

(2006) 10 KL CK 0091

In the High Court Of Kerala

Case No : Writ Petition (C) No. 32515 of 2005

Indian Telephone Industries Ltd.

APPELLANT

Vs

Asstt. P.F. Commnr. and Others

RESPONDENT

Date of Decision : 10-10-2006

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 15, 17, 5, 6
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 17(2), 17(3), 18, 22(1)

Citation : (2006) 10 KL CK 0091

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

Advocate : N. Raghuraj, for the Appellant; Thomas Mathew Nellimoottil (SC, PF) and K. Jayakumar, for the Respondent

Judgement

S. Siri Jagan, J.—The petitioner in this writ petition, namely, M/s. Indian Telephone Industries Limited, is a Public Limited Company under the administrative control of the Ministry of Communications and Information Technology of the Government of India. This writ petition related to imposition of damages u/s 14B of the Employees Provident Funds and Miscellaneous Provisions Act (hereinafter referred to as "the Act") on the Company for delay in payment of contributions under the Act in respect of the employee of the Palakkad unit of the Company, which is one of its seven units scattered all over India, for the period from September, 2003 to October, 2004. The petitioner-Company was established in the year 1948. Stated to be due to change in the policy of the Government of India, the petitioner-Company, which was making profits till 1995, started accumulating losses which has presently swelled up to the tune of Rs. 1330 crores. In view of the precarious financial situation of the Company, which could not be reversed by efforts of the Company on its own, the Company made a reference to the Board of Industries and Financial Reconstruction, u/s 15 of the Sick Industrial Companies (Special Provisions) Act, 1985, (for short "the

SIC Act") which reference was registered by the BIFR as Case No. 504/2004 as per Ext. P 1 letter issued by the Registrar of the BIFR. The BIFR thought it fit to explore the possibility of revival of the Company, which resulted in Ext. P9 order of the BIFR, by which the State Bank of India was appointed as an operating agency in terms of Section 17 (3) of the SIC Act for preparing a scheme for rehabilitation of the Company in accordance with the guidelines appended to the order, u/s 17(3) of the SIC Act.

2. In view of the acute financial crisis faced by the Company, the petitioner was unable to pay salary to the employees of the Company for the period from September. 2003 to October, 2004. In December. 2004, the Cabinet Committee of Economic Affairs sanctioned a revival package to the Company and as part of the said package, funds were released in March, 2005 for clearing the liabilities of the Company including the salary arrears and provident fund contributions etc. Pursuant thereto, the Company was able to pay arrears of salary for the above said periods. Evidently, as a result of the above, there was delay in payment of contributions under the Act in respect of the employees of the Company for the above said period. Proceedings were initiated by the 1st respondent for imposition of damages u/s 14-B and realisation of interest u/s 7Q of the Act. It resulted in Ext. P2 order by which damages to the tune of Rs. 86,952/- was imposed on the petitioner in respect of the delay in payment of inspection charges and pension fund contributions for the above said period and Ext. P3 order whereby an amount of Rs. 3,85,485/- was imposed as damages for delay in payment of employees' provident fund contributions on the petitioner-Company. Apparently, believing that Ext. P9 order of the BIFR amounted to sanctioning of a scheme of rehabilitation as contemplated under the second proviso to Section 14B of the Act. the petitioner-Company filed Ext. P4 application for waiver of damages under the said proviso before the Central Board of Trustees of the Provident Fund Organisation. In the meanwhile, the 1st respondent issued Ext. P5 order to the 4th respondent-Bank u/s 87 of the Act demanding the Bank to pay an amount of Rs. 5,33,814/- lying in deposit in the accounts of the Company with the said Bank. By Ext. P6 judgment, this Court in W.P.(C) No. 23176/2005 directed the Central Board of Trustees of the P.F. Organisation to consider Ext. P4 application of the Company under the second proviso to Section 14B of the Act and stayed further proceedings for recovery of damages as per Exts. P2 and P3 orders. However, by Ext. P8 order, the Central Provident Fund Commissioner informed the petitioner-Company that since the petitioner's case does not fulfill the legal requirements for waiver of the damage u/s 14B of the Act it cannot be considered. Accordingly, the 1st respondent again by Ext. P7 addressed the 4th respondent-Bank to comply with Ext. P5 order u/s 8 of the Act. The petitioner now challenges Exts. P2, P3, P5. P7 and P8 orders in this writ petition.

