
(2003) 09 CAL CK 0050
In the Calcutta High Court
Case No : Writ Petition No. 9799 (W) of 2003

Jenson and Nicholson (India) Ltd. and Another	APPELLANT
Vs	
Regional Provident Fund Commissioner and Others	RESPONDENT

Date of Decision : 18-09-2003

Acts Referred:

Citation : (2004) 4 CHN 308

Hon'ble Judges : D.P. Kundu, J

Bench : Single Bench

Advocate : P.K. Mallick, A.C. Chakraborty and Indrani Chakraborty, S.K. Chakraborty, Nos. 1 to 3, K.H. Dasan and Mala Chakraborty, for the added parties, for the appearing parties; K.H. Dasan and Mala Chakraborty for the added parties, for the Respondent

Judgement

D.P. Kundu, J.—Prior to initiating the present writ petition the writ petitioners in the instant writ proceeding initiated another writ proceeding being W. P. No. 8478 (W) of 2003 wherein the writ petitioners challenged (1) summons dated 2nd June, 2003 directing the writ petitioner No. 1 (hereinafter referred to as the company) to appear in person u/s 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the P. F. Act) and (2) a reminder dated 02.06.2003 regarding non-submission of monthly returns, both issued by Assistant Provident Fund Commissioner(Ex), West Bengal (hereinafter referred to as A. C). W. P. No. 8478 (W) of 2003 was disposed of by an order dated 11.06.2003 passed by D.P. Kundu, J. The relevant part of the aforesaid order dated 11.06.2003 is set out hereinbelow:

"Heard the learned advocates for the parties and perused the averments made in the writ application.

I dispose of the writ application by the following order.

Pursuant to the communication dated 02.06.2003 which is at page 92-93 of the writ application, the petitioners shall appear before the appropriate authority on

13.6.2003 and shall make out their case before the appropriate authority. The appropriate authority shall decide the matter strictly in accordance with law after affording just, fair and reasonable opportunity of oral hearing to the writ petitioners. While deciding the matter, the appropriate authority should take into consideration the averments made in paragraphs 9,28,30 and 38 of the writ application and also should consider annexure P-2 of the writ application.

The appropriate authority after considering the entire matter including the averments made in paragraphs 9,28,30 and 38 of the writ application and after considering the Annexure P-2 of the writ application, shall pass a reasoned order. While passing the reasoned order, the appropriate authority should also consider the prayer of the writ petitioners regarding payment by instalments. A copy of the reasoned order shall be communicated to the writ petitioners in accordance with the provisions of law. So long the reasoned order is not communicated to the writ petitioners in accordance with the provisions of law, no coercive action should be taken against the petitioners under the provisions of Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and the Employees' Provident Fund Scheme, 1952.

As no affidavit-in-opposition has been filed by the respondents the allegations made in the writ application are deemed to have been denied.

Learned advocate for the respondents is directed to communicate the gist, of the order to the respondents who are directed to act upon such communication."

2. Pursuant to the aforesaid order dated 11.06.2003 passed in W. P. No. 8478(W) of 2003, A. C. passed (1) order dated 24.06.2003 in the matter of enquiry u/s 7A of the P. F. Act against the company, Code No. WB/9888, for determination of the dues for the period 7/2002 to 3/2003 and (2) order dated 24.06.2003 in the matter of enquiry u/s 7A of the P. F. Act against the company, Code No. WB/5143, for determination of dues for the period 7/2002 to 3/2003. Those two orders are hereinafter referred to as the aforesaid two orders. The reasons for passing the aforesaid two orders are same. Under these circumstances suffice it to refer to the order dated 24.06.2003 passed by A. C. in respect of Code No. WB/9888. The relevant parts of the order dated 24.06.2003 passed by A. C. in connection with the Code No. WB/9888 are set out hereunder:

"a) I have considered the returns submitted by the estt. Annexure P-2 of the writ petition and the report submitted by the squad of EOs. In the statutory returns filed, the estt. has admitted the same dues as are stated in the report of the squad, Further, the dues have been verified during the course of hearing and admitted by the estt. Hence, there is no dispute with regard to quantum of dues.

b) In view of the order of the Hon"ble High Court, I have also considered the submissions made by the estt. in paras 9,28,30, 38 and P-2 of the writ petition as well as its prayer for instalments. In para 9 of the writ petition, the estt. has narrated the financial health of the company and events/circumstances which has led to it. In para 28 apprehension that recovery of P. F. dues may lead of

closure and loss of employment to a large number of employees has been expressed. In para 30, the estt. has made an assurance that current dues shall be paid from 4/ 03 and it has bona fide intention to liquidate the dues prior to 4/03 in instalments. In para 38 the estt has submitted that unless the Hon"ble Court allows payment of dues prior to 4/03 in instalments along with payment of current dues, it shall suffer irreparable loss and injury. P-2 is the dues-payment statement submitted by the estt. to the Hon"ble Court.

c) From a look at the Balance Sheet of the company, annexed to the writ petition, it indeed appears that the company is in bad shape but that has no connection with determination of dues. As far as payment is concerned, an estt may liquidate the same on approval of the competent authority in instalments subject to fulfilment of laid down conditions which as explained below, the estt. do not satisfy at the moment.

d) Regarding apprehension of loss of employment, it is worth mentioning here that the office of the RPFC has received complaints from the employees also urging immediate intervention and positive steps. One such complaint has reference No. RBEU/AKG dt. 2.5.03 received from POBBIALAC WORKS EMPLOYEES UNION. P. O.-Garifa. Naihati. 24-Pgn(N) under the signature of its General Secretary. The said letter is taken on record.

