
(2011) 01 DEL CK 0046

In the Delhi High Court

Case No : Writ Petition (C) 10387 of 2006

Hi-Tech Vocational Training Centre

APPELLANT

Vs

Assistant Provident Fund Commissioner

RESPONDENT

Date of Decision : 28-01-2011

Acts Referred:

Citation : (2011) 177 DLT 415 : (2011) 129 FLR 274 : (2011) 3 LLJ 554 : (2011) LLR 231

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : V. Shrivastav, for the Appellant; Rajesh Manchanda, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—The petition impugns the order dated 16th January, 2006 of the Assistant Provident Fund Commissioner (Respondent), made in exercise of powers u/s 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and imposing total penalty by way of damages of Rs. 1,69,913/- on the Petitioner. Notice of the petition was issued and the operation of the order stayed. The said interim order has continued to remain in force. The pleadings have been completed. The counsels have been heard.

2. Section 14B empowers the Provident Fund Commissioner, when an employer makes default in the payment of any contribution to the Fund, to recover from such employer by way of penalty, such damages not exceeding the amount of arrears, as may be specified in the Scheme.

3. The Respondent, being of the view that the Petitioner had failed to remit the provident fund and allied dues for the period from the date of coverage to March, 2003 within the stipulated time, issued a notice dated 24th September, 2003 to the Petitioner to show cause as to why damages as envisaged u/s 14B be not recovered by way of penalty from the Petitioner. The impugned order records

that the case was adjourned on as many as 31 occasions and when the authorized representative of the Petitioner appeared. The order further records that notwithstanding so many opportunities, the Petitioner failed to render any cogent explanation or reason for delay in payment of the statutory dues. The Respondent, though recording that Section 14B seeks to address such employers who make default in payment of statutory contributions for their own profit, held that the present case warranted imposition of damages owing to the frequency of defaults. Accordingly penalty by way of damages in the sum of Rs. 1,69,913/- as aforesaid was levied.

4. It is the case of the Petitioner before this Court that the Petitioner is a government run society under the control of the Commissioner of Industries who is also the ex-officio President of the Petitioner Society; that the principal officer of the Petitioner Society is the Joint Commissioner of Industries of Govt. of NCT of Delhi; that the other members of the Governing Council of the Petitioner Society are also the various officials of the Govt. of NCT of Delhi, Managing Director of DSIDC, Managing Director of Delhi Financial Corporation, Director of Delhi Institute of Technology and Joint Director of Industries, Delhi. The Petitioner further pleads that it had itself in August, 1993 written to the Respondent to register itself under the provisions of the Act and was accorded registration with effect from the month of January, 1994; that the Petitioner works under the procedure laid down by the Govt. of NCT of Delhi and any transfer of funds from the Govt. of NCT of Delhi to the Petitioner takes place through a sanction and in which often considerable delays occur and which has resulted in some minor procedural unintentional delays in depositing the contribution; that the said explanations were rendered by the Petitioner before the Respondent also but have not been considered by the Respondent. The Petitioner states that the major delay occurred only consequent to the Provident Funds (Amendment) Act, 1998 and pursuant where to the amount required to be deposited being heavy, various sanctions had to be obtained which resulted in delay. It is also pleaded that since the officers of the Petitioner Society are appointed on deputation, there is frequently a void when the officer is reverted to the parent department/organization and in the appointment of a new officer and which has also resulted in delay in deposit of contributions from time to time.

5. The Respondent in its counter affidavit has supported the order impugned in this petition by contending that the same is reasoned and detailed. It is further pleaded that the Petitioner was admittedly in default and there is nothing wrong in damages being levied against the Petitioner. It is further pleaded that the order is appeal able.

6. The Petitioner has filed a rejoinder reiterating its pleas. It is also contended that at the time when this writ petition was preferred, the Tribunal before whom the appeal was maintainable was not functional leading to this petition being filed.

7. It being undisputed that the Petitioner is also but a hand of the government, it was at the outset enquired from the counsel for the Respondent as to in which

fund the monies collected by way of such penalty/damages go. Though the counsel for the Respondent initially tentatively stated that the same are also distributed to the employees of the Petitioner but the same does not look probable. The counsel has himself stated that the said fund may be being used for providing other reliefs to the employees in general.