3. The petitioner's challenge is on several grounds. The first is that this Court had by Ext. P6 judgment, directed the Central Board of Trustees of the Provident Fund Organisation to consider Ext. P4 application submitted by the petitioner

under the second proviso to Section 14B of the Act. Therefore, the 5th respondent had a duty to place Ext. P4 application before the Central Board of Trustees and instead of that the 5th respondent-Central Provident Fund Commissioner himself decided that the petitioner's application cannot be considered for want of fulfillment of legal requirements, which is without jurisdiction as only the Central Board of Trustees could have passed orders on Ext. P4 application which was the direction in Ext. P6 judgment. Second is that since proceedings u/s 14B of the Act is quasi-criminal in nature, the same being for imposition of penalty by way of damages, the 1st respondent ought to have considered whether there was deliberate omission on the part of the petitioner to pay contribution and without a finding that the petitioner had wilfully refused to pay damages penalty u/s 14B could not have been imposed on the petitioner as done in Exts. P2 and P3. The contention of the petitioner is that the 1st respondent ought to have considered the fact that the petitioner was a sick Company in respect of which rehabilitation efforts are in progress by the BIFR and that the petitioner could not pay the contributions only because it could not even pay wages to its employees at all. The tenor of the contention is that since the contribution being payable by deduction from the wages paid to the workers, when wages themselves were not paid, the question of deduction and payment of contributions do not arise and consequently damages as well. The petitioner buttresses their contention by pointing out that contributions were deducted and paid when wages were actually paid. The 1st respondent ought to have considered these matters and entered a finding in respect thereof without which there would not be application of mind by him which would render the impugned orders vitiated, submits the petitioner.

4. The 1st respondent has filed a counter affidavit refuting the contentions of the petitioner. The main thrust of the contention of the 1st respondent is that proceedings u/s 14B are not merely punitive, but also compensatory in nature. The financial difficulties of the petitioner is not a matter relevant for the purpose of imposition and quantification of damages u/s 14B and the 1st respondent is bound by clause 32-B of the Employees' Provident Funds Scheme, which stipulates the rates at which damages are to be imposed u/s 14B which alone is liable to be looked into by the 1st respondent while imposing damages. Regarding the contention that Ext. P8 is vitiated the same having been passed by the Central Provident Fund Commissioner instead of the Central Board of Trustees, the contention is that since the conditions for consideration as provided under the second proviso to Section 14B are not satisfied there being no scheme sanctioned by the BIFR for rehabilitation of the Company, which is a pre-requisite for consideration of the application, the 5th respondent is perfectly justified in rejecting the petition without placing it before the Board of Trustees, meaning thereby that when the basic conditions for consideration of the application under the second proviso to Section 14B themselves are absent, the 5th respondent is not bound to place the application of the petitioner before the Board of Trustees at all because even if the Board of Trustees had considered it, the same would

only have been rejected in the absence of a scheme sanctioned by the BIFR under the SIC Act.

5. The petitioner has filed a reply affidavit in which they would submit that the question of proceedings u/s 14B being compensatory in nature also does not arise since the petitioner has already paid interest on the contributions amounting to Rs. 2,72.107/ -. The petitioner would further submit that after having recovered the interest which is the compensatory part, again u/s 14B no damages can be imposed by way of compensation.

6. Since a very fundamental question as to the scope of Section 14B has been raised, particularly in the background of amendment of the Section by Amendment Act No. 33 of 1988, I deem it fit to consider the scope of that Section first in the light of the Supreme Court decisions on the subject.

7. Originally, before amendment in 1988, Section 14B of the Employees Provident Funds and Miscellaneous Provisions Act read thus in the statute book:

Power to recover damages:- Where an employer makes defaults in the payment of any contribution to the Fund (the Family Fund or the Insurance Fund) or in the transfer of accumulations required to be transferred by him under sub-section (2) of Section 15 (for 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 u/s 17, (the Central Provident Fund Commissioner, or such other office as may be authorised by the Central Government, by notification in the official gazette in this behalf) may recover from the employer such damages, not exceeding the amount of arrear as it may think fit to impose:

Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard." (Emphasis supplied)

At the relevant time, the power u/s 14B was a power to recover damages not exceeding an amount of arrears as the competent authority under the Act may think fit to impose. The scope of this provision was examined by the Supreme Court of India in the decision of *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, . In that decision, the Supreme Court held that the damages imposed under the said Section are both punitive and compensatory in nature. After examining the scope of various provisions of the Act, the statement of objects and reasons for bringing in the legislation, other Supreme Court decisions etc., as also those of different High Courts, the Supreme Court held as follows in paragraphs 21 to 24:

21. The traditional view of damages as meaning actual loss does not take into account the social content of a provision like Section 14B contained in a socioeconomic measure like the Act in question. The word "damages" has different shades of meaning. It must take its colour and content from its context, and it cannot be read in isolation, nor can Section 14B be read out of context.