e) As has been stated hereinbefore, an estt may avail the facility of instalments provided it satisfies the laid down conditions and the competent authority approves the proposal".

f) However, there is no provision for liquidation of employees" share of contribution in instalments as it is not at all dependent on the financial health of the estt. It is employee"s part of the wages which he entrusts his employer for deposition in his P. F. account. Non- deposition of the same is a serious offence of criminal breach of trust attracting provisions of Sections 406 and 409 of IPC.

g) The estt. has also not been able to establish its bona fide intentions to pay the current dues from 4/03 which is evident from the fact that though the same should have been paid within 15.5.03, it had not been paid till the date of filing of the writ petition i.e. 9.6.03.

h) Payment of current dues within time is one of the conditions for consideration of any instalment proposal. Finally, P-2 being dues-payment statement submitted by the estt before the Hon"ble Court the same has been considered during determination of dues.

i) Under the circumstances, the estt. is not eligible for instalments at this stage for its dues prior to 3/03 for the very reason that it has neither cleared entire employees share of contribution along with ROL nor made payment of current dues. It is, however, clarified that the undersigned is not the competent authority to grant instalments and has only stated the rule position."

3. Before proceeding further it is made clear that in the present writ proceeding

the writ petitioners have not challenged the determination of the amount due from the company under the P. F. Act and the Scheme by the A. C. contained in the aforesaid two orders. The aforesaid two orders have two distinct parts which are severable from each other. One part relates to the determination of amount due u/s 7A(l)(b) of the P. F. Act. The other part relates to observations and comments regarding eligibility of the company for availing itself the facility of instalments to liquidate the provident fund arrears. In the present writ proceeding the writ petitioners have challenged the observations and comments made by A. C. in the aforesaid two orders regarding eligibility of the company to avail itself of the "scheme of grant of instalment facility" to liquidate the provident fund arrears.

4. Mr. Mallick the learned Senior Advocate for the writ petitioners argued the following points:

1. Respondents have failed to carry out the mandate of this Court contained in the order dated 11.06.2003 passed in W. P. No. 8478 (W) of 2008.

2. A. C. while passing the orders both dated 24.6.2003, considered and taken on record the complaint from the respondent No. 6, union without disclosing the same to the company and without giving any opportunity to the company to explain its case in respect of the said complaint.

3. A. C. in utter violation of the principles of natural justice passed the orders both dated 24,6.2003.

4. This Court by its order dated 11.6.2003 passed in W. P. No. 8478(W) of 2003 directed the appropriate authority to take the decision regarding the instalments but the A. C. who passed the orders though was not the appropriate authority to take the decision regarding the instalments yet he did not refer the matter to the appropriate authority who was competent to take decision regarding instalments.

5. A. C. while passing the aforesaid two orders did not follow the procedures contained in (1) Circular No. E-II/26(l)79/Vol. II dated 8.2.1983 issued by Central Provident Fund Commissioner and (2) Circular No. E-II/26(l)79/Vol. III dated 8.3.1985 issued by Dy. Central Provident Fund Commissioner.

6. A. C. who had no authority to consider grant of instalment facility passed the aforesaid two orders making observations and comments regarding eligibility of the company to avail itself of the facility of instalments to liquidate the provident fund arrears relying upon superseded procedures contained in Circular No. E-II/26(l)79/Vol.II dated 5.10.1981 issued by Regional Provident Fund Commissioner (HQRS) for Central Provident Fund Commissioner.

7. The observations and comments made by A. C. regarding eligibility of the company to avail itself of the facility of instalments to liquidate the provident fund arrears contained in the aforesaid two orders are perverse.

5. On 20.8.2003, in the present writ proceeding this Court passed the following

order.

"Affidavits filed by the parties be kept on record.

The learned Advocate for the Provident Fund Authorities has submitted before the Court xerox copies of (1) Circular dated 29.5.90. (2) Circular dated 8.3.85, (3) Circular dated 8.2.83, (4) Circular dated 5.10.81 and (5) Letter dated 2.5.2003 written by Shri Amal Kumar Guha. Joint Secretary, Robbialac Works Employees Union. Those documents be kept on record.

Let this matter stand adjourned and be taken up on Friday i.e. 22nd August, 2003 at 2 PM as Specially Fixed Matter for orders".

6. On 22.8.2003 at the time of hearing of the matter the learned Advocate appearing for the Provident Fund Authorities wanted to rely upon Central Provident Fund Commissioner Circular No. E104-29-5/4 dated 7.2.1995 apart from the documents which the Provident Fund Authorities submitted before the Court on 20.8.2003. By an order passed by this Court on 22.8.2003 the learned Advocate for the Provident Fund Authorities was directed to produce the said circular on the next date but no such circular was ever produced before the Court by the learned advocate for the Provident Fund Authorities, The learned Advocate for the respondent Nos. 5 to 10 in course of his argument referred to the following lines from Law of Employees" Provident Funds (Second Edition) by Dr. R. G. Chaturvedi at page 348:

"Power has further been given, under Central Provident Fund Commissioner's Circular No. E104-29-5/4, dated 7th February, 1995 to the Regional Commissioner to grant instalments, provided the employer gives surety or security worth twice the amount due and if he agrees to pay damages".

7. But the learned Advocate for the respondent Nos. 5 to 10 also did not produce the said circular dated 7.2.1995. Under the circumstances this Court without looking into the aforesaid circular dated 7.2.1995 cannot rely upon the abovequoted lines from the Law of Employees" Provident Funds (Second Edition) by Dr. R.G. Chaturvedi.

