

(1968) 09 KAR CK 0008

In the Karnataka High Court

Case No : Writ Petition No's. 121 and 122 of 1966

Fernandes (R.)

APPELLANT

Vs

State of Mysore and Others

RESPONDENT

Date of Decision : 04-09-1968

Acts Referred:

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

Citation : (1969) ILR (Kar) 9 : (1969) 2 LLJ 442 : (1968) 2 MysLJ 537

Hon'ble Judges : Ahmed Ali Khan, J;A.R. Somnath Ayyar, J

Bench : Division Bench

Judgement

Somnath Ayyar, J.—The petitioner in Writ Petition No. 121 of 1966 is a certain Fernandes who is the managing partner of a cashewnut factory in Mangalore. The petitioner in Writ Petition No. 122 of 1966 is a certain Mizar Govinda Annappa Pai who is the proprietor of another reasons cashewnut factory in that place. For the reason that they committed default in the payment of their committed default in the payment of their contribution to the employees' provident fund payable under the Employees' Provident Funds Act, 1952, and the administrative charges payable under the scheme made under the provisions of the Act, the Regional Provident Fund Commissioner called upon them to pay damages determined under S. 14B of that Act. The amount demanded of Fernandes was Rs. 12,760 which consisted of amount described as penal interest and penal damages. Similarly, the amount demanded of Mizar Govinda Annappa Pai was Rs. 19,318.

2. We are asked in these writ petitions to quash those demands on the ground that there was no proper determination of the damages which could be demanded under S. 14B of the Employees' provident Funds Act, 1952, which would be referred to in the course of this judgment as the Act.

3. That section reads :

"Where an employer makes default in the payment of any contribution to the

fund or in the transfer of accumulations required to be transferred by him under Sub-section (2) of S. 15 [or Sub-section (5) of S. 17] or in the payment of any charges payable under any other provisions of this Act or of any scheme or under any of the conditions specified under S. 17, the appropriate Government may recover from the employer such damages not exceeding twenty-five per cent of the amount of arrears, as it may think fit to impose."

4. The Government of the new State of Mysore in the exercise of the power created by S. 19 delegated the power to recover damages under the provisions of this section to the Regional Provident Fund Commissioner, Bangalore, by a notification made on 2 September, 1963. By that notification the Regional provident Fund Commissioner was directed to recover from the defaulters, damages specified in a table annexed to the notification. That table incorporated a formula for the computation of damages which could be recovered on the basis of the number of defaults and the period during which there was non-payment. That table is :

PERIOD OF DEFAULT	Serial No.	One month	Over 1 month	Over 2 months	Over 3 months	Over 4 months	Over 5 months
default or less	1	up to 2 months	up to 4 months	up to 4 months	up to 4 months	up to 4 months	up to 5 months
First	2	per 2 per cent of arrears.	per 5 per cent of arrears.	per 10 per cent of arrears.	per 15 per cent of arrears.	per 20 per cent of arrears.	per 25 per cent of arrears.
Second	5	per 10 per cent of arrears.	per 15 per cent of arrears.	per 20 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.
Third	10	per 15 per cent of arrears.	per 20 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.
Fourth	15	per 20 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.
Fifth	20	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.
Sixth	25	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.	per 25 per cent of arrears.

5. The office of the Regional provident Fund Commissioner, therefore, made the arithmetic directed by that table and arrived at the sums which the petitioner were called upon to pay.

6. Sri Jagannatha Shetti contends that it was the duty of the State Government under S. 14B of the Act to determine the sum of money which could be recovered as damages under its provisions in each case which came up before it and that it could not make a formula of universal application such as the one which the table to the notification incorporates. He maintained that since the only power that was delegated to the Regional Provident Funds Commissioner was the power to make a calculation in accordance with the system evolved by the State Government, there was no proper determination either by the State Government or by the Regional Provident Fund Commissioner of damages recoverable from the petitioners, if any.

7. We are of the opinion that this criticism of the impugned demands is unassailable. Section 14B empowers the State Government to recover damages when an employer makes a default with respect to any one of the three distinct matters to which that section refers. Although it states that the upper limit of the

damages which could be recovered in respect of such default is 25 per cent of the arrears, it contains a clear direction that the damages which could be recovered are those which the appropriate Government might think fit to impose. So it plain that in each case which arises for consideration, it is the duty of the appropriate Government to determine the amount of the damages which in its opinion could properly be recovered having regard to all the facts and circumstances of the case. The words "such damages - as it may think fit to impose," are susceptible of no other construction than that there should be an estimation of the amount of damages in each case which presents itself, and that that estimation should rest upon a consideration of all relevant facts and circumstances.

8. But what the State Government did in the case before us was to evolve a rigid and inflexible formula for the computation of damages. It is clear that a general scheme of that description is not authorized by S. 14B. The damages which could be recovered under that section are in the nature of a punishment or penalty as explained by the High Court of Patna in *R. B. H. M. Jute Mills (Private), Ltd. v. Regional Provident Fund Commissioner, Bihar and others* 1958 I Ilj 598 and it is the duty of the appropriate Government in every case which arises before it to decide whether any damages should be recovered at all and if so, how much.

