

(1982) 02 KL CK 0007
In the High Court Of Kerala

Calicut Modern Spg. and Wvg. Mills Ltd.	APPELLANT
Vs	
Regional P.F. Commissioner	RESPONDENT

Date of Decision : 17-02-1982

Acts Referred:

Citation : (1982) 1 ILR (Ker) 698 : (1982) 1 LLJ 440

Hon'ble Judges : Khalid, J;Balagangadharan Nair, J

Bench : Division Bench

Judgement

Khalid, J.—The petitioner, a company registered under the Companies Act, employs about 250 employees. There was a strike by the workmen in January, 1974 which, according to the petitioner, was an illegal strike. Consequent on this strike, the management declared lock-out. The lock-out was lifted only on 26-4-1974. Wages were paid for the period during which the strike and the lock-out were in force, only in the month of May, 1974. The Provident Fund contribution was sent for the period February, 1974 to May, 1974 on 13-5-1974. The respondent, the Regional Provident Fund Commissioner, Trivandrum, issued a show cause notice dated 3-3-1976 Exts. P1 and P1 (a) u/s 14-B of the Employees Provident Fund and Family Pension Fund Act 1952, for short the Act, informing the petitioner that there was a delay in remittance to the fund for the months of February, 1974 to May, 1974 and November 1974. The petitioner was directed to show cause in writing why penal damages should not be levied. The petitioner replied that there was a strike in the mills in the last week of January, 1974 and the Mills was on lock-out from 1-2-1974. During the strike a tense situation prevailed and the managerial personnel were not allowed to enter the Mills. This accounted for the delay in the remittance. Remittance was made immediately after the lock-out was lifted. There was a delay of 10 days in submitting the return in November 1974 because of acute financial difficulties. Since the Company was passing through a financial crisis provident Fund could not be paid in time during the period June, 1975 to March 1976. There was a cash loss of Rs. 8,00,000/- for the year 1975-76 due to slump in the market. There was a conference convened by the respondent and by proceedings dated

30-3-1976 a determination u/s 7-A of the Act was made and the Provident Fund for the months of January, 1976 to March, 1976 was directed to be paid in three instalments. This is evidenced by Ext. P3. The amount as per Ext. P3 had been paid in accordance with the directions contained therein. Thereafter Exts. P4 and P4(a) notices were sent to the petitioner asking it to show cause why penal damages u/s 14-B should not be imposed for the alleged delayed payment. By Ext. P5 reply the petitioner explained that there was no default as such but the delay was due to reasons beyond the control of the management. Thereafter the respondent passed Exts. P6 and P6(a) orders dated 1-9-1977 imposing a damage of Rs. 25,470.20 for the delayed payment of Provident Fund for the period February 1974 to May, 1974, November 1974, and June 1975 to March, 1976. These orders are under challenge in this petition.

2. This original petition originally was listed before Kochu Thommen, J. The learned Judge adjourned the petition to be heard by a Division Bench making the following reference order:

The question which has to be considered is whether for the period when no wages were payable on account of a justifiable lock-out the employer was liable to make contribution to the Provident Fund. I am of the view that this question which is of general importance should be considered by a Division Bench.

It is thus that this petition comes up before us. We may at the outset observe that the question canvassed before us by the learned Counsel for the petitioner to get the orders under challenge quashed was not on the ground that the lock-out was justifiable. The question argued before us is that Section 14-B would not be attracted in cases where the employer is disabled from paying the wages to the employees in time. According to him deduction of the employees' contribution is possible only when wages are paid. Before us the question that the lock-out was justifiable did not figure prominently. We refer to this aspect to disabuse an impression that might be created that the petitioner sought justification for the delayed payment on the ground that the lock-out was justified. The reference order might, remotely though, give such an impression. What was canvassed before us is this general question: Is the employer liable to pay the contribution when he is not in a position to pay the wages to the employees, for reasons beyond his control.