8. On 8.8.2003 the learned Advocate for the Provident Fund Authorities submitted before the Court that Provident Fund Authorities would not file any affidavit-in-opposition in respect of the writ petition. The learned Advocate for the Provident Fund Authorities was directed to produce the records. On 1.9,2003 the learned Advocate for the respondent Nos. 5 to 10 submitted that the respondent Nos. 5 to 10 were not pressing the affidavit-in-opposition affirmed on 13th 1 August, 2003 by Shri Ranjit Banerjee, General Secretary of respondent No. 5 Association as well as the respondent No. 8 in the present writ proceeding. The order dated 1.9.2003 is set out hereunder:

"The letter dated 28th August, 2003 issued by Smt. Mala Chakraborty, Advocate addressed to Indrani Chakraborty, Id. Advocate along with enclosure as produced by the Id. Advocate for the writ petitioner be kept with the record.

Ld. Advocate for the respondent Nos. 5-10 submits that respondent Nos. 5-10 and their Id. Advocates are not pressing the affidavit-in-opposition affirmed on 13th August, 03 by Shri Ranjit Banerjee, General Secretary of respondent No. 5 Association as well as respondent No. 8 in the writ proceeding.

Hearing concluded. In spite of direction of this Court dated 22.8.03, the Id. Advocates for the Provident Fund Authorities failed to produce Central Provident Fund Commissioner's Circular No. E104-29-5/4 dated 07.02.95 till now.

C. A. V."

9. Shri Mallick the learned Senior Advocate for the writ petitioner in support of his argument referred to and relied upon (1) Sarbojit Bandhpadhyay v. University of Calcutta, reported at 1996(1) CLJ 362, (2) B.S. Minhas Vs. Indian Statistical Institute and Others, , (3) Union of India v. Tulsiram Patel, reported at AIR 1985 SC 1476, (4) Tata Cellular Vs. Union of India, , (5) Collector of Customs, Calcutta v. Biswanath Mukherjee, reported at 1974 CLJ 251, (6) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, : AIR1999SC22 , (7) In the Matter of the Appropriate Authority and Another Vs. Smt. Sudha Patil and Another, .

10. The learned Advocate for the Provident Fund Authorities argued that the writ petitioners should pay 50% of the total dues first and thereafter the rest 50% of the total dues may be paid in instalments.

11. The learned Advocate for the respondent Nos. 5 to 10 argued the following points: (1) The writ petitioners are not paying the current dues, (2) when the writ petitioners are paying salaries at least they should have deposited the employees' share deducted by the writ petitioners from the salary of the employees, (3) the orders under challenge in the present writ proceeding had been issued u/s 7A of the P. F. Act and those orders are appealable and the writ petitioners could have preferred an appeal u/s 7-I of the P. F. Act. The writ petitioners chose not to prefer an appeal. Under the circumstances the writ petition is not maintainable as there is an alternative remedy prescribed by the P. F. Act, (4) the company has not been declared as a sick company under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as SICA).

12. The learned Advocate for the respondent Nos. 5 to 10 referred to and relied upon Sub - section (1) of paragraph 30, paragraph 38 and paragraph 60 of the Employees' Provident Funds Scheme, 1952 (hereinafter referred to as the scheme).

13. The learned Advocate for the respondent Nos. 5 to 10 referred to and relied upon an order dated 6.3.2002 passed by D.P. Kundu, J. in G. A. No. 829 of 2002 arising out of W. P. No. 515 of 1997. The learned Advocate for the respondent Nos. 5 to 10 also referred to and relied upon (1) Punjab National Bank Vs. O.C. Krishnan and Others, , (2) Chhotu Ram Vs. Urvashi Gulati and Another, .

14. Sub-section (1) of Section 7A of the P. F. Act confers power upon (a) The Central Provident Fund Commissioner, (b) any Additional Central Provident Fund Commissioner, (c) any Dy. Provident Fund Commissioner, (d) any Regional Provident Fund Commissioner or (e) any Assistant Provident Fund Commissioner by order (i) decide a dispute where a dispute arises regarding the applicability of the P, F. Act to an establishment and (ii) determine the amount due from any employer under any provision of the P. F. Act, the scheme or the pension scheme or the insurance scheme as the case may be.

15. There is no dispute regarding applicability of the P. F. Act to the company. Determination of the amount due from the company is also not in dispute which is evident from the aforesaid two orders under challenge wherein the A. C. himself held:

"I have considered the returns submitted by the estt. Annexure P-2 of the writ petition and the report submitted by the squad of EOs. In the statutory returns filed, the estt. has admitted the same dues as are stated in the report of the squad. Further, the dues have been verified during the course of hearing and admitted by the estt. Hence, there is no dispute with regard to quantum of dues".

16. Section 7-I of the P. F. Act, inter alia, lays down that any person aggrieved by an order passed by any authority under Sub-section (1) of Section 7A of the P. F. Act may prefer an appeal to a Tribunal against such order. As there is no dispute with regard to the quantum of dues the question of preferring an appeal by the company against the aforesaid two orders passed by A. C. did not and does not arise at all. The company is not at all aggrieved by the amount of due determined by A. C. under Sub-section (1) of Section 7A of the P. F. Act. The whole case of the writ petitioners is that they want to pay the provident fund arrears by instalments. This aspect of the matter is not covered by Section 7-I of the P. F. Act. In the facts and circumstances of the present case Section 7-I of the P. F. Act is not at all attracted. Supreme Court in paragraph 6 of the reported decision in Punjab National Bank v. O.C. Krishnan and Ors. case (supra) observed as follows:

"The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely filing of an appeal u/s 20 and this fast track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the Court refrains from exercising its jurisdiction under the said Constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

It has been pointed out that the provisions regarding appeal contained in Section 7-I of the P. F. Act is not attracted in the facts and circumstances of the present case. Therefore, Punjab National Bank v. O. C. Krishnan and Ors., (supra) has no manner of application in the facts and circumstances of the present case.

