

(2015) 03 DEL CK 0036
In the Delhi High Court
Case No : Writ Petition(C) 3743/2011

DCM Shriram Consolidated Ltd.

APPELLANT

Vs

The Employees Provident Funds Appellate Tribunal and
Others

RESPONDENT

Date of Decision : 13-03-2015

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14 B,
14-B, 15, 17, 2(b)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2015) 145 FLR 832 : (2015) LLR 473

Hon'ble Judges : V.P. Vaish, J.

Bench : Single Bench

Advocate : Naveen Kumar and Rashmi, for the Appellant; Balraj Diwan,
Advocates for the Respondent

Final Decision : Disposed off

Judgement

V.P. Vaish, J.—By way of the present petition the petitioner impugns the order dated 28.03.2011 passed by the Presiding Officer, Employees' Provident Fund Appellate Tribunal (respondent No. 1 herein) wherein the statutory appeal filed by the petitioner under Section 7-I of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "EPF Act") was dismissed and also impugns the order dated 03.02.2006 wherein the Assistant Provident Funds Commissioner (respondent No. 3 herein) imposed damages to the tune of Rs. 19,69,566/- (Rupees Nineteen lakh sixty nine thousand five hundred and sixty six) on the petitioner under Section 14 B of the EPF Act.

2. Succinctly stating the case of the petitioner is that the petitioner's manufacturing unit M/s. Shriram Fertiliser and Chemicals is covered under the EPF Act since the year 1960 and has been allotted a P.F. Code No. RJ/337 for making Provident Fund contributions which the petitioner has been diligently depositing since then. On 20.05.1983, the Inspector of Provident Fund visited

and inspected the accounts of the petitioner for the month of April, 1983 and observed in his report dated 20.05.1983 that the Good Work Reward paid by the petitioner to its workers was subject to provident fund contributions. Against the said observation the petitioner filed its reply dated 18.06.1983 by submitting that the Good Work Reward was in the nature of an overtime payment and it was not included in the scope of basic wages under Section 2(b) of the EPF Act so as to be liable for contributions under the EPF Act.

3. Thereafter, on 14.11.1983 the Regional Provident Fund Commissioner issued a notice under Section 7-A of the EPF Act proposing to conduct an enquiry for determining the amount payable by the petitioner on account of Good Work Reward. The said notice was duly replied by the petitioner vide reply dated 18.10.1985 reiterating its stand that Good Work Reward was paid as an overtime allowance in consideration of the employees working beyond their normal working hours in certain contingencies and was in a nature of allowance similar to overtime allowance as excluded from the definition of basic wages under Section 2(b) of the EPF Act. Despite this, the Regional Provident Fund Commissioner vide its order dated 15.05.1985 held that the petitioner was liable to pay PF contribution in respect of Good Work Reward and adjourned the matter for determining the exact amount of liability.

4. Against the said order, the petitioner preferred a Civil Writ Petition before the High Court of Rajasthan reiterating his earlier stand. On 18.10.1985, the petitioner without prejudice to its rights and contentions filed month wise details of payment made under the head of Good Work Reward.

5. On 06.05.1986, the Regional Provident Fund Commissioner proceeded to determine the amount of liability of the petitioner even during the pendency of the writ petition filed by petitioner before the High Court of Rajasthan. Considering the month wise details of payment of Good Work Reward the amount of liability of the petitioner was determined as Rs. 28,53,895/- (Rupees Twenty eight lakhs fifty three thousand eight hundred ninety five) on account of Good Work Reward paid by the petitioner to its employees between the period from 1968 to 1983.

6. Against the said order, the petitioner filed a writ petition bearing No. 1112/1986 before the High Court of Rajasthan. Vide its order dated 12.08.1986, High Court of Rajasthan declined to pass any stay order against the operation of impugned order therein, however, it extended the time of payment of dues/ contributions for a further period of two months from the date of its own order.

7. In compliance of the order dated 12.08.1986, passed by High Court of Rajasthan in S.B. Civil Writ Petition No. 1112/1986, the petitioner deposited the entire amount calculated as per order dated 06.05.1986.

8. Finally, on 02.07.1997 the writ petition No. 1112/1986 was disposed of by the Single Judge of the High Court of Rajasthan holding that the Good Work Reward paid by the petitioner was not covered within the definition of overtime allowance

under the Factories Act, 1948 and hence it cannot be treated as an overtime allowance nor would it be treated as other allowance similar to overtime allowance.