8. The counsel for the Petitioner has argued that the Petitioner has not profited from the delay in payment as may be expected from a private employer who may choose to delay the contribution to earn there from. It is further contended that the Respondent could not issue a show cause notice in the year 2003 with respect to the defaults w.e.f. 1993 and on the basis whereof the damages have been calculated. Reliance in this regard is placed on;

(i) Snap Tap Machine Accessories (India) Pvt. Ltd. v. Regional Provident Fund Commissioner 90 Factories Journal Reports 220 (Madras) holding that if damages are levied after long interval and the authority is not diligent in realizing contribution and no assessment or ascertainment of loss before levying damages is made, the order levying damages is liable to be set aside;

(ii) Pioneer Sports Works Pvt. Ltd. v. State of Punjab 34 Factories Journal Reports 140 (Punjab and Haryana) where levy of damages with respect to the pre-discovery period i.e. before the establishment was made liable under the Act was held to be unlawful and unjustifiable. The counsel for the Petitioner contends that in the present case also, damages have been levied w.e.f. 1993 when the Petitioner was registered only w.e.f. January, 1994;

(iii) Thandava Co-operative Sugars Ltd. Vs. Regional Provident Fund Commissioner, holding imposition of damages without considering the circumstance of financial difficulty to be invalid;

(iv) R.P.F.C., Tamil Nadu v. The South India Flour Mills Pvt. Ltd. 1986 LAB. I.C. 650 (Madras) laying down that the Commissioner is not bound to levy damages and the damages have to be computed taking into account the facts and circumstances of each case;

(v) Vegetable Vitamins Foods Co. Ltd. Vs. Regional Provident Fund Commissioner, Mah. and Goa and Others, laying down that while levying damages, mitigating factors have to be taken into account.

9. From a perusal of computation of damages annexed to the counter affidavit of the Respondent, though it appears that the assessment of damages is with effect from August, 1993 but the counsel is unable to explain as to in which column the period of delay has been taken note of. Thus, as of today we have no clear cut basis as to how the amount levied by way of penal damages has been computed. The counsel for the Respondent of course seeks adjournment to call the concerned official with records to explain the same. However now when the pleadings have been completed and the counsels have been heard and the matter has remained pending before this Court for over four years, it is not

deemed expedient to adjourn the matter. For the same reason, now it is not deemed expedient to relegate the Petitioner to the remedy of appeal.

10. The counsel for the Respondent after lunch, in response to the query aforesaid of the Court has referred to *Organo Chemical Industries v. Union of India* AIR 1979 SC 1803 laying down imposition of damages u/s 14B is meant to penalize the 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 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. It was further held that damages awarded u/s 14B belong to Employees' Provident Fund and not general revenue of State.

11. The counsel for the Respondent has also referred to:

a) *M/s Hindustan Times Ltd. v. Union of India* AIR 1998 SC 688 laying down that the Act does not contain any provision prescribing a period of limitation for assessment or recovery of damages and the provisions of Indian Limitation Act, 1963 are not attracted. It was further held that the rule that power should be exercised within reasonable time cannot also be applied. It was yet further held that defense of power-cut, financial problems relating to other indebtedness or delay in realization of amounts paid by cheques or drafts are not justifiable grounds for the employer to escape liability for damages;

b) *M/s. K. Streetlite Electric Corporation Vs. Regional Provident Fund Commissioner, Haryana*, laying down that delay in initiating proceedings u/s 14B of the Act will not be a ground for setting aside an order imposing damages unless specific plea of prejudice is raised before the Provident Fund Commissioner i.e. that between the period of default and the date of initiation of action u/s 14B the employer has altered 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;

c) *Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner*, holding the Act to be a social welfare legislation and requiring a purposive interpretation to be given to provisions thereof.

12. I have considered the matter in the light of the aforesaid pronouncements. I also find that the Supreme Court recently in *Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another*, while considering *pari materia* provision of the Employees' State Insurance Act, 1948 (*supra*) and after noticing the judgment in *M/s Hindustan Times Ltd.* (*supra*) held that statute itself does not say that penalty has to be levied only in the manner prescribed - it is also not a case where the authority is left with no discretion; the legislation does not provide that adjudication for the purpose of levy of penalty proceedings would be a mere formality of imposition of penalty as also computation of the quantum thereof became a foregone conclusion. It was held that ordinarily such provision would

not be held to be providing for mandatory imposition of penalty and if the proceeding is an adjudicatory one, imposition of penalty cannot be mandatory. The Supreme Court held that existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or quantum thereof. Relying upon the earlier judgment in *M/s. Prestolite of India Ltd. Vs. The Regional Director and another*, it was held that even if the regulations have prescribed general guidelines and upper limits at which the imposition of damages can be made, it cannot be contended that in no case the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter, as the adjudicating authority is not bound to act mechanically in applying the uppermost limit of the table.