17. The learned Advocate for respondent Nos. 5 to 10 argued that this Court by an order dated 11.6.2003 passed in W. P. No. 8478 (W) of 2003 directed the appropriate authority to consider the case of the petitioners. The learned Advocate for the respondent Nos. 5 to 10 argued that a direction for consideration does not mean that the prayers of the writ petitioners should be allowed. In support of his argument the learned Advocate for the respondent Nos. 5 to 10 referred to relied upon Chhotu Ram case (supra) wherein Supreme Court in paragraph 8 of the reported decision, inter alia, held as follows:

"There was no mandate as such to offer promotion to the petitioner, Incidentally the petitioner's case was duly considered but since the latter was not found eligible and fit for promotion for reasons noticed as below, no promotion could be offered to the petitioner. Promotion was to be offered only however, upon compliance with certain eligibility criteria. This Court by reason of the order dated 8.10.1999 did not issue a mandate but issued a direction for consideration only. In the event however, the matter being not considered or in the event consideration was effected in a manner to whittle down the claim of the petitioner, initiation of the proceedings cannot but be said to be justified. But in the event, however, contextual facts depict that the consideration was effected in accordance with the normal rules, practice and procedure and upon such consideration, no promotion could be offered to the petitioner, question of there being any act of contempt would not arise."

18. There is no doubt that this Court by order dated 1.6.2003 passed in W. P. No. 8478(W) of 2003 did not direct the Provident Fund Authorities to allow instalments but directed for consideration of the case of the writ petitioners regarding their prayer for instalments. But consideration must be a proper consideration in law. All relevant matters ought to have taken into consideration and all irrelevant matters ought to have been omitted. When irrelevant matters are taken into consideration omitting relevant matters then such consideration would not be a proper consideration in law. It has to be seen whether A. C. was competent to consider and properly considered the case of the writ petitioners regarding their prayer for payment of dues by instalments.

19. In paragraph 4 of the supplementary affidavit affirmed on 26th August, 2003 by Shri Nasir Ahmed the writ petitioners stated as follows:

"With regard to the Provident Fund dues, as on Friday, that is, on 29"" August, 2003 the position is as follows:

A. Regarding Workers" Dues between Rs.53,48,000.00 Provident Fund No. July, 2002 to WPF-9888 March, 2003 B. Regarding Employees" Dues between Rs. 18, 90,434.00 Provident Fund No. July 2002 to EPF-5143 March 2003 C. For

the month of April, 2003 i) Workers" Provident Fund Dues Rs. 5, 84,928.00 ii) Employees" Provident Fund Dues Rs. 4,46,118.00 D. For the month of May, 2003 i) Workers" Provident Fund Dues Rs. NIL ii) Employees" Provident Fund Dues. Rs. 2,10,511.00 _____ Rs.84,79,991.00 E. Original order of the Hon"ble Justice D. P. Kundu dated 11th June, 2003 passed in the writ petition being W. P. No. 8478(W)of2003 F. For the month of June, 2003 i) Workers" Provident Fund Dues Rs. NIL ii) Employees" Provident Fund Dues Rs. NIL G. For the month of July, 2003 i) Workers" Provident Fund Dues Rs. NIL ii) Employees" Provident Fund Dues Rs. NIL Xerox copies of the statements along with bank receipts towards payment of Provident Fund dues for the month of May, 2003(in part) and June, 2003 to July, 2003 (in full) in respect of WPE-9888 and EPF-5143 are annexed hereto and collectively marked with letter "P-7".

The statements stated in the above quoted paragraph 4 of the supplementary affidavit are not in dispute.

20. The question of streamlining the procedure of grant of instalments facility to the sick and closed units and evolving a procedure for uniform adoption in this regard by all regions had been under consideration of the office of the Central Provident Fund Commissioner, New Delhi for quite some time before 5.10.1981. Before 5.10.1981 conditions which were existing and imposed by the Employees" Provident Fund Organisation while granting instalment facilities were outlined as under:

"(i) The employer should pay in lump sum the employees" share of contributions in arrears,

(ii) The employer"s share of contribution in arrears shall be payable in suitable monthly instalments not exceeding thirty-six,

(iii) Current contributions (both employees" and employer"s shares) shall be paid promptly and regularly,

(iv) The employer should furnish a Bank Guarantee or Collateral securities for twice the amount of the arrears or the State Government should stand surety for the arrears,

(v) The employer should undertake to pay such damages as may be levied by the appropriate authority in accordance with Section 14B of the Employees" Provident Funds and Miscellaneous Provisions Act, 1952,

(vi) Contributions in respect of outgoing members shall be payable in full in addition to the current contribution and the amount of instalment,

(vii) The employer should agree to pay the legal cost that may be determined by the Provident Fund Authorities, and

(viii) In cases of non-compliance with any of the conditions of instalment the instalment facility shall be deemed to have been withdrawn and legal action revived."