The very object appearing in Section 14B of the Act was not construed to mean penal damages. The imposition of damages u/s 14B serves a two-fold purpose. Its predominant object is to penalise, so that an employer may be thwarted or deterred from making any further defaults. 22. The expression "damages" occurring in Section 14B is in substance, 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". We are clearly of the opinion that the imposition of damages u/s 14B on employer is 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 14B is related to the word "default". The words used in Section 14B 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 14B must mean "failure in performance" or "failure to act". At the same time, the imposition of damages u/s 14B is to provide reparation for the amount of loss suffered by the employees.

23. The construction that we have placed on the word "damages" appearing in Section 14B of the Act, is in accord with the intent and purpose of the legislation. It was brought on the statute book by Act 37 of 1953, the objects and reasons so far material, read:

There are also certain administrative difficulties to be set right. There is no provision for inspection of exempted factories nor is there any provision for the recovery of dues from such factories. An employer can delay payment of Provident Fund dues without any additional financial liability. No punishment has been laid down for contravention of some of the provision of the Act. (emphasis supplied)

The object and purpose of the section is to authorise the Regional Provident Fund Commissioner to impose exemplary or punitive damages and thereby prevent employers from making defaults. The provision for imposition of damages at twenty-five per cent of the amount of arrear, however, did not prove to be effective. Accordingly, by Act 40 of 1973, the words "not exceeding the amount of arrear" were substituted, for the words "twenty-five per cent", the necessity for making this change is brought out in the objects and reasons, a material portion of which reads:

STATEMENT OF OBJECTS AND REASONS (Act 40 of 1973)

The working of the Employees Provident Fund and Family Pension Fund Act, 1952

and the Employees" Provident Fund Scheme has revealed that the present provisions of the Act and the Scheme are not effective in preventing defaults in payment of contributions to the Employees" Provident Fund or in recovery of the dues on that account. The result is that the amount of Provident Fund arrears recoverable from the employers has been steadily increasing. In 1959-60, the arrears which amounted to Rs. 3.65 crores rose to Rs. 5.96 crores as on March 31, 1970 and they have risen to Rs. 20.65 crores as on March 31, 1972.

2. The National Commission on Labour has recommended that in order to check the growth of arrears, penalties for defaults in payment of Provident Fund dues should be made more stringent and that the default should be made cognisable. In its 116th Report presented to Parliament in April 1970, the Estimates Committee has endorsed the recommendations made by the National Commission on Labour and has further suggested that Government should consider the feasibility of providing compulsory imprisonment for certain offences under the Act. Accordingly, it is proposed to amend the Act so as to render the penal provisions more stringent and to make defaults cognisable offences. Provision is also being made for compulsory imprisonment in cases of non-payment of contributions and administration or inspection charges. As recommended by the Estimates Committee, a further provision is being made to enable levy of damages equal to the amount of arrears from a defaulting employer, (emphasis supplied)

Each word, phrase or sentence is to be considered in the light of general purpose of the Act itself. A bare mechanical interpretation of the words "devoid of concept or purpose" will reduce most of legislation to futility. It is a salutary rule, well established, that the intention of the legislation must be found by reading the statute as a whole.

24. There appears to be a misconception that the object of imposition of penalty u/s 14B is not "to provide compensation for the employees" whose interest may be injured, by loss of interest and the like. There is also a misconception that the damages imposed u/s 14B are not transferred to the Employees" Provident Fund and the Family Pension Fund, of the employees who may be adversely affected, but the amount is transferred to the General Revenues of the appropriate Government. We find that this assumption is wholly unwarranted. In assessing the damages, the Regional Provident Fund Commissioner is not only bound to take into account the loss to the beneficiaries but also the default by the employer in making his contributions, which occasions the infliction of damages. The learned Additional Solicitor General was fair enough to concede that the entire amount of damages awarded u/s 14B, except for the amount relatable to administrative charges, must necessarily be transferred to the Employees" Provident Fund and the Family Pension Fund. We hope that those charged with administering the Act will keep this in view while allocating the damages u/s 14B of the Act to different heads. The employees would, of course, get damages commensurate with their loss i.e., the amount of interest on delayed payments;

but the remaining amount should go to augment the "Fund" constituted u/s 5 for implementing the Schemes under the Act.