9. Aggrieved by the said order, the petitioner preferred a D.B. Special Appeal (Writ) No. 1339/1997, which was admitted by Hon"ble Division Bench of High Court for hearing along with other Writ Petition No. 1112/1986. The Division Bench of the High Court vide its order dated 29.07.2003 disposed of the appeal observing that the Good Work Reward being paid by the petitioner was "basic wages" as defined under Section 2(b) of the EPF Act.

10. On 25.05.2004, respondent No. 3 issued a show-cause notice thereby calling upon the petitioner to show-cause as to why damages should not be levied on the petitioner in delaying the payment of contribution towards Good Work Reward. The petitioner appeared before respondent No. 3 and filed its reply to the said show cause notice. It also attended the personal hearing before respondent No. 3 and filed written arguments on 06.10.2005. However, the respondent No. 3 passed the impugned order dated 03.02.2006 imposing damages to the tune of Rs. 19,69,566/- (Rupees Nineteen lakhs sixty nine thousand five hundred sixty six) under Section 14 B EPF Act on the petitioner.

11. The petitioner filed statutory appeal under Section 7-I of the EPF Act against the order dated 03.02.2006 along with a prayer for urgent hearing and interim stay against the operation and execution of the said order. However, since the post of Presiding Officer of respondent No. 1 Tribunal was vacant the application of petitioner for interim stay was not taken up for hearing and thus the petitioner filed a writ petition bearing W.P.(C) No. 6080/2006 before this court. This court, vide its order dated 21.04.2006 granted stay against the operation and execution of order dated 03.02.2006. The proceedings in appeal subsequently commenced before respondent No. 1 Tribunal leading finally to the passing of the impugned order dated 28.03.2011.

12. Feeling aggrieved by the said order, the petitioner has filed the present petition.

13. Learned counsel for the petitioner contended that the impugned order was passed without taking note of contentions raised by the petitioner and as such it is non-speaking and cryptic. The reliance placed by respondent No. 1 on " Gram Sewa Samiti Vs. Regional Commissioner, Employees" Provident Fund, and Regional Provident Fund Commissioner Vs. M/s. K.T. Rolling Mills Pvt. Ltd., was misconceived and the law stated therein does not apply to the facts of the present case. There was no observation by respondent No. 3 in his order dated 03.02.2006 that the default on the part of the petitioner was intentional or deliberate. No penalty could have been imposed under Section 14 B of the EPF Act unless there is a proof or at least an allegation that default on the part of the petitioner was intentional or deliberate.

14. It was further contended by learned counsel for the petitioner that there was

no delay or default on the part of the petitioner as the petitioner deposited the entire contribution on 25.07.1986 and 16.10.1986 as per the direction of Regional Provident Fund Commissioner dated 06.05.1986. Otherwise also, the petitioner had challenged the said order by filing a writ petition No. 1112/1986 before the High Court of Rajasthan wherein the High Court vide its order dated 12.08.1986 extended the time limit for depositing the contribution amount for a period of two months from the date of its order. There was a bonafide dispute with regard to the interpretation of Section 2(b) of the EPF Act and to the fact whether the PF contribution was payable on Good Work Reward which was a kind of overtime allowance.

15. Lastly, it was contended by the counsel for the petitioner that the proceedings for levy of damages were initiated after a period of twenty years by which time, the concerned employees/ workers were not traceable and the relevant records of the petitioner were long lost. If the respondent had to impose any damages on the petitioner it should have exercised its quasi-judicial discretion to impose only a nominal amount. The counsel for petitioner relied upon judgment in "K.S. Street Light Electric Corporation vs. RPFC", 2001 (SCC) LandS 372 to urge that in the said case, in similar facts and circumstances as one before this court, the Hon"ble Supreme Court had reduced the damages from 100% to 25%.

16. Per contra, learned counsel for respondents urged that the delay, if any, was on the part of the petitioner in depositing the PF contribution and hence the petitioner is liable to pay damages as per Section 14-B of the EPF Act. The EPF Act is a social security legislation and is meant for the benefits of the employees. The provisions of Section 14-B and Section 7-Q of the EPF Act have to be strictly construed.

17. I have given my thoughtful consideration to the submissions made by learned counsel for both the parties and have also perused the material on record.

