

(2003) 01 CAL CK 0030
In the Calcutta High Court
Case No : Writ Petition No. 99 of 2003

Eveready Industries (India) Ltd. and Others	APPELLANT
Vs	
Regional Provident Fund Commissioner	RESPONDENT

Date of Decision : 20-01-2003

Acts Referred:

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

Citation : (2003) 3 CALLT 113 : 108 CWN 989 : (2003) 97 FLR 580 : (2003) 2 ILR (Cal) 53 : (2003) 2 LLJ 1034

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Abhijit Chatterjee and C.M. Ghorawat, for the Appellant; Anil Kumar Gupta, for the Respondent

Judgement

Amitava Lala, J.—It appears to this Court that the Regional Provident Fund Commissioner, Jalpaiguri, in the order impugned directed the petitioners to pay certain amount for the period March 1989 to September, 1997, and October 1997 to February 1998.

2. It further appears from the figures that the claim amount is Rs. 68,43,066 and Rs. 1,94,884 respectively totalling to Rs. 70,37,950. After giving particulars of the figure derived from the order impugned, the concerned authority stated that the amount of damages should be paid by the aforesaid employer/petitioner-company in the respective employees' provident fund accounts maintained by the bank within a period 15 days, failing which a proceeding for recovery of such sums will be made u/s 8 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. It was also directed that in case of failure to deposit penal damages within the stipulated period. Section 7Q of the Act for further simple interest will be added. The petitioner-company invoked the writ jurisdiction without preferring appeal by saying that alternative remedy is no bar in the facts and circumstances of this case.

3. According to Mr. Abhijit Chatterjee, learned counsel appearing for the

petitioners that from an order u/s 14B, i. e., to recover the damages by the authority there is a provision of appeal but from an order u/s 17B, a new insertion in the Act has no provision of appeal. Upon going through Section 7-1, being a provision of appeal to the respective Tribunal, I find that the statement of Mr. Chatterjee is substantially correct but a close scrutiny is required to be made before taking any decision by the Court of law. It has to be ascertained whether the self-imposed restriction in respect of alternative remedy will be maintained in this particular case or will be given a relaxation.

4. In course of hearing, a decision in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, has come into play. This case indicates a guideline for hearing of the matters under Article 226 of the Constitution of India by the High Court. In paragraph 15 of the Judgment the Supreme Court held that the restriction of the High Court is self-imposed. If an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. There are four exceptions, firstly, where the writ petition has been filed for the enforcement of any of the fundamental rights, secondly, where there has been a violation of the principle of natural justice, thirdly, where the order or proceedings are wholly without jurisdiction and fourthly, where the vires of an Act is challenged. Therefore, the task of the writ Court hereunder is to ascertain whether the case of the petitioner- company is falling upon any of the aforesaid four exceptions or not.

5. In a judgment of the Calcutta High Court in Darjeeling Dooars Plantation Ltd. and Another Vs. Regional P.F. Commissioner and Others, a Division Bench of this Court held that there is a distinction between Section 14B and Section 17B of the Act. There is a distinction between the word "employer" and the "other person". The "other person" comes only after transfer of the establishments either in whole or in part. Transfer of the establishment is contemplated u/s 17B. Section 17B does not contemplate any hearing of the "employer" and the "other person" or either of them. Section 17B of the Act contemplates stage post transfer. It says that the "employer" and the "person" to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer. On the other hand, Section 14B contemplates a hearing of the "employer". The absence of the expression the "other person" in such Section clearly shows that it is a stage prior to the transfer of the establishment. The proviso to Section 14B is specific on this issue.