13. I rather find the same trend of thought to be running through all the judgments. Even in *Organo Chemical Industries (supra)* it was held that the power to impose damages u/s 14B is a quasi-judicial function and must be exercised after notice to the defaulter and after giving him reasonable opportunity of being heard and that the order u/s 14B must be a "speaking order". It was further held that while fixing the amount of damages the Provident Fund Commissioner is required to take into consideration various factors viz the number of defaults, the period of delay, the frequency of defaults and the amounts involved. It was yet further held that the order has to be objective. The same aspect was reiterated in *M/s Hindustan Times Ltd.* Even in *M/s. K. Streetlite Electric Corporation (supra)*, the Supreme Court reduced the damages to 25% only of that imposed by the Provident Fund Commissioner.

14. The position which thus emerges is that it is not as if the Respondent was bound to impose damages at the rates provided for. The rates provided for are of maximum damages which can be levied. The order impugned in the present case however appears to impose the maximum damages without disclosing any reason there for.

15. Faced with the aforesaid, the counsel for the Respondent has contended that no reply whatsoever was filed by the Petitioner to the show cause notice and in spite of as many as 31 hearings. However the impugned order does not state that no explanation for default has been given by the Petitioner. Rather it records "no cogent explanation or reason has been submitted by the employer for delayed payment of statutory dues" however it does not disclose as to what was the explanation or reason furnished which was not found to be cogent by the Respondent. The Petitioner on the contrary contends that during the oral hearings, the same explanation/reason as given before this Court was given to the Respondent also and which has not been considered.

16. In view of the dicta in *HMT Ltd. (supra)*, it was mandatory for the Respondent to before levying damages return a finding of mens rea or actus reus on the part of the Petitioner to contravene the statutory provisions. The same has not been done in the present case. The order has been made mechanically and there was no adjudication at all as required to be made in law. The

Respondent proceeded on the premise that where there is a default there has to be levy of damages. The same is not the position in law.

17. The reasons given by the Petitioner and as recorded hereinabove are found to be such owing whereto it can safely be concluded that there was no mens rea or actus reus to violate the statutory provision on behalf of the Petitioner. It cannot be lost sight of that the Petitioner is a government run society manned by government officials from various departments. None stood to gain from the delays in compliance of the statutory provisions.

18. There is another interesting aspect of the matter which does not appear to have been considered in any of the judgments aforesaid. Section 14B empowers imposition of "penalty" by recovery of "such damages, not exceeding the amount of arrears", when an employer makes "default in the payment of any contribution to the Fund....." The language suggests that for power u/s 14B to be exercised, if not on the date of levy of damages, at least on the date of invocation of Section 14B, there must be a "default" coupled with "arrears". There can be no "arrears" if the contribution to the Fund has already been paid, even if belatedly. Black's Law Dictionary, 6th Edition defines "arrears" as money which is overdue and "unpaid". What has already been paid, cannot be "arrears". If there are no "arrears" there can be no computation of damages not exceeding the arrears. Though Section 14B itself refers to the scheme qua computation of rate of damages but para 32A of the Scheme also uses the word arrears in conjunction with period of default. It thus cannot be said that under the Scheme recovery of damages without the contribution being in arrears is possible.

19. The Supreme Court in *Vithal Vasudeo Kulkarni and Others Vs. Maruti Rama Nagane and Others*, , in relation to Rent Act held that the provision presupposes that there are arrears at the date of the application and which can be directed to be paid; if the tenant has paid up all the arrears and the landlord has accepted them, the cause of action disappears by payment. The said view was approved of in *Dhan Singh Ramkrishna Chaudhari and Others Vs. Laxminarayan Ramkishan and Another*, .

20. In my opinion, the aforesaid dicta squarely applies to Section 14B also. The proceedings for imposition of penalty there under can be initiated only if there are arrears and then, maximum damages of equal to arrears can be recovered. However, the proceedings cannot be commenced if there are no arrears on that date, even if there has been delay in payments.

21. I am conscious that the said interpretation may go contrary to the spirit of the statute. However in the face of the language used, which does not permit any other interpretation and the provision being penal - required to be interpreted strictly, I am unable to hold otherwise. Had the legislature intended to penalize delay in payment, instead of "default" and "arrears", the expressions "delay" and "damages proportionate to delay" would have been used.

22. There is no discussion on the said aspect also in the impugned order. Rather

it appears that as on the date of notice dated 24th September, 2003 (supra), all payments had been made, though belatedly. The petition is entitled to succeed on this ground also.

23. The petition therefore succeeds. The order impugned in this petition is quashed/set aside. No order as to costs.