8. Subsequently, Section 14B was amended by Act 33 of 1988. After amendment, the Section reads as follows:

14-B. Power to recover damages:- Where an employer makes default in the payment of any contribution to the Fund (the Family Pension Fund of 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 u/s 17, 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 u/s 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." (Emphasis supplied)

The amendment was brought into force with effect from 1-9-1991 by Notification No. SO 2259 dated 7-8-1991 published in the Gazette of India dated 24-8-1991. On a comparison of the pre-amended Section and the amended Section, it is to be noted that for the words "from the employer such damages not exceeding the amount of arrears as it may think fit to impose:", the words "from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the scheme" were substituted. Along with this amendment, the legislature brought in an additional Section also in the Employees Provident Funds and Miscellaneous Provisions Act, namely, Section 7Q, imposing interest for the delay in payment of amounts due under the Act. The said Section 7Q reads as follows:

7Q. Interest payable by the employer:- The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment:

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank

From these amendments. I find that by the above amendments, the legislature consciously wanted to separate the compensatory portion from the damages u/s 14B making Section 14B made purely punitive and transferring the compensatory portion to and incorporating the same in Section 70. A careful reading of the Organo Chemical's case and the amendment would lend credence to this interpretation.

9. In Organo Chemical's case, after finding that Section 14B as it existed then was both punitive and compensatory in nature, the Supreme Court held as follows in paragraph 24:

.... In assessing the damages, the Regional Provident Fund Commissioner is not only bound to take into account the loss to the beneficiaries but also the default by the employer in making his contributions, which occasions the infliction of damages. The learned Additional Solicitor General was fair enough to concede that the entire amount of damages awarded u/s 14B, except for the amount relatable to administrative charges, must necessarily be transferred to the Employees' Provident Fund and the Family Pension Fund. We hope that those charged with administering the Act will keep this in view while allocating the damages u/s 14B of the Act to different heads. The employees would, of course, get damages commensurate with their loss i.e., the amount of interest on delayed payments, but the remaining amount should go to augment the "Fund" constituted u/s 5 for implementing the Schemes under the Act (Emphasis supplied)

This would evidently mean that the compensatory part of the unamended Section 14B damages was the amount of interest on delayed payments which have to be credited to the individual account of the members of the Fund. Since the same has now been incorporated in Section 7Q of the Act, I am of opinion that the legislature has consciously decided to separate the punitive and compensatory parts of damages under the unamended Section 14B and confined Section 14B to the punitive part alone by making it clear in the amended Section that the damages u/s 14B is by way of penalty and by including the provision for interest on delayed payments by incorporating Section 7Q.

10. Therefore, the irresistible conclusion is that Section 14B as it now stands is purely punitive in nature. When Section 14B is by way of penalty alone, then the 1st respondent has to impose damages u/s 14B strictly in accordance with the principles for imposing penalty which is a quasi-criminal proceedings. The Supreme Court, as clearly as in 1970 had laid down guidelines in the matter of imposing penalty for failure to carry out a statutory obligation in the decision of Hindustan Steel Ltd. Vs. State of Orissa, . In the same, the Supreme Court held as follows:-

.... An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty

of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute...

Under Section 14B also, which when considered purely as a penalty provision for failure to carry out a statutory obligation, the 1st respondent ought to have imposed damages u/s 14B, as if in a quasi-criminal proceedings bearing in mind the principles laid down in the above decision of the Supreme Court, i.e., by ascertaining whether the petitioner either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or in disregard of its obligation. If damages have to be imposed only on satisfying the above conditions, then certainly the 1st respondent ought to have looked into the question as to whether there was any conscious failure on the part of the petitioner-Company in non-payment of contributions under the Act. In considering that question, the 1st respondent has to certainly appreciate the background in which the failure to pay contributions arose. If that be so, the fact that the Company was in dire financial straits and the wages of the employees, from which the employees' contribution has to be deducted and paid, has not been paid to the workmen, for whose benefit the Act itself was enacted, is a relevant consideration which has to be taken into account by the 1st respondent while quantifying the damages u/s 14B. Of course, the learned counsel for the 1st respondent would point out that the Supreme Court has not chosen to note any such departure from the language of the amended Section in subsequent decisions on the question of damages u/s 14B, even after the amendment of Section 14B. The decisions referred to by the 1st respondent are the decisions in *Regional Provident Fund Commissioner v. S.D. College. Hoshiarpur & Others*, reported in JT 1997(10) S.C. 638 and *M/s. Hindustan Times Ltd. v. Union of India & Ors.* reported in AIR 1998 S.C. 688. On going through those decisions, I find that both those decisions related to imposition of damages under the unamended Section 14B, the period of contributions in those decisions being March, 1982 to February, 1988 in *S.D. College's* case and for the period July. 1965, October 1965, December 1965, January 1966, March 1966. August 1966. July 1967, August 1967, May 1968, July 1967 to November, 1968 in the other case. Therefore, those decisions cannot be considered to have dealt with the effect of amendment to Section 14B. Hence. I do not find any merit in the contentions of the counsel for the 1st respondent based on those decisions on the scope of the amended Section 14B and the new Section 7Q.