6. In a further judgment in The Regional Provident Fund Commissioner, Mangalore Vs. M/s. Karnataka Forest Plantations Corporation Limited, Bangalore, held that the concept of penalty would arise only when there is a guilt. While interpreting Section 17B it was held that the transferee employer would be liable to pay the contribution for the period preceding the transfer. Section 17B cannot be interpreted to mean that the transferee employer would be liable also to pay penalty for the default committed by the previous employer during the period anterior to the transfer. The penalty as correctly interpreted cannot be treated as

either contribution or as other sums due from the employer. Such an interpretation would be opposed to the principle of natural justice. Penalty cannot be saddled on somebody who is not guilty. So far as the judgment of Whirlpool Corporation (supra) is concerned, the Supreme Court adopted the same view by a subsequent judgment in State of Haryana Vs. Haryana Veterinary and A.H.T.S. Asson. and Another,

7. Mr. Anil Kumar Gupta, learned counsel appearing for the provident fund authority has taken the similar view as was taken by learned counsel in the judgment of the Karnataka High Court. He contended that the transferee establishment becomes jointly and severally liable along with transferor to pay dues u/s 14B by virtue of Section 17B irrespective of the fact whether the scheme taken over provides for liability u/s 14B of the Act or not.

8. According to me, since u/s 17B both are jointly and severally liable for pre-taking liabilities the authority is wholly without jurisdiction in calling upon the petitioners to pay the compensation and/or damages either in the form of the penalty or otherwise for the period prior to take over. Both learned counsel relied upon the judgment in Organo Chemical Industries and Another Vs. Union of India (UOI) and Others, . Mr. Gupta has very much stressed on the said judgment to prove that damages and penalty are not the same or similar. According to me, this question is different from the question of alternative remedy. It appears from the said judgment that damages u/s 14B include a punitive sum quantified according to the circumstances of the case. The penal levy included in damages is perfectly within the area of implied powers and the legislature may, while enforcing collections, legitimately and reasonably provide for recovery of additional sums in the shape of penalty so as: to see that avoidance is obviated. Such a penal levy can take the form of damages because the reparation for the injury suffered by the default is more than the narrow computation of interest on the contribution.

9. Mr. Gupta further contended that the damages, in substance, are a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty u/s 14B is not merely to provide compensation for the employees. The imposition of damages u/s 14B serves both purposes.

10. I am sorry to say that the argument put forward by Mr. Gupta in this respect is not at all convincing because of the reason that the question of guilt as against the employer still has to be judged first by the authority. If it is done then in that case further payment of compensation or penalty will arise but if there is no judgment in respect of the guilt as against the employer u/s 17B it cannot prescribe for payment of damages and/or penalty. This is not contribution on the part of the present employer for the pre-taking period. Therefore, if the question of alternative remedy comes out it will answer that the question of violation of principle of natural justice and error of jurisdiction are forthcoming before the writ Court and for the same ratio of Whirlpool Corporation's case (supra) is applicable herein. Although Mr. Gupta has cited several single Bench judgments

to this Court in respect of jurisdiction of the authority in determining the question, I am of the view that such circumstances are not fit for the circumstances prevailing hereunder in respect of determining the guilt and/or of jurisdiction of appellate authorities particularly when the judgments of different Division Benches are prevailing. It is further significant to note hereunder that one of such Division Bench judgments passed by this Court in respect- of Darjeeling Dooars Plantation Ltd. 's case (supra) was cited before the authority but such authority fails to appreciate the facts and circumstances in determining the question of damages and/or penalty. Therefore, according to me enforcement of legal right before this Court even having alternative remedy in this particular case has no bar and this Court upon going through the merits of the same is inclined to set aside the operation of the same and it has been done hereunder with a direction upon the said authority to reconsider this issue within a period of three months from date in the light of the judgment and order passed by this Court. However, the order of setting aside will not cause any prejudice in making payment if not already paid, in respect of post take over period from October, 1997 to February, 1998, for a sum of Rs. 1,94,884 which is directed to be deposited within four weeks from date. In default, the authority concerned is entitled to take all possible steps within its jurisdiction.

11. Since no affidavit-in-opposition filed by the respondents no allegation in respect of the merits in question is admitted. All questions are kept open for the concerned authority.

12. The writ petition is thus disposed of without any order as to costs.

13. Let xerox certified copy of this order be supplied to learned counsel for the parties within three days from the date of putting the requisites.