18. Undisputedly EPF Act is a beneficial piece of legislation. It was passed with an object of making some provisions for the future of the industrial worker after his retirement or for his dependents in the case of his early death. The parliamentarian, after considering various financial and administrative difficulties in old and survival pension"s schemes and gratuity schemes, agreed to introduce the institution of contributory provident fund schemes in which, both the worker and the employer would contribute. Provident fund scheme was considered as a means to encourage the stabilization of a steady labour force in industrial centre. The Parliamentarians were well aware of the fact that with industrial growth, although, the big employers had introduced the scheme of provident fund for the welfare of their workers, but all these schemes until then were private and voluntary and the workers of the small employers remain deprived of the benefits which were provided by big employers. Thus, with an object to provide for compulsory establishment of provident fund by every employer in the

industrial concerns for the betterment of his employee, the EPF Act was enacted.

19. The EPF Act, under its various sections, encompasses the provisions for establishment of Employees' Provident Fund Schemes, contribution and matters which may be provided for in scheme, determination of money due from the employer, deposit of amount due, mode of penalties, recovery, etc. Section 14-B of the EPF Act provides for the power to recover damages which is material in the present case. Section 14-B of the EPF Act reads as under:-

"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 under section 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 under section 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."

20. Section 14-B of the EPF Act was inserted with an object to act as a deterrent measure on the employer to prevent them from not carrying out their statutory obligations to make payments to the provident fund. The damages under Section 14-B EPF Act are penal in nature. This section authorizes the Central Provident Fund Commissioner or such other officer as may be authorised to impose exemplary or punitive damages and thereby prevent the employer from making defaults. In the absence of such a provision, the employer could deliberately default in the payment of their provident fund contributions and in the meanwhile utilize both their contributions as well as that of employees' in their business. In such a case, an employer could delay the payment of provident fund dues without any genuine reasons on his part for doing so and may escape from his liability to make payment without undergoing any additional financial liabilities. To prevent this, the said section was made a part of the EPF Act and also the words "damages not exceeding 25% of amount of arrears" were amended to "not exceeding the amount of arrears" under the said section.

21. The Hon'ble Supreme Court in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, , referred to the reasons which made the

Parliamentarian to insert Section 14-B on the statute book and observed:-

"10. In its working, the authorities were faced with certain administrative difficulties. An employer could delay payment of Provident Fund dues without any additional financial liability. Parliament, accordingly, inserted Section 14-B for recovery of damages on the amount of arrears. The reason for enacting Section 14-B 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 thereby to prevent employers from making defaults. Section 14-B, as originally enacted, provided for imposition of such damages, not exceeding 25% of the amount of arrears. This, however, did not prove to be sufficiently deterrent. The employers were still making defaults in making contributions to the Provident Fund, and in the meanwhile utilising both their own contribution as well as the employees' contribution, in their business. The provision contained in Section 14-B for recovery of damages, therefore, proved to be illusory. Accordingly, by Act 40 of 1973, the words "twenty-five per cent of" were omitted from Section 14-B and the words "not exceeding the amount of arrear" were substituted. The intention is to invest the Regional Provident Fund Commissioner with power to impose such damages that the employer would not find it profitable to make defaults in making payments."

22. The Hon^{ble} Supreme Court speaking through Sen, J. in *Organo Chemical's* case (*supra*) discussed the scope of "damages" under Section 14-B of the EPF Act and observed as under:-

"22. The expression "damages" occurring in Section 14-B is, in substance, a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty under Section 14-B is not merely "to provide compensation for the employees". We are clearly of the opinion that the imposition of damages under Section 14-B 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 14-B is related to the word "default". The words used in Section 14-B 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 14-B must mean "failure in performance" or "failure to act". At the same time, the imposition of damages under Section 14-B is to provide reparation for the amount of loss suffered by

the employees."

23. In the same judgment, concurring with Sen J., Krishna Iyer J., with regard to damages observed as under:-

"38. What do we mean by "damages"? The expression "damages" is neither vague nor over-wide. It has more than one signification but the precise import in a given context is not difficult to discern. A plurality of variants stemming out of a core concept is seen in such words as actual damages, civil damages, compensatory damages, consequential damages, contingent damages, continuing damages, double damages, excessive damages, exemplary damages, general damages, irreparable damages, pecuniary damages, prospective damages, special damages, speculative damages, substantial damages, unliquidated damages. But the essentials are (a) detriment to one by the wrongdoing of another, (b) reparation awarded to the injured through legal remedies, and (c) its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often, not always, a punitive addition as a deterrent-cum-denunciation by the law. For instance, "exemplary damages" are damages on an increased scale, awarded to the plaintiff ever and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages, and (vulgarly) "smart-money". [See Black's Law Dictionary, 4th Edn., pp. 467-648] It is sufficient for our present purpose to state that the power conferred to award damages is delimited by the content and contour of the concept itself and if the Court finds the Commissioner travelling beyond, the blow will fall. Section 14-B is good for these reasons."