9. Section 14B does not compel recovery of damages in each case in which there is a default, nor does it specify the amount of damages which should be recovered. It confers on the appropriate Government the power not only to decide whether in the circumstances of the case any damages should be recovered from the employer and to further decide if it conclusion that such recovery should be made, how much should be recovery from him. And went it reaches the conclusion that the case in one in which damages should be recovered, the quantification of the damages should be made on the materials before it and having regard to all relevant circumstances and facts of that case.

10. But the table appended to the notification made by the Government of the State of Mysore on 2 September, 1963 places fetters on the exercise of that power bestowed by S. 14B. It does not reserve for the appropriate Government or the Regional Provident Fund Commissioner, the power to say, whatever may be the extenuating circumstances, that the employer cannot be absolved from liability to pay damages. Then again, it divests the authority which should make a computation of the damages, of the power to measure the damages which could be recovered on the merits of each case. The prescription of the notification is that if there is a default during a particular period a certain sum of money must needs be recovered as damages soley on the basis of number of defaults committed by him and the period during which he has been defaulter. This prescription is founded on the unsupportable assumption that in the decision of the question whether any damages should be recovered and if so their measure, the only factors which have relevance are the number of defaults and their duration. It overlooks the relevance of other factors, an exhaustive

catalogue of which is of course not possible.

11. The power created by S. 14B is to determine the amount of those damages as Government may think fit to impose. The words "may recover" occurring in the concluding part of that section demonstrate that in a given case Government have the power, if the circumstances justify the conclusion, to decide against the recovery of any damages, and it is that power of which the State Government stood denuded by the prescription of a rigid formula which in its opinion should settle all cases arising under that section. That formula also resulted in the abdication of the duty to consider the facts of each case even with respect to the measure of damages. The words "as it may think fit to impose" clearly display the legislative intent that in each case there should be an application of the mind of the appropriate Government to its relevant features which should guide the conclusion both on the question whether any damages should be demanded and of their quantum. The formation of the opinion that the case is a fit one for the demand for payment of damages and of a particular sum of money as damages, is what S. 14B clearly insists upon, and it is plain that that opinion has to be formed independently in the case of each default to which S. 14B refers.

12. The table which forms an annexure to the Government notification makes such application of the mind impossible. It transforms the duty confided by S. 14B to estimate the damages on an investigation in to the relevant facts, into a mere mechanical function without reference to the relevant facts of each case. There are many incongruities displayed by that table. It directs that in a case where the default extends over a period of a month or less the damages should be equivalent to 2 per cent of the arrears. An employer who pays the arrears only a day late and a person in whose case there is a delay of thirty days are both liable to pay the same amount by way of damages which shall not be less than 2 per cent of the arrears. It again directs that where the delay in the payment is for a period more than a month and not more than two months, damages equivalent to 5 per cent of the arrears should be recovered. So the amount of damages payable would be the same where there is a delay during a period of a month and one day or during the full period of two months. It will also be observed that whereas a person who has defaulted during a period of one month should pay damages amounting to 2 per cent of the arrears, a person who is a defaulter for a period of a month and one day becomes liable to pay a sum equivalent to 5 per cent of the arrears. The same odd feature of the table is discernible with respect to all the six defaults to which it refers and the delay of five months of which it speaks.

13. It is easy to see that a mechanical computation of damages in that way is not what is envisaged by S. 14B. The view that we take is also the view taken by the High Court of Bombay in *Bharat Barrel and Drum Manufacturing Company (Private), Ltd. Vs. Raval (B.N.) and Another*, . Such is also the effect of the pronouncement of the High Court of Madras in *Regional Provident Fund Commissioner, Madras Vs. K.R. Subbaier Tape Factory, Tiruchirapalli*, .

14. Sri Shetti is, in our opinion right in making the submission that no determination under S. 14B could be made without affording the defaulter an opportunity to show cause against such determination. Although that section does not say so in so many words, it is clear that an adjudication under its provisions without affording that opportunity to the defaulter, would plainly transgress the rules of natural justice.

15. We therefore set aside the impugned demands reserving liberty for the appropriate authority to make a fresh determination under S. 14B of the Act.

16. Before we conclude, we should notice a question which was debated during the argument as to where the power resides to make that determination. Sri Shetti for the petitioners submitted that since some of the defaults committed by the petitioners were antecedent to the notification by which there was a delegation of power to the Regional provident Fund Commissioner, the State Government alone had the power to make a determination with respect to those defaults.

17. But it is clear that this postulates is unacceptable since the authority which could exercise power under S. 14B is the authority in whom that power resides at the point of time when the determination has to be made irrespective of the period of default. We were intimated by both sides that the notification by which there was delegation, has since been rescinded and that the power which was so delegated has been recalled by the State Government. So it is clear that although it was possible for Government notwithstanding the delegation to exercise power which it had so delegated, that power exclusively vests in Government after the delegate power was recalled. That being so, and with respect to the defaults with which we are concerned in these write petitions, the power created by S. 14B to decide whether any damages should be recovered and to decide their quantum now resides in Government which is the repository of that power. We make this elucidation so that there should be no further controversy in respect of this question.

18. In the circumstances, we make no direction in regard to costs.