3. The delay in the remittance in this case relates to four periods; for the months of 2/74 to 4/74, 11/74, 6/75 to 12/75 and 1/76 to 3/76. The delay for the first period is attempted to be explained by the illegal strike and the consequent lock-out from January 1974 to 26-4-1974; the delay of 10 days in November due to financial difficulties; the delay from 6/75 to 12/75 on account of cash loss of over 8 lakhs of rupees due to slump in the market and the non-payment for the period from 1/76 to 3/76 having been excused by Ext. P. 3 order permitting the petitioner to pay in three instalments which payment was duly made according to the said order. The learned Counsel for the petitioner submits that if the petitioner's inability to make remittance for the first period is accepted then

proceedings u/s 14-B cannot be justified. As a consequence, he submits that the 10 days" delay in November, 1974 would become the first default as opposed to the fifth default as seen in Ext. P6(a) entitling the petitioner to claim nil damages or in any case far below the 10% imposed. The period from 6/75 to 12/75 is covered by the plea of great financial loss. It is submitted that the imposition of damages is out of proportion to the delay and Ext. P6 (a) order has to be quashed for the reason that the imposition of damage is without application of the mind. For the last period from 1/76 to 3/76 there is no default at all because the default was condoned by Ext. P 3 order. Thereafter the imposition of damages u/s 14-B is bad. In any case it is submitted that to denote those three defaults as eighth ninth and tenth was wrong and that they should have been denoted as first, second and third since they were for the year 1976. The stand taken by the respondent in the counter affidavit is that the -petitioner has admitted that there was default in making remittances for the concerned period and that when default is admitted action u/s 14-B should automatically follow. All that the authority exercising power u/s 14-B can do is to mitigate the damages having regard to the circumstances under which the delay occurred, Regarding Ext. P3 order it is stated that instalment payments were permitted as a matter of grace and this does not enable the petitioner to escape from the vice of Section 14-B. The employer has an initial obligation to make the remittances and failure to pay has necessarily to be visited by the legal consequences.

4. With these facts now we will approach the relevant provisions of law governing the case. Section 6 of the Act is the charging Section. This Section provides that the contribution which shall be paid by the employer to the Fund shall be six and a quarter percent of the basic wages etc and the employee's contributions shall be equal to the contribution payable by the employer in respect of him. Section 7-A provides for determination of moneys due from employers after conducting such enquiry as the Provident Fund Commissioner or any other authority authorised in that behalf may deem necessary. Section 14 deals with penalties for contravention of the relevant Sections of the Act or Para 38 of the Scheme. Section 14-B gives the power to the authorities concerned to recover damages. This Section provides for recovery from the employer damages not exceeding the amount of arrear as the officer concerned may think fit to impose where an employer makes default in the payment of any contribution to the Fund, These Sections are clear and do not admit of any dispute or ambiguity. The Sections impose an obligation on the employer to make remittances to the Fund both for the employer and for employee and provides for penalties for contravention of the provisions of the Act and the Scheme and enable recovery of damages for default in payment. The power to recover damages can be exercised u/s 14-B "where an employer makes default in the payment of any contribution to the Fund" The expression "makes default" is synonymous with failure to pay.

5. Considerable arguments were addressed before us by the learned Counsel for the petitioner on the respective fields of operation of Paragraphs 30 and 38 of the Employees' Provident Funds Scheme. According to him, the mode of

payment is provided in Paragraph 38 of the Scheme and Paragraph 30 only provides as to who should make the contribution. He read paragraph 38 to contend that the obligation on the employer to pay contribution arises only when wages in respect of any period or part of periods for which contributions are payable, are paid because the employee's contribution can be deducted from his wages when wages are actually paid. To appreciate his contention it is necessary to read Paragraphs 30 and 38 together:

30. Payment of contribution,- (1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribupayable by such member (in the Scheme referred to as the member's contribution).

