table while assessing damages, he must give valid reasons. For this, he relied upon the judgment of the Division Bench of the Madras High Court in The Regional Provident Fund Commissioner, Tamilnadu Vs. The South India Flour Mills (Pvt.) Ltd., wherein, it was observed "that where the Commissioner wants to depart from the table, he must give valid reasons which may be tested

if an occasion arises." (p. 293)

15. However, we do not subscribe to this view. In our view, the order of the Commissioner, whether it follows the Table or not, must disclose that the case of the employer has been properly considered. The order must contain specific indication that a judicial and objective mind has been applied to the facts of a particular case because the authority acting u/s 14B of the Act should remember that no procedural safeguard by way of appeal or revision has been provided against its decision and, therefore, they must act in a more careful manner and their order must disclose that not only the rules of natural justice have been followed, but each and every aspect of the case has been considered after taking into consideration the relevant factors for assessing the damages. The authority, while acting u/s 14B of the Act, must not only refer to the reply and the material submitted by the employer in response to the show-cause notice for assessment of damages, but should also record its reasons as to how he arrived at those findings. If such a procedure is followed, then the employer cannot make a grievance that the Table for assessing the damages provided by the Government, meant only for the guidance for the authority, was mechanically applied.

16. Adverting to the facts of this case, we find that the impugned order is a detailed and speaking order. The Commissioner, while assessing damages, has taken into consideration all the facts relevant for the assessment of such damages. He, of course, has assessed the damages on the basis of the Table but he has taken it only for the purpose of his guidance. The explanation of the employer that contribution could not be deposited in time because the unit of the petitioner-firm was not running smoothly on account of labour trouble, strike, slow-down and tool-down, financial losses, cut in power supply, etc., did not find favour with the Commissioner and rightly so in our view because timely deposit of provident fund contribution is absolutely a statutory obligation which cannot be allowed to be diluted by such extraneous factors. It is not conceivable that an employer who can afford to pay wages of the employees, could not afford to deposit 8 per cent, of the employees' provident fund contribution particularly when, in spite of these difficulties, the establishment could manage to keep running and meet other financial obligations. No material was produced either before the Commissioner or before us to show that delay in payment of the contribution and other charges was totally unintentional and beyond the control of the petitioner firm. In the absence of any satisfactory and convincing evidence, the respondent rightly and justifiably levied damages against the petitioner-firm. We also find that the damages are reasonable considering that the petitioner-firm was a habitual defaulter and failed to remit the contribution and administrative and other charges in time for the period April 1979 to December, 1980.

17. Learned counsel for the petitioner-firm also submitted that the petitioner-firm is not liable to pay any damages because the first default was committed as far back as on April 9, 1979, but show-cause notice was issued only on October

6,1987. We find that this argument is also devoid of any merit. Section 14B of the Act does not require that action to levy damages should be taken immediately or soon after the employer makes default in making the payment of contribution nor does it prescribe any period of limitation for recovery of damages. In view of this, the exercise of powers by the Commissioner to assess and recover the damages after a lapse of 6-7 years after the first default was committed, cannot be said to be without jurisdiction.

18. As a result thereof, we find no merit in the writ petition and the same is dismissed. However, parties are left to bear their own costs.