11. While considering the question as to whether there was a conscious failure on the part of the petitioner in payment of contributions, the relevant provisions

of the Employees Provident Funds Scheme would be relevant, according to me. The relevant portion of Clause 30 of the Employees Provident Fund Scheme reads thus:

30. Payment of contributions: (1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

(2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges.

(3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges." (Emphasis supplied)

Clause 31 of the Scheme stipulates that notwithstanding any contract to the contrary, the employer shall not be entitled to deduct the employer's contribution from the wages of a member or otherwise, to recover it from him. Clause 32 of the Scheme stipulates the mode of recovery of the employees' share of the contribution. It would be advantageous to extract the said clause here:

32. Recovery of a member's share of contribution:

The amount of a member's contribution paid by the employer or a contractor shall notwithstanding the provisions in this Scheme or any law for the time being in force or any contract to the contrary, be recoverable by means of deduction from the wages of the member and not otherwise:

Provided that no such deduction may be made from any wage other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable:

Provided further that the employer or a contractor shall be entitled to recover the employee's share from a wage other than that which is paid in respect of the period for which the contribution has been paid or is payable where the employee has in writing given a false declaration at the time of joining service with the said employer or a contractor that he was not already a member of the Fund:

Provided further that where no such deduction has been made on account of an accidental mistake or a clerical error, such deduction may, with the consent in writing of the Inspector be made from the subsequent wages.

(2) Deduction made from the wages of a member paid on daily, weekly or fortnightly basis should be totalled up to indicate the monthly deductions.

(3) Any sum deducted by an employer or the contractor from the wages of an employee under this Scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted". (Emphasis supplied)

Clause 38 of the Scheme again gives the mode of payment of contributions, which reads thus:

38. Mode of payment of contributions:- (1) The employer, shall, before paying the member his wages in respect of any period or part of 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 of such percentage of the pay ("basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, as the Central Government may fix. He shall within fifteen days of the close of every month pay the same to the Fund by separate bank drafts or cheques on account of contributions and administrative charge:

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.

Provided further that where there is no branch of the Reserve Bank or the State Bank of India at the station where the factory or other establishment is situated, the employer shall pay to the Fund the amount mentioned above by means of Reserve Bank of India (Government Drafts at par) separately on account of contributions and administrative charge.

(2) The employer shall forward to the Commissioner within twenty-five days of close of the month, a monthly abstract in such form as the Commissioner may specify showing the aggregate amount of recoveries made from the wages of all the members and the aggregate amount contributed by the employer in respect of all such members for the month.

Provided that an employer shall send in Nil return, if no such recoveries have been made from the employees:

Provided further that in the case of any such employee who has become a member of the Pension Funds under the employees' Pension Scheme 1995, the aforesaid Form shall also contain such particulars as are necessary to comply with the requirements of that Scheme.

(3) The employer shall send to the Commissioner within one month of the close of the period of currency, a consolidated Annual Contribution Statement in Form 6-A showing the total amount of recoveries made during the period of currency from the wages of each member and the total amount contributed by the

employer in respect of each such member for the said period. The employer shall maintain on his record duplicate copies of the aforesaid monthly abstract and consolidated annual contribution statement for production at the time of inspection by the Inspector. (Emphasis supplied)

