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**(1998) 02 OHC CK 0027**  
**In the Orissa High Court**  
**Case No : O.J.C. No. 12584 of 1997**

Esskey Machinery (P) Ltd.

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

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**Date of Decision :** 11-02-1998

**Acts Referred:**

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

**Citation :** (1999) 1 LLJ 1001

**Hon'ble Judges :** S.C. Datta, J;A. Pasayat, J

**Bench :** Division Bench

**Advocate :** Somanath Mishra and G. Tripathy, for the Appellant; H.K. Jena, for the Respondent

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## Judgement

1. Petitioner calls in question legality of order passed u/s 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (in short, the "Act"). By the impugned order dated February 25, 1997 in P.O. case No. 87 of 1996-97, the Regional Provident Fund "Commissioner, Orissa (in Short, the Commissioner)" levied penal damages of Rs. 7,93,629/- for delay in deposit of provident fund dues required to be paid during the period 1988-89 to 1993-94. The Commissioner considered the factual aspects and observed that delay ranged between 23 days to 833 days. Taking note of decision of the Apex Court in *Organo Chemical Industries v. Union of India*, (1979-II-LLJ-416) it was observed that reasons indicated by petitioner to justify delay in deposit were not acceptable. It was also observed that reasons indicated are not germane.

2. In the present writ application financial stringency and accumulated loss have been highlighted. It is also stated that the unit has been declared to be sick unit. It was indicated that accumulated loss upto financial year 1993-94 was in the neighbourhood of Rs. 25,00,000/- It was also highlighted that there was abnormal delay in initiation of the proceeding, and had it been done earlier it could have taken immediate steps to make up the deficiency. Reliance is placed on a decision of this Court in *Orissa Forest Development Corporation Ltd. v.*

Regional Provident Fund Commissioner, Orissa, (1995-I-LLJ-936) to buttress the submission. It was also stated that it may move for waiver of penal damages in terms of the Employees' Provident Funds and Miscellaneous Provisions Scheme, 1952 (in short, the "Scheme"). Learned counsel for Commissioner submitted that the writ application is not maintainable as an appeal is provided to the Tribunal constituted in terms of Section 7(1) of the Act.

3. Section 14-15 as amended by Act 40/73 with effect from November 1, 1973 confers power on the concerned "authority to recover damages. Where an employer makes default in the payment of any contribution to the Trust Fund the concerned authority may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme. The Section itself, after the 1973 amendment now provides that before levying and recovering damages, the employer shall be given a reasonable opportunity of being heard. The Scheme referred to in Section 14B is the Employees' Provident Funds Scheme, 1952 so far as provident fund contributions are concerned.

Under Clause 29 of the said Scheme, the contribution payable by the employer shall be equal to the contribution payable by the employee under Clause 32(3).

"any sum deducted by an employer from the wages of an employee under the Scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted."

Therefore the scheme creates a fiction of entrustment.

Clause 38 deals with the mode of payment and says that the employer shall before paying the member his wages in respect of any period or part of a 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 shall be paid within 15 days of the close of every month in to the fund by separate bank drafts or cheques

"Provided that if the payment is made by a cheque, it should be drawn only on the local bank of the place in which deposits are made."

This is obviously meant for early clearance and for payment in to the fund.

4. Clause 52 requires investment of the monies belonging to the Employees' Provident Fund. Clause 60 requires interest to be credited to the member's account. The computation of damages shows that the department permits a grace period of 5 days and it is only thereafter that the damages are computed. Section 11 of the Act deals with penalties. Further u/s 485 Explanation I of the Indian Penal Code, 1860, if a person being an employer deducts the employee's contribution from the wages payable to the employee for crediting to provident fund or family pension fund established by any law for the time being in force the said amount shall be deemed to have been entrusted with the amount of the contribution as deducted by him and in default, the person could be liable for

criminal breach of trust.

5. It appears that soon after 1952 delays in remitting the contributions under the Act became chronic and the arrears payable to the trust fund increased from time to time. This was because initially the maximum damages awardable was only 25% of the arrears and no interest is payable. Therefore by an amendment in 1973 the damages were increased from 25% to a maximum of 100% . The Statement of Objects and Reasons of the Bill which became Act 48/73 states that the arrears in 1959-60 were Rs 3.65 crores; in March 1965, they were Rs. 5.96 crores, then by March, 1970 they rose to Rs. 14.6 crores and by March, 1971 to Rs. 20.65 crores. It was stated there that the employers were using those monies "in their business". The National Commission on Labour recommended stringent measures in its 116th Report which was endorsed by the Estimates Committee, resulting in the 1973 Act.