21. The above conditions were considered, reviewed by the Central Board of Trustees, and thereafter by a Circular No. E-II/26(I)79/Vol.II dated 5.10.1981 issued by the Regional Provident Fund Commissioner (HQRS) for Central Provident Fund Commissioner revised procedures had been laid down. In this connection paragraphs 3, 4 and 5 of the aforesaid Circular dated 5.10.1981 are set out hereinbelow:

"3. The Board while considering carefully the various implications inherent in the proposal, however, felt that the suggestion for extension of facility for payment of statutory dues by suitable number of instalments without a Bank Guarantee would be against the present guidelines laid down by the Board. It was apprehended that the same would be encouraging defaults and giving rise to further arrears. The Board however, agreed that each genuine case should be examined on its own merit and in cases where the employer of a sick unit who had requested for extension facility for payment of statutory dues by suitable number of instalments and yet who was not in a position to produce a Bank Guarantee, the proposal may be placed before the General Purposes Committee, a Standing Committee of the Central Board of Trustees for consideration on merits and taking a final decision."

4. The Government have since conveyed its approval for similar recommendations of the E. P. F. Review Committee (Ramanujam Committee) which also had gone into these questions on the subject-matter which are as under:

"Sick units may be granted instalment facilities for payment of arrears more freely on the following conditions-

- (i) The current dues are paid without fail,
- (ii) The contributions in respect of outgoing members are paid in full with interest;
- (iii) Available security is produced even if it be by way of a second charge on the assets".

5. In view of the above, any request received from the employers for grant of instalment facilities to clear the arrears may be processed in the light of the guidelines mentioned above and the request should be referred to this office for obtaining approval of the General Purposes Committee before giving effect to the instalment facility. However, it may please be kept in view that the proposals for grant of instalment facility are not forwarded as a matter of routine and only in genuine and very deserving cases such requests for extending the facility may be entertained and forwarded."

22. The question of further streamlining the procedure for grant of instalment facility to the sick and closed exempted and unexempted establishments and delegation of financial powers to the various facility with a view to recovering the arrears without any delay and without solely depending on the legal and penal

actions alone had been under consideration of the Central Government and the office of the Central Provident Fund Commissioner for some time before 8.2.1983. The Central Board of Trustees, Employees Provident Fund in its 93rd meeting held at New Delhi on 10.11.1.982 considered the liberalization made in the existing conditions which had been communicated by Circular No. E-II/13(16)80TN dated 8.4.1981 in the matter of recovering the arrear of damages and No. E-II/26(I)79/Vol. II dated 5.10.1981 in the matter of recovering the arrears of damages and the Employees" Provident Fund arrears respectively. The Central Board of Trustees, Employees" Provident Fund also approved the proposal for extending the facility for granting instalment facility also to the exempted establishments, which are in arrears in transferring the dues to the Board of Trustees, subject to the same conditions specified in the case of unexempted establishments contained in paragraph 3(1) of the Circular No. E-11/26(1)79/Vol.II dated 8.2.1983. The relevant part of the aforesaid Circular dated 8.2.1983 is set out hereinbelow:

"To

All Regional Provident Fund Commissioners,

Subject: Grant of facility to Sick Units for remittance of statutory dues in suitable number of instalments in respect of exempted and unexempted establishments. Modification of the guidelines laid down by the Central Board of Trustees and delegation of financial powers for consideration of the proposals. Sir,

The question of further streamlining the procedure for grant of instalment facility to the sick and closed exempted and unexempted establishments and delegation of financial powers to the various authorities with a view to recovering the arrears without any delay and without solely depending on the legal and penal actions alone had been under consideration of the Government and this office for some time past.

Accordingly, the Government has recently liberalized certain conditions in this regard and also decided to delegate more financial powers to various authorities for speedy processing of the cases. The Central Board of Trustees, Employees" Provident Fund in its 93rd" meeting held at New Delhi, on 10.11.82 considered the liberalization made in the existing conditions which had been communicated to you vide this office Circular letter No. E-II/13(16)80TN dated 08.04.81 in the matter of recovering the arrears of damages and No. E-II/26(I)79/Vol.II, dated 05.10.81 in the matter of recovering the Employees" Provident Fund arrears.

3. The conditions subject to which the instalment facility can be granted to the Sick Units and the authority competent to grant such facilities in genuinely deserving cases are furnished below:

(I) PAYING THE ARREARS OF EMPLOYEES" PROVIDENT FUND ARREARS IN INSTALMENTS.

(i) The employers' share of contributions as also the employees' share of contributions in arrears may be allowed to be paid in suitability monthly instalments not exceeding thirty-six.

(ii) Current contributions (both employees' and employers' shares) shall be paid promptly and regularly.

(iii) The instalment amounts are also required to be remitted within the prescribed dates as for current dues.

(iv) The employer should furnish a Bank Guarantee for an amount equal to one instalment to the satisfaction of the Regional Provident Fund Commissioner.

(v) Contributions due in respect of outgoing/deceased members shall be payable in one lump sum as and when required in addition to the current dues and the amount of instalment;

(vi) The employer should undertake to pay such damages on all belated remittances as may be levied by the Regional Provident Fund Commissioner in accordance with the provisions in Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952;

(vii) In case of non-compliance with any of the conditions of instalment, the instalment facility shall be deemed to have been withdrawn without prior notice and legal action that has been kept in abeyance during the currency of the instalment facility will be received.