From these provisions, an interpretation that the liability to pay contributions, at least the employee's share, is by deduction from the wages of the employees and arises only at the time of payment of wages cannot be said to be far fetched. However, in this connection, the learned counsel for the 1st respondent brings to my attention a Division bench decision of this Court in Calicut Modern Spinning & Weaving Mills Ltd. v. Regional Provident Fund Commissioner, reported in 1982 KLT 303 wherein the Division Bench held that the employer is bound to pay contributions under the Act every month voluntarily irrespective of the fact that wages have been paid or not. I have my own doubts about the correctness of that decision. That decision lays stress on the word "in the first instance" occurring in clause 30 to hold that the employer is liable to pay contributions even if no wages are paid. But, I feel that those words are used in the context of contractor's employees to denote that even in the case of contractor's employees, the employer has to pay the contribution in the first instance. But, being a Division Bench decision, I am bound by that. However, since in that decision, the Division Bench itself had specifically held that although even in cases of lock-outs, strikes etc. failure to make contribution resulting in default will have to be visited by damages u/s 14B, the authority can consider the question of mitigation of damages having regard to the attendant circumstances that had resulted in the delay. I need not delve into that question any further since the same is in consonance with the view I propose to take, in the sense that for deciding damages u/s 14B, the reasons for non-remittance have to be considered. Going by that decision itself, the 1st respondent is bound to look into the circumstances under which the delay in non-payment of contribution occurred and I would go only to the extent that while considering that question, the 1st respondent is bound to consider the above provisions in the Scheme regarding the point of time when contributions are to be made. That being so the fact that the petitioner had not paid wages to the employees which had caused the delay in payment of contributions and the petitioner paid the contributions immediately on payment of wages itself, is certainly a mitigating circumstance which would have to be taken into account by the 1st respondent while quantifying damages u/s 14B as a penalty for delay in payment, keeping in mind the principles of imposing penalty as explained above based on the Supreme Court decision.

12. Now, the fact that the petitioner-Company was declared as a sick unit and the BIFR was seized of the question of rehabilitation of the Company is also, according to me, a relevant consideration for deciding the quantum of damages payable by the Company u/s 14B. In this connection, we must bear in mind the object of the Employees Provident Funds and Miscellaneous Provisions Act itself. There cannot be two views regarding the proposition that this is a beneficial

legislation intended for the betterment of the service conditions and living conditions of the employees of factories and establishments so that the future of the industrial worker, after he retires or that of his dependents in the case of his early death, would be protected. Viewed thus, the 1st respondent is bound to consider the impact of his order u/s 14B on the workers as well who are supposed to be the direct beneficiaries of the order. If that order itself results in putting the lives of those workmen themselves in misery, then it would be the bounden duty of the 1st respondent to try his level best to avoid such a negative after-effect of his order which is expected to be for the benefit of those workmen themselves. The petitioner-Company has been declared as a sick industrial Company by the BIFR as evidenced by Exts. PI and P9. Although proceedings have not finally resulted in sanction of a scheme itself for rehabilitation, it is clear that the BIFR had appointed the State Bank of India as the operating agency and gave a responsibility to the Bank to prepare a revival scheme based on the revival proposal submitted by the Company. Guidelines for preparation of rehabilitation scheme has also been formulated by BIFR itself as is clear from the annexure to Ext. P9. Clause 12 of Ext. P9 contains the following:

12. The company shall not that protection of Section 22 (1) of SICA will not be available to it against withholding of any of the workers dues, including EPR & ESIC dues (other than damages levied if any), gratuity, wages for the working period etc. It shall not default in the timely payment of any such dues on the ground that its case is pending with the BIFR.

If at this point, the 1st respondent imposes heavy damages giving a set back to the rehabilitation efforts, according to me, the 1st respondent would be failing in his duty to safeguard the interests of the workers in so far as the direct result of his order would be putting the rehabilitation efforts itself in jeopardy, especially when the guidelines for framing the rehabilitation scheme includes deferring of damages under the Employees Provident Fund Act also and gives protection of Section 22(1) against damages u/s 14B as well.

13. I also note that several High Courts have also taken the view that while considering the question of imposition of damages u/s 14B, the question as to whether the defaulting Company has been declared as a sick Company is a relevant consideration. Reference to the following decisions, viz. *Star of Gujarat Textile Mills Ltd. v. Regional P.F. Commissioner & Anr.*, 1993 (1)LLJ 1023. *Easwaran & Sons Engineers Ltd. v. RPF Commr. Madras & another.* 1998 (4) LLN 272. *Poysha Industrial Company Ltd. v. Union of India.* (1995-11 LLJ 137 and *Bakshi Steels Ltd. v. RPF Commnr.* 1995 (69) FLR 549 would be apposite in this context.

14. In this connection. I have to dispose of the contention of the counsel for the 1st respondent that in view of the words "as may be specified in the Scheme" now occurring in Section 14B and the new clause 32A of the Employees Provident Funds Scheme, the 1st respondent has no discretion in the matter except to apply the formula in clause 32A for quantification of damages also. I think that

this is a myopic view of the said provisions. If while deciding the quantum of damages u/s 14B the reasons for the delay has to be taken into account, then the damages cannot be as per any strait-jacketed formula. At the best, clause 32 A would only serve as a guideline. In fact, the words used in clause 32A is that "may recover from the employer by way of penalty damages at the rates given below", which would also suggest that the same is intended as a guideline. Here, it may work the other way also. The clause takes into account only the period of delay, but does not take into account the number of delays, which also may be a factor in favour of imposition of higher damages. Further, when Section 14B envisages a maximum damages equal to the amount of arrears, the maximum envisaged by clause 32A is only 37%. Therefore, Clause 37A is purely in the nature of guidelines and not a structured formula of invariable application in all circumstances without reference to the reasons for delay.