6. In *Coal Mines Provident Commissioner, Dhanbad v. J. Lala and Sons*. (1976-II-LLJ-91)(SC) interpreting Section 10F of the Coal Mines Provident Funds and Bonus Scheme Act, 1948, it was stated by the Apex Court that by the use of the words "may levy damages", in case of default in payment of contribution, and the words as "it may think fit to impose" it was clear that the determination was not based on the inflexible application of a rigid formula and that by these words, the authorities were to apply their mind to the facts and circumstances of the case. As a duty was judicially imposed on the authority principles of natural justice were in *Organo Chemical's* case (supra) (sic) where the virtue of the Act were upheld, the Apex Court laid down that while passing orders u/s 14B the authority was acting in a Quasi judicial capacity and was bound to give reasons for its orders. The levy was not necessarily proportionate to the loss incurred by the employee inasmuch as it was partly compensatory and partly penal.

7. Now the Act does not contain any provision prescribing a period of limitation for assessment or recovery of damages. The monies payable into the Fund are for the estimate (sic) benefit of the employees can directly recover these amounts. The power of computation and recovery are both vested in the Regional Provident Commissioner or other officer as provided in Section 14B. Recovery is not by way of suit. Initially, it was provided that the arrears could be recovered in the same manner as arrears of land revenue. But by Act 37/53 Section 14B was amended providing for a special procedure u/s 8-B to 8-C. By Act 40/73 Section 11 was amended by making the amount a first charge on the estate of the establishment if the arrears of employee's contribution were for a period of more than 6 months. By Act 33/88, the charge was extended to the employee's share of contribution as well.

8. Decision of this Court in *Orissa Forest Development Corporation* (supra) was referred to by Apex Court in *M/s. Hindustan Times Ltd. v. Union of India*. (1998-I-LLJ-682) . It was observed that the case was not correctly decided. Principles to be adopted in a case u/s 14B were highlighted in paragraph 26 of the said judgment which reads as follows at Page 689:

"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 in to consideration the number 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 relations 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 defense in the reply to the show cause notice and must satisfy the concerned authority with acceptable material, if these pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect."

In that view of the matter, we find no scope for accepting the plea that because of financial stringency there was default in, making payment and consequently penal damages cannot be levied.

9. So far as question of waiver is concerned, the position was examined in *Saila Behari Das, Senior Manager, Orissa Construction Corporation Structural Steel Part-I v. Regional Provident Fund Commissioner, Orissa, 1997 (II) Orissa LR 182*.

10. Paras 32-A and 32-B of the Scheme prescribe the rate of damages which can be levied for various periods of default, and the terms and conditions for reduction of waiver of damages respectively. Where the default is for more than six months or beyond it, the rate of damages (percentage of arrears per annum) is 37. The provisions read as follows :

"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 accumulation 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 the 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 (% of arrears per annum)

- a) Less than two months Seventeen
- b) Two months and above but less than four months Twenty-two
- c) Four months and above but less than six months Twenty- seven
- d) Six months and above Thirty- seven

(2) The damages shall be calculated to the nearest rupee. 50 paise or more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored.

32-B Terms and conditions for reduction or waiver of damages. The Central Board may reduce or waive the damages levied u/s 14B of the Act in relation to an establishment specified in the second proviso to Section 14B subject to the following terms and conditions namely:

- (a) in case of a cheque of management including transfer of the undertaking to workers co-operative and in case of merger or amalgamation of the sick industrial company with any other industrial company complete waiver of damages may be allowed;
- (b) in cases, where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its Scheme, in this behalf recommends waiver of damages up to 100 per cent may be allowed;
- (c) in other cases depending on merits, reduction of damages up to 50 per cent may be allowed."

The details of period for which defaults were, committed reveal that almost in every case the delay was sustained. Section 14B of the Act puts a higher limit of penal damages at an amount equal to amount of arrears. It is seen from the impugned order that the maximum amount leviable has been kept in view.

11. It is seen from the impugned order that the written submission filed by the representative of petitioner was considered. The damages have been calculated by taking in to account the periods of delay. This cannot be said to be a case where there was no material for levying penal damages.

12. Ultimately it was prayed by the learned counsel for petitioner that direction should be given for waiver of damages. Para 32-B of the Scheme quoted above

deals with reduction or waiver of damages under certain terms and conditions. The Central Board is authorised to direct for reduction or waiver of damages. Let the petitioner move the Central Board, if so advised by the end of March, 1998 for reduction or waiver of damages. Within that period an amount of 50% of demand raised shall be deposited with the opposite party without prejudice to the petitioner's application for waiver on its own merits. Till the end of March, 1998, no coercive action shall be taken.

The writ application is disposed of accordingly.

S.C. Datta, J.

13. I agree.