(II) CONDITIONS REQUIRED TO BE FULFILLED BY THE EMPLOYERS OF SICK DEFAULTING ESTABLISHMENTS FOR PAYING THE ARREARS OF DAMAGES IN INSTALMENTS;

(a) The employer seeking grant of instalment facilities to pay the damages in a reasonable number of instalments should have first paid the Employees' Provident Fund, Family Pension Fund and Deposit-Linked Insurance Fund contributions and Administrative charges in full;

(b) The employer should agree to offer a Bank Guarantee for an amount equal to one instalment. This guarantee will be a rotating one to avoid renewing the same every month. The guarantee should be furnished to the satisfaction of the Regional Provident Fund Commissioner;

(c) Once the instalment facility is granted, the employer shall notwithstanding the inflow and outflow of cash remit the monthly instalment of damages together with the current contributions and the Administrative charges on or before the due dates; and

(d) Non-compliance with any of the conditions specified above would entail revocation of the instalment facility without prior notice to the employer and enforcement for the Bank Guarantee besides initiating such legal/penal action as may be considered necessary for realization of the remaining amount.

4. The Board also approved the proposal for extending the facility for granting instalment facility to the exempted establishments also which are in arrears in transferring the dues to the Board of Trustees, subject to the same conditions specified in the case of unexempted establishments as stated in para 3(1) above.

5. In the light of the accepted recommendations of the Employees' Provident Fund Review Committee, the Government has evolved and approved the following proposals for delegation of powers to the Central Provident Fund Commissioner, Regional Committee and the General Purposes Committee for consideration of the requests received from the establishments for grant of instalment facility with reference to the quantum of amount involved in each case as detailed below:

Quantum of arrears:

Power to grant instalment

Facility to be exercised by

(a) The Central Provident Fund Commissioner upto Rs. 50,000/-.

(b) The Regional Committee between Rs. 50,000 and Rs. 1/- lakh.

(c) The General Purposes Committee above Rs. 1/-lakh.

This proposal has also been approved by the Central Board of Trustees in its 93rd meeting held at New Delhi, on 10.11.82.

6. In all the cases where instalment facilities have been granted by the General Purposes Committee, Central Provident Fund Commissioner/ Regional Committee, the prosecutions complaints/criminal cases filed against the employer will be kept in abeyance, if possible. In case of non-compliance with any of the conditions governing the grant of instalment facility, immediate action will be taken to review the cases.

7. You are requested to give effect to the above instructions uniformly in all cases. Any request received from the employers in sick and closed units for grant of instalment facility to clear the arrears may be processed in the light of the above guidelines and the proposals forwarded to this office clearly indicating the position point-wise as stated above for consideration by the Central Commissioner/General Purposes Committee. The employers of sick and closed units may also be informed of all the conditions required to be complied with in clear terms wherever requests are received from the employers in this regard. While forwarding the proposals to this office, the complete details of the case such as nature, period and amount of default, past performance of the establishment present compliance position, the financial position of the establishment as contained in the Audited Balance Sheet and other financial statements and other relevant details may also be furnished invariably all cases without fail. All cases considered and approved by the General Purposes Committee/Central Commissioner/ Regional Committee may please be got

entered in a Central Register to watch the compliance position of the establishment on the approved scheme of instalment so that it should be possible to give the details the arrears at any given time without any omission.

8. The receipt of this communication may please be acknowledged.

Yours faithfully, Sd/- (B. K. Bhattacharya) Central Provident Fund Commissioner;

23. Subsequent to the issue of the guidelines contained in the aforesaid circular dated 8.2.83 the working of those guidelines and the scheme of grant of instalment facility was once again examined in detail and it was decided that in all cases of requests for grant of instalment facility by establishments exempted or unexempted whose arrears do not exceed Rs. 1 lakh (in individual cases) the Regional Provident Fund Commissioner shall grant the instalment facility subject to the fulfilment of the conditions specified by the Board and Government. It was further decided that in all other cases the requests of the employers should be processed by the Regional Provident Fund Commissioner in the light of the existing guidelines and apprehensive proposals should be submitted to the Central Provident Fund Commissioner for his consideration. It was further decided that even in the former cases wherever the consideration of the request of the establishments involves any departure from the specified guidelines such cases should be referred to the Central Provident Fund Commissioner who will place the same before GPC for appropriate decision in this connection the relevant part of the Circular No. E-II/26(I)79/Vol.II dated 8.3.85 are set out hereinbelow;

"To

All Regional Provident Fund Commissioners,

Subject : Grant of instalment facility to sick units to liquidate the Provident Fund arrears in instalments delegation of powers. Sir,

Please refer to this office circular letter No. E-II/26(I)79/Vol.II dated 08.02.83 wherein detailed guidelines were issued for the grant of instalment facility to sick establishments to enable them to clear the dues in not more than 36 monthly instalments.

Subsequent to the issue of the above guidelines the working of these guidelines and the scheme of grant of instalment facility was examined in detail. With a view to speeding up the cases for grant of instalment facility where the requests of the employers fall strictly within guidelines specified by the Board and the Govt. It has since been decided that in all cases of requests for grant of instalment facility by establishments exempted or unexempted whose arrears do not exceed Rs. 1 lakh (in individual case) the Regional P. F. Commissioner shall grant the instalment facility subject to the fulfilment of the conditions specified by the Board and Govt. In all other cases the requests of the employers should be processed by the Regional Provident Fund Commissioner in the light of the existing guidelines and comprehensive proposals should be submitted to the Central Provident Fund Commissioner for his consideration. Even in the former

cases wherever the consideration of the request of the establishments involves any departure from the specified guidelines such cases should be referred to the Central Provident Fund Commissioner who will place that same before the GPC for appropriate decision.