* * * * 38. Mode of payment of contributions- (1) The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employees contribution from his wages which together with his own contribution as well as an administrative charge of such percentage of the pay basic wages, dearness allowance retaning allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee and in respect of which provident fund contributions are payable, as the Central Government may fix, he shall with- in fifteen days of the close of every month pay the same to the Fund by separate bank drafts are cheques on account of contributions and administrative charge.

Provided that if payment is made by a cheque on an outstation bank, the actual bank, the actual bank collection charge in respect of both the contributions and the administrative charges shall be included in the amount for which the cheque is drawn in respect of the administrative charge:

Provided further that where there is no branch of the Reserve Bank of the State Bank of India at the station where the factory or other establishment is situated, the employer shall pay to the Fund the amount mentioned above by means of Reserve Bank of India Governmental Drafts at par separately on account of contributions and administrative charge

* * * *

Paragraph 38 obliges the employer to make the payment within fifteen days of the close of every month. Paragraph 30 casts an obligation on the employer to pay both the contributions payable by himself and on behalf of the member employed by him in the first instance. It is the words "in the first instance" that gave rise to considerable difficulties for the petitioners' counsel. According to him. paragraph 30 does not provide for the mode of payment and for this reason the words "in the first instance" should not be read to mean that there is an obligation on the part of the employer to make remittances of the contributions irrespective of the fact that wages had been paid or not. According to him, this

mode is prescribed in paragraph 38 and his obligation to make remittances comes into being only when wages are paid. We have no hesitation to reject this submission, We read paragraph 30 as casting an obligation on the part of the employer to make the contributions payable by himself and on behalf of the member to the Fund in the first instance on every due date as contemplated in paragraph 38. We do not subscribe to the view that "in the first instance" would mean only for the first time. According to us, "in the first instance" means payment of contribution voluntarily by the employer for every month irrespective of the fact that wages have been paid or not.

6. We say this because the measure which was enacted for the support of the working class is intended to keep the Fund available for the purposes for which the Fund is created lest the neglect of the employer should deplete it and enable him to divert the moneys for a alien purposes. As observed in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, at 421.

The whole project gets stultified if employers thwart contributory responsibility and this wider fallout must colour the concept of "damages" when the Court seeks to define its content in the special setting of the Act.

To allow the employer to make the contribution only when he pays the wages would be to stultify the project. To accept the petitioner's contention in this case would be to enable the employer to divert remittances to the Fund to suit his convenience putting forward sometimes reasonable grounds, sometimes justifiable grounds and roost often unjustifiable grounds. The authority under the Act has discretion to mitigate damages depending upon the circumstances of the case but never a discretion to condone the delay; damages in rare cases can be nil percentage but failure to pay will always attract Section 14-B. In reinforcement of the view that we take, we think it necessary to refer Para 32 also, which reads:

32 Recovery of a member's share or contribution.-(1) The amount of a member's contribution paid by the employer or a contractor shall, notwithstanding the provisions in this Scheme or any law for the time being in force or any contract to the contrary, be recoverable by means of deduction from the wages of the member and otherwise;

* * * *

The caption of this Para is Recovery of a member's share or contribution. A close reading of this Para makes it abundantly clear that it relates to the recovery by the employers of the members contribution "paid" by him. This contemplates the earlier payment by the employer of the employees contribution before deduction is made from the wages to be paid. A combined reading of Paras 30 and 32 shows that in cases where due payment of wages is made impracticable for certain reasons, the obligation of the employer to pay both the contributions payable by himself and on behalf of the member continues. If the two Paras are

so understood it is not difficult to reject the submission made by the petitioner that his obligation arises only when wages are paid. Paragraphs 30 and 32 occur in Chapter V of the Scheme under the heading "Contributions" and para 38 occurs in Chapter VI under the heading "Declaration, Contribution Cards and Returns". Though the sub-heading of Para 38 is "Mode of payment of contributions," it is to be understood as the mode in the normal circumstances where wages are paid by the employer in due time. In unusual circumstances, Para 30 comes into operation and Para 32 enables the employer to recover the contribution paid by him in the first instance. As a result of this discussion we hold disagreeing with the petitioner's contention that even in cases of a lock-out, strike etc. failure to make the contribution resulting in default will have to be visited by damages u/s 14-B. The only question that can be considered by the authority is mitigation of damages having regard to the attendant circumstances that had resulted in the delay.