15. I am of opinion that merely because there is belated payment of contributions, liability to pay damages does not automatically arise, but the same shall be decided by applying mind to the merits of each case and not by resorting to mere arithmetic calculation of damages. Even though liability to pay contributions is statutory, to hold that delay automatically attracts damages would be too rigid a way of construing the Section, especially since the imposition of damages is punitive in nature. There must be application of mind taking into account the reasons for delay and whether the delay could have been avoided by ordinary diligence by the employer. For this, one cannot with any amount of certainty say what are the circumstances which would mitigate the damages and which would not. The same would differ from case to case, which requires exercise of judicial discretion by the authority imposing damages by application of mind to the circumstances pleaded and proved by the defaulting employer.

16. Viewed thus, I have no doubt in my mind that the fact that the petitioner-Company was declared as a sick industry by the BIFR and the delay in payment of contributions was on account of the fact that the Company could no even pay wages to the employees are certainly considerations which should have weighed with the 1st respondent while considering the quantum of damages to be imposed on the petitioner u/s 14B. A reading of Exts. P2 and P3 shows that such a consideration is sadly lacking in this case. The only findings in this respect in Exts. P2 and P3 are to the following effect:

Ext. P2

4(i) I consider that the financial difficulties faced by the establishment cannot be a valid ground for committing defaults of the payment of Provident Funds dues especially when the employees' share deducted from their salary/wages has not been paid.

5. The employees' Provident Funds and Miscellaneous Provisions Act, 1952 is a social welfare legislation and the successful working of the social security scheme

depends on the prompt compliance made by the employer. The damages are levied as detailed below as measure of penalty for the failure to prompt compliance in the matter of remittance of dues under Act/Scheme.

Ext. P3

4. I have gone through the case in detail. There is no dispute on the default committed. The financial difficulties faced by the establishment cannot be a valid ground for committing default of payment of provident fund dues as it is part and parcel of any business and Industry.

5. The employees' Provident Funds and Miscellaneous Provisions Act, 1952 is a social welfare legislation and the successful working of the social security scheme depends on the prompt compliance made by the employer. The damages are levied as detailed below as measure of penalty for the failure to prompt compliance in the matter of remittance of dues under Act/Schemes.

17. Therefore, I am satisfied that the 1st respondent has not properly applied his mind while passing Exts. P2 and P3 orders. Exts. P2 and P3 orders are therefore liable to be quashed on that ground alone.

18. Now, I would consider the first issue as to the competency of the 5th respondent to reject Ext. P2 application at the threshold without placing it before the Board of Trustees. According to learned counsel for the 1st respondent, since sanctioning of a scheme for rehabilitation in respect of the petitioner-Company by the BIFR is a condition precedent for consideration of his application under the second proviso to Section 14B, the 5th respondent was certainly justified in rejecting Ext. P4 without placing it before the Board of Trustees since no scheme for rehabilitation has been sanctioned by the BIFR. The 1st respondent also relied on Ext. A1 judgment in W.P.(C) No. 27156/2005 wherein a similar contention was rejected by a learned Judge. I am of opinion that even going by that decision for rejection the petitioner's application, the 5th respondent had to come to a conclusion that there was no scheme sanctioned by the BIFR for rehabilitation of the petitioner-Company. Only if that question is free from doubt, the 5th respondent can if at all reject Ext. P4 application by himself without placing the same before the Central Board of Trustees.