3. As you are aware, the establishments seeking instalment facility subject to their fulfilling all the conditions, are to be allowed to clear the dues in not more than 36 monthly instalments. This does not however mean that 36 monthly instalment should be allowed invariably in every case. Depending upon the facts and circumstances of each case and upon the cash inflow, outflow of the establishment as also its capacity to pay, the number of instalments should be fixed at the reasonable minimum as it should be our endeavour to realize the arrears as quickly as possible.

. 4. In all cases where instalments are being granted by the Regional Provident Fund Commissioner or by the Central Provident Fund Commissioner or the GPC the payment position should be watched carefully through a register to be maintained by the Regional Office and a periodic report should be furnished to the Central Provident Fund Commissioner indicating the extent of compliance with the instalment scheme by the establishment and also of their compliance for the current period to enable the Central Provident Fund Commissioner to place the information before the GPC and the CBT in pursuance of the decision of the GPC. The delegation of the powers to the Regional Provident Fund Commissioner and the Central Provident Fund Commissioner for the grant of instalment facility as specified above has duly been approved by the Govt. of India vide their letter No. R-11013/53/ 84-PF II dated 19.01.85.

5. Kindly acknowledge receipt.

(This issues with the Central Provident Fund Commissioner's approval)

(Hindi version will follow)

Yours faithfully, Sd/- (S. P. Mohrotra) Dy. Central Provident Fund Commissioner

24. The circular No. P.Q. Cell/26(1)89 dated 29.5.90 issued by Regional Provident Fund Commissioner (HQRS) for Central Provident Fund Commissioner relates to grant of instalment facilities to the industrial companies adjudged as sick by the B.I.F.R. for payment of arrears of Employees' Provident Fund dues. This circular has no manner of application in the facts and circumstances of the present case because the company is not adjudged as sick by the B.I.F.R. Therefore, in the present writ proceeding the relevant circulars are Circular dated 8.2.83 and Circular dated 8.3.85.

25. The validity or legality of the aforesaid circulars dated 8.2.1983 and 8.3.1985 are not under challenge. The said two circulars laid down the "scheme of grant of instalment facility". This Court is of the view that having laid down the "scheme of grant of instalment facility", even though generous, the said scheme must be scrupulously observed "he that takes the procedural sword shall perish with that

sword". This principle has been accepted as applicable in India by Supreme Court in number of decisions.

26. It is evident that the "scheme of grant of instalment facility" was formulated to grant instalment facility to sick units for remittance of statutory dues in suitable number of instalments in respect of exempted and unexempted establishments. By the words "sick units" it was meant the units which are not financially stable or in good shape. It should be remembered that in the year 1983 or in the year 1985 when the aforesaid two circulars were issued SICA was not in existence. SICA received the assent of the President of India on 8th January, 1986. Therefore, the definition of "sick industrial company" in Section 3(o) of SICA has no manner of application in respect of the aforesaid two circulars. From the aforesaid two orders passed by A. C. it is evident that A. C. found "From a look at the-Balance Sheet of the company, annexed to the writ petition, it indeed appears that the company is in bad shape....." This finding of the A. C. clearly shows that the company was a "sick" one within the meaning of the aforesaid two circulars, dated 8.2.1983 and 8.3.1985. Under the circumstances this Court is of the view that the company is entitled to consideration for the benefit of the "scheme of grant of instalment facility" contained in the aforesaid two circulars dated 8.2.1983 and 8.3.1985. There is no dispute regarding the amount due from the company under the provisions of the P. F. Act and the Scheme. The point to be decided in the present writ proceeding is whether the company is entitled to have the benefit of "scheme of grant of instalment facility".

27. Circular dated 8.2.1983 laid down that the power to grant instalment facility to be exercised by (a) The Central Provident Fund Commissioner upto Rs. 50,000/-, (b) The Regional Committee between Rs. 50,000/- and Rs. 1 lakh, (c) The General Purposes Committee above Rs. 1 lakh. The circular dated 8.2.1983 directed all concerned authorities to give effect the instructions contained in the said letter uniformly in all cases. It was directed that any request received from the employers in sick and closed units for grant of instalment facility to clear the arrears may be processed in the light of the scheme of grant of instalment facility contained in the said circular and the proposals may be forwarded to the office of the Central Provident Fund Commissioner clearly indicating the position point-wise as stated in the said circular dated 8.2.1983 for consideration by the Central Provident Fund Commissioner/General Purposes Committee. It was further laid down by the aforesaid circular dated 8.2.1983 that the employers of sick and closed units may also be informed of all the conditions required to be complied with in clear terms wherever requests are received from the employers in this regard. From the circular dated 8.3.1985 it is evident that subsequent to the issue of the circular dated 8.2.1983 the "scheme of grant of instalment facility" was examined in detail and with a view to speeding up the cases for grant of instalment facility where the request of the employess fall strictly within the scheme specified by the Board and the Government, it had been decided that in all cases of requests for grant of instalment facility by establishments

exempted or unexempted whose arrears do not exceed Rs. 1 lakh (in individual case) the Regional Provident Fund Commissioner shall grant the instalment facility subject to the fulfilment of the conditions specified by the Board and the Government and in all other cases the requests of the employers should be processed by the Regional Provident Fund Commissioner in the light of the existing scheme and comprehensive proposals should be submitted to the Central Provident Fund Commissioner for his consideration. It was further laid down by the circular dated 8.3.1985 that even in the former cases wherever the consideration of the request of the establishments involves any departure from the specified scheme such cases should be referred to the Central Provident Fund Commissioner who will place the same before the General Purposes Committee for appropriate decision.