7. In *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, Sen, J. delivering the main judgment observed thus in paragraph 33 dealing with paras 30 and 38 of the Scheme:

33. The initial responsibility for making payment of the contribution of the employer as well as of the employee, lies on the employer. Para 30 of the Scheme makes it incumbent on the employer that he shall, in the first instance, pay both the contribution payable by himself and also on behalf of the member employed by him. Under para 38, the employer is authorised before paying the member employee his wages in respect of any period or part of period for which contributions are payable, to deduct the employee's contribution from his wages. It further provides that the deposit of such contribution shall be made by the employer within fifteen days of the close of every month, i. e. a contribution for a particular month has got to be deposited by the 15th day of the month following. A breach of any of these requirements is made a penal offence.

The position has thus been made clear that the initial responsibility for making payment of the contribution lies on the employer. In Paragraph 35 the learned Judge has outlined the reason that motivated enactment of Section 14-B of the Act in these words:

The reason for enacting Section 14B is that employers may be deterred and thwarted from making defaults in carrying out statutory obligations to make payments to the Provident Fund. The object and purpose of the section is to authorise the Regional provident Fund Commissioner to impose exemplary or punitive damages and there by to prevent employers from making defaults.

We may in passing refer to a few other authorities which were brought to our notice. In *N.K. Industries (Private) Ltd., Kanpur Vs. Regional Provident Fund Commissioner, U.P.*, the Scope of the Scheme has been laid down as follows:

The Scheme was framed as far back as 2nd September, 1952. The petitioner should have made its own contribution and also that of the employees long

before a demand was made from it. The petitioner could have after making the contribution of the employee's share recovered the same from the employee concerned. There is a duty cast upon the petitioner to contribute both the shares i.e. his share as also that of the employee, inasmuch as the petitioner did not do so it is to blame itself.

in *Solanki Workshop v. R.P.F. Commissioner* 1961 I LLJ 613 the scope of para 30 is laid down as follows:

Paragraph 30 clearly enjoins that the employer shall, in the first instance, pay both the contributions payable by himself and also on behalf of the employees. This provision is in no way inconsistent with Section 6 (2) and item 2 of Sch. II. Item 2 specifically speaks of the time and manner in which contributions shall be made by employers and by, or on behalf of, employees. The words "on behalf of employees" are very significant and they give Government the power to frame a scheme containing a provision for the payment of the employees' contribution by some other person on their behalf.

... .. It must be noted that Para 30 in no way alters the employee's legal liability for the payment of his contribution u/s 6(1) of the Act. The liability continues to remain on the employee and what Para 30 does is only to make the employer responsible in the first instance for the payment of the employee's contribution. This is made further Clear by Para 32 of the scheme which enables the employer to deduct from the wages of an employee the amount of his contribution with the condition that the deduction must be from the wage of that period in respect of which the contribution is payable.

In *Amin Chand v. State of Punjab* AIR 1965 Punjab 441, the same principle is discussed in paragraph 7 which we usefully quote:

7. There is no force in the second submission of the learned Counsel. The Scheme makes it imperative for the employer to make his contribution simultaneously with that of the employees. Reference may be made to paras 29 and 30 of the Scheme. In para 30 the employer's liability to make the payment in the first instance of both the contribution by himself and also on behalf of the member is made mandatory. This leaves no room for the contention of Mr. Thapar that the contribution of the employer could have been made by the end of the following month. Paragraph 38 says that the payment has to be made by the 15th of every month and it means that the contribution of the employer together with administrative charges should have been transferred to the fund as defined in the Act on the 15th of every month.