19. In Ext. P9. I find that in paragraph 6 the BIFR had held as follows:

6. On a query of the Bench, the representative of the company indicated that it would not be possible for them to work out a scheme u/s. 17(2) of SICA on their own. In view of this, the Bench noted that the provisions of Section 18 of SICA would have to be explored in public interest in relation to the company. Accordingly, in terms of the powers available u/s. 17(3) of SICA, the Bench appointed SBI as the Operating Agency with directions to prepare a revival scheme for it, if feasible based on the revival proposal to be submitted by the company. The OA was directed to keep in view the provisions of Section 18 of SICA and the enclosed guidelines while carrying out this exercise. The cut-off

date (COD) for the scheme should be taken as 31-12-2005". (Emphasis supplied)

Guidelines for the preparation of the scheme by the operating agency has also been formulated by the BIFR itself as per the annexure to Ext. P9 order. I am of opinion that since the Sick Industrial Companies (Special Provisions) Act, as evident from the preamble to the Act, is intended for securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto. The interpretation of the provisions of the Act should as far as possible, go to promote the object for which the Act was enacted. Therefore, in respect of matters relating to actions which would go against such attempts fructifying, the interpretation favourable to the sick Company has to be adopted. Viewed thus, the words "a scheme for rehabilitation has been sanctioned by the BIFR" obtaining in the second proviso to Section 14B could also be interpreted to mean a case where the BIFR had decided to prepare the revival scheme by directing the operating agency to prepare the revival scheme in accordance with guidelines prescribed. When such an interpretation cannot be stated to be far fetched, it was for the Board of Trustees to decide whether Ext. P9 amounts to sanctioning of a revival scheme by the BIFR and the 5th respondent could not have pre-empted the consideration of Ext. P4 by the Board of Trustees by rejecting the same at the threshold without placing it before the Board of Trustees. Here, it must also be noted that in Ext. P6 judgment, this Court had directed the Central Board of Trustees to consider the petitioner's representation. I may extract the relevant portions of Ext. P6:

4. In the aforesaid context, the petitioner filed Ext. P3 before the 3rd respondent Board of Trustees invoking the second proviso to Section 14B of the Act read with Clause 32B of the Employees' Provident Fund Scheme. So much so, now it will be up to the 3rd respondent to consider Ext. P3 in accordance with law and come to its own decisions within the frame work of law as to whether the petitioner is entitled to any benefit at all and if so the extent of any such benefit and the nature of the order that is to be passed as regards the petitioner in relation to Ext. P2 order for damages.

In the aforesaid circumstances, this writ petition is disposed of directing that until the final consideration and disposal of Ext. P3 application by the 3rd respondent the competent authority, further action for recovery against the petitioner on the basis of Exts. P2 and P4 will stand stayed.

In Annexure A1 judgment, this Court was not considering a case of direction by the Court, but a suo motu rejection by the Central Provident Fund Commissioner. Therefore. Ext. P8 order passed by the 5th respondent would not be in compliance with Ext. P6 judgment also. As such, I am of opinion that Ext. P8 order and consequently Ext. P9 order issued by the 1st respondent u/s 8F which

is a consequential order are also unsustainable and liable to be quashed.

20. There is another question also as to the competency of the 1st respondent to impose damages on inspection charges as done by the 1st respondent in Ext. P2. Section 14B starts with the sentence, 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". Therefore, damages can be imposed only in respect of the contributions payable alone. Contribution has been defined u/s 2(c) of the Act thus:

(c) "contribution" means a contribution payable in respect of a member under a Scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies.

The definition of contributions does not take in administrative charges. In fact, in clause 38 of the Scheme, which has been quoted earlier in this judgment, the employer is to deduct employee's contribution from his wages and is to pay the same together with his contribution as well as administrative charges as the Central Government may fix. Therefore, I am of opinion that the 1st respondent does not have power to impose damages for delay in payment of administrative charges, which, I presume, is the inspection charges mentioned in Ext. P2. Therefore, Ext. P2 is also bad for having imposed damages in respect of inspection charges as well, for which the 1st respondent has no jurisdiction under the Act. For the foregoing reasons, I set aside the impugned orders and issue the following directions:

The 1st respondent shall reconsider the question of imposition of damages on the petitioner-Company for delay in payment of contributions for the period from September, 2003 to October, 2004 afresh in accordance with the observations and findings contained in this judgment, after affording an opportunity of being heard to the petitioner and taking into account, inter alia, the facts that the wages of the employees were not paid in time contributions were paid when wages were actually paid and the petitioner-Company was registered as a sick industry by BIFR and not merely adopting the structured formula in clause 32A of the Employees Provident Funds Scheme. If the petitioner is still aggrieved by the fresh orders to be passed by the 1st respondent in the matter of imposition of damages u/s 14B, it would be open to the petitioner to file an application under the second proviso to Section 14B of the Act before the Board of Trustees, in which event, the 5th respondent shall place the same before the Board of Trustees who shall consider the same in accordance with law and the observations contained in this judgment. I make it clear that this would be without prejudice to the right of the petitioner to file appeal before the Appellate Tribunal, if the petitioner so wishes. The writ petition is disposed of as above.