24. It is true that Section 14-B of the EPF Act is a penal provision directed towards the realization of "damages" in lieu of non-deposit of provident fund dues. However, the power given to the competent authority under this section is not unguided or unreasonable. The power of the authority under Section 14-B of EPF Act is quasi-judicial in nature and the competent authority has to apply its mind to the facts of the case and reply to the show-cause notice and pass a reasoned decision after following the principles of natural justice. Although, the power is given to impose penalty on the defaulter, however, it is not mandatory in all cases for the authority to do so. The competent authority, on the other hand, must apply its mind to the facts of the case in the light of several factors such as the period of delay, the frequency of defaults and number of defaults and amount involved, etc before it makes up its mind to impose damages under Section 14-B EPF Act. Proper consideration must also be given to the reasons of delay as stated by the defaulter in his reply. In the same context the Apex Court

in M/s. Hindustan Times Limited Vs. Union of India and Others, , held:-

"29. From the aforesaid decisions, the following principles can be summarised:

The authority under Section 14-B 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 under Section 14-B. 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 under Section 14-B would be taken; mere delay in initiating action under Section 14-B 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 under Section 14-B, 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. Further, under Section 14-B EPF Act the authority concerned is empowered to impose a penalty up to a maximum limit, i.e., "such damages, not exceeding the amount of arrears, as may be specified in the Scheme" however, it is not mandatory that the competent authority must always impose the maximum cap of damages provided under the said section as a matter of routine or as a mechanical exercise. Rather, the authority concerned is expected to pass an order that would sub- serve the purpose of introduction of Section 14-B in the scheme of the EPF Act.

26. Therefore, it becomes obligatory on the concerned authority that once it makes up its mind to impose penalty it should also decide the quantum of

damages which it seeks to impose on the erring party. Here too the competent authority is under an obligation to decide the quantum of damages only after consideration of proper facts and circumstances of the case.

27. In the present case, it is an admitted fact that the calculations of Provident Fund dues payable on account of Good Work Reward for the period from 1967 to 1983 were determined by the Regional Provident Fund Commissioner on 06.05.1986 and the entire dues were deposited by the petitioner finally on 16.10.1986. The proceedings under Section 14-B of the EPF Act were initiated against the petitioner on 25.05.2004. At this juncture it would also be important to observe the petitioner had filed the writ petition before Rajasthan High Court challenging the order dated 15.05.1985 passed by the Regional Provident Fund Commissioner determining that the Good Work Reward as paid by the petitioner to its employees was liable for PF contribution under the EPF Act. The petitioner had also filed a writ petition No. 1112/1986 against the order dated 06.05.1986. When the said two writ petitions were disposed off on 12.08.1986 with the directions to the petitioner to deposit the said dues within two months of this order the entire dues were deposited by the petitioner finally on 16.10.1986. However, from a perusal of the impugned order dated 03.02.2006 it is not clear whether the said facts were taken into consideration by respondent No. 3 while imposing the damages @ 100% for the relevant period on the petitioner. Clearly as observed above imposition of damages @100% should not be a mechanical exercise.

28. It is the case of the petitioner that all the employees in question have superannuated and are untraceable. Even the records of the company are lost. In such peculiar facts and circumstances of the case, this Court is of the opinion that no useful purpose would be served in remanding the matter back to the Assistant Provident Fund Commissioner to reconsider its decision and pass a reasoned decision in the matter especially so when the default period in question is as early as 1967 to 1983.

29. During the course of arguments before this Court, the counsel for the petitioner has shown its willingness to pay 50% of damages so calculated as per impugned order dated 03.02.2006. However, the said proposal was not acceptable to the respondent. It may also be observed that the petitioner has already deposited 40% of damages as per order of this Court dated 27.05.2011.

30. Hence, in the light of aforesaid discussion, keeping in mind the peculiar facts of the case, this Court is of the opinion that the interest of justice would be met if the petitioner deposits the 50% of the damages as calculated by the Assistant Provident Fund Commissioner as per impugned order dated 03.02.2006. However, the amount to the extent of 40% already deposited by the petitioner in terms of order dated 27.05.2011 shall be adjusted. The petitioner is directed to deposit remaining amount of 10% damages within a period of four weeks. On deposit of said amount, the amount already deposited by the petitioner along with interest accrued thereupon and the amount of 10% of damages ordered by

this court be released to the respondent.

31. With the aforesaid discussion the petition stands disposed of. It is made clear that the observations made herein above relate to the peculiar facts and circumstances of the present case and the same shall not be taken as a precedent.