We do not think it necessary to multiply citations The principle is settled that the initial obligation to pay the contribution is on the employer irrespective of the fact whether wages are paid or not. The employer gets a right to recover the contribution paid in the manner in which Para 32 provides for. If the employer commits delay and consequently defaults payment in time, the Provident Fund Commissioner will look into the causes of the delay and award damages

commensurate with the mitigating circumstances that the defaulting employer brings to the notice of the Commissioner.

8. Now we will consider the petitioner's challenge against Exts. P 6 and P 6(a). It is necessary to bear in mind that ours is only a correctional jurisdiction and not an appellate jurisdiction. We will exercise our jurisdiction only if we are satisfied that there is an error apparent on the face of the record or if the order is manifestly unjust or in violation of the principles of natural justice. In Ext. P 6 the respondent has observed that he applied his mind to all the relevant facts and went into the reasons stated by the employer. The order was passed considering the special circumstances in the establishment and the great financial loss incurred by the establishment. These circumstances persuaded the respondent to take a lenient view and to award reduced rates of damages. We see no reason to find fault with Ext. P6 since it had been passed in accordance with law and within the jurisdictional limits of the respondent. Now coming to Ext. P6(a); for the 1st period from 2/74 to 5/74 the percentage of damages ranges from 17 1/2 to 15%. The rate of imposition of this damages has a rationale behind it. For the first 87 days' delay, the percentage is 10% and for the second and third default it is 15% For the fourth default since the delay was only 14 days the percentage given is 7 1/2%. There is nothing wrong in this imposition. Since we have rejected the petitioner's case of complete exoneration of damages on account of the strike and the lock-out, we hold that the damages imposed were in accordance with law. The petitioner admits 10 days delay in the month 11/74. 10% damages in this behalf cannot be said to be extortionate. The 3rd period is from 6/75 to 12/75. The explanation for this delay is financial difficulty. Exhbt. P6 states that a lenient view was taken because of great financial loss. The percentage for this period ranged from 2 1/2% for delay of 7 days to 20% for a delay of 202 days. The petitioner's learned Counsel tried to make out a case that a uniform rate of 20% for the 3rd, 4th, 5th, 6th and 7th defaults could not be justified since the periods of delay differed. As already observed, we are not sitting in appeal over this order. What is more, this percentage cannot be said to be unreasonable for the reason that the respondent was considering the consecutive delay and defaults committed by the petitioner. We see no reason to interfere with the award of this damage also. Then we come to the last three months covered by Ext. P3. In Ext. P3, the petitioner was permitted to remit the dues in three instalments. Ext. P3 does not indicate that the granting of this three instalments would absolve the petitioner from his liability for damages u/s 14-B of the Act. The instalments granted were as a result of a sympathetic consideration. The consequence of the default still continued. The contention that the respondent should be deemed to have waived his right to proceed u/s 14-B for the reason that he had permitted payment of the dues in three instalments cannot be accepted. We, therefore, hold that the award of damages for this period also is justified. What remains is the case about the defaults in 1976. It is contended that the damages for that year should not be considered as 8th, 9th and 10th defaults but only as 1st, 2nd 3rd. There may,

perhaps, be some justification for this submission. However, we do not feel persuaded to fault the award for the reason that the respondent held that the petitioner had defaulted payment of dues continuously right from June 1975 to March, 1976. Though, we could have taken a view as suggested by the petitioner's counsel, we do not think it proper to substitute our view to the one taken by the respondent, for the reason that it is not manifestly perverse or unjust. The percentage given also is not disproportionately harsh.

9. For the above reasons, we hold that the petitioner has not made a case in support of the prayer to quash Exts. P 6 and P 6(a). The petition fails and is dismissed. Parties are directed to bear their costs.