28. It is evident from the aforesaid two circulars dated 8.2.1983 and 8.3.1985 that A. C. is not the competent or appropriate authority regarding "scheme of grant of instalment facility". The A. C. who passed the aforesaid two orders was aware that he is not the competent authority which is evident from the following words "As far as payment is concerned, estt. may liquidate the same on approval of the competent authority in instalments subject to fulfilment of laid down conditions.....As has been stated hereunder before, an estt. may avail the facility of instalments provided it satisfies the laid down conditions and the competent authority approves the proposal". Being aware of the position that he is not the competent authority regarding grant of instalment facility as prayed for by the company the A. C. who passed the aforesaid two orders ought not to have made any observation and comment regarding entitlement of the company to avail itself of the "scheme of grant of instalment facility." A. C. who passed the aforesaid two orders made observations and comments beyond the scope of "or is not justified by the "scheme of grant of instalment facility" contained in the aforesaid circulars dated 8.2.1983 and 8.3.1985. That apart in the aforesaid two orders A. C. observed "However, there is no provision for liquidation of employees share of contribution in instalments as it is not at all dependent on the financial health of the estt." It is true that in the circular dated 5.10.1981 it was laid down as follows:

"The employer should pay in lump sum the employees" share of contributions in arrears". But the scheme contained in the circular dated 5.10.1981 was reconsidered and thereafter by circular dated 8.2.1983 it was clearly laid down "The employers" share of contributions as also the employees" share of contributions in arrears may be allowed to be paid in suitably monthly instalments not exceeding 36." Therefore, it is evident that A. C. while making observation and/or comment regarding prayer for instalment took into consideration the conditions laid down in the circular dated 5.10.1981 which was altered, liberalized or changed by circular dated 8.2.1983. It is also evident that the A. C. while making comments regarding prayer for instalments did not consider the "scheme of grant of instalment facility" contained in the circulars dated 8.2.1983 and 8.3.1985. The Barium Chemicals Ltd. and Another Vs. The

Company Law Board and Others, of the reported decision observed as follows:

"When a power is exercised for a purpose or with an intention beyond the scope of or is not justified by the instrument creating it, it would be a case of fraud on power, though no corrupt motive or bargain is imputed. In this sense, if it could be shown that an authority exercising power has taken into account, it may even be bona fide and with the best of intentions, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad. [See S. Pratap Singh Vs. The State of Punjab,]"

29. In Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, of the reported decision, Supreme Court, inter alia, observed as follows:

"Fraud on power voids the order if it is not exercised bona fide for the end design. There is a distinction between exercise of power in good faith and misuses in bad faith. The former arises when an authority misuses its power in breach of law, say, by taking into account bona fide, and with best of intentions, some extraneous matters or by ignoring relevant matters. That would render the impugned act or order ultra vires. It would be a case of fraud on powers."

30. In view of the discussions made hereinabove this Court is of the view that the observations and comments of A. C, contained in the aforesaid two orders regarding eligibility of the company for availing itself the facility of instalments to liquidate the Provident Fund arrears were illegal, bad and null and void. A. C. is not the competent authority to take any decision or to make any comment in respect of the prayer made by the company regarding grant of instalment facility to liquidate the Provident Fund arrears in instalments. Those observations and comments are null and void due to lack of inherent jurisdiction. However, the observations and comments of A. C. regarding grant of prayer of the company for grant of instalment facility to liquidate the Provident Fund arrears in instalments are cleanly severable from the determination made by him u/s 7A of the P. F. Act regarding the amount due from the company under the provisions of P. F. Act and the scheme. It often happens that a Tribunal or authority makes a proper order but adds some direction or condition or makes some observations and comments which are beyond its powers. It is now well-settled that if the bad can be cleanly severed from the good the Court will quash the bad part only and leave the good standing. Where an order is not divisible into component parts but is a single whole the Court may decline to sever the bad from the good. But there is no "blue pencil rule" requiring the bad part of the order to be identifiable in the order itself. These cases depend not upon rigid rules but upon the balance of advantage as perceived by the Court. An order should be quashed fully when such order could not be split into good and bad parts. Order passed which is partly within the power and partly in excess of it may be severed, so that it is valid to the extent that it falls within the competence and no further. But it may well be that if the excess is so entwined with the valid as to be separable from it

only with difficulty, then the whole of the requirement will be bad. The Court declines to perform feats of surgery in such cases. (Administrative Law, Eighth Edition by H. W.R. Wade and C. F. Forsyth, pages 294 and 295). Under the circumstances the observations and comments made by A. C. in the aforesaid two orders (which are under challenge in the present writ proceeding) so far the same relate to the prayer of the company regarding instalment facility to liquidate the Provident Fund arrears are quashed and set aside.

31. This Court directs the General Purposes Committee to consider and disposed of in accordance with law, as quickly as possible by a reasoned order the prayer of the company for grant of instalment facility to liquidate the Provident Fund arrears in accordance with the "scheme of grant of instalment facility" contained in the aforesaid Circulars dated 8.2.1983 and 8.3.1985. The respondents are restrained from taking any coercive action against the company so long the reasoned order of the General Purposes Committee disposing of the prayer of the company is not communicated to the company.

32. In these terms the writ application is disposed of. No order as to costs.

33. Urgent xerox certified copy, if applied for, should be made available to the parties forthwith.