

(2006) 10 MAD CK 0198

In the Madras High Court

Case No : Writ Petition No's. 33458 and 40442 of 2004

Kasthuri Mills (P) Ltd.

APPELLANT

Vs

Assistant Provident Fund Commissioner

RESPONDENT

Date of Decision : 19-10-2006

Acts Referred:

Constitution of India, 1950 — Article 14

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

Citation : (2007) 112 FLR 797 : (2007) 2 LLJ 956

Hon'ble Judges : P.R. Shivakumar, J;D. Murugesan, J

Bench : Division Bench

Advocate : M.S. Krishnan and Sarvabhauman Associates, for the Appellant; V. Vibhishanan, for the Respondent

Final Decision : Allowed

Judgement

D. Murugesan, J.—The petitioner has questioned the impugned order, claiming damages u/s 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The challenge to the impugned order is on the ground of violation of the very provision of Section 14-B.

Mr. Krishnan, learned Counsel appealing for the petitioner has submitted that though the impugned order was dated September 2, 2004, it was signed by the authority only on September 14, 2004 and thereafter only it was communicated to the petitioner. By the impugned order, the petitioner was given opportunity to appear before the authority, namely, the Assistant Commissioner, Provident Fund within a period of fifteen days to explain as to the circumstances under which the contributions were not made in time. Even before the expiry of the said period, determination was made on September 20, 2004. The order contravenes the Second. proviso to Section 14-B of the Act. The learned Counsel brought to our notice, the judgment of the Apex Court in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, . In particular, the learned Counsel drew our attention to para 13 of the said judgment in support of his submission.

He would also rely upon the judgment of the Division Bench of this Court in *The Regional Provident Fund Commissioner, Tamilnadu Vs. The South India Flour Mills (Pvt.) Ltd.*, .

2. The Provident Fund Authority is entitled and empowered to levy and recover damages for the delayed payment of contribution in terms of Section 14-B of the Act. However, considering the fact that nature of levy of damages is punitive and there were circumstances that could be explained to the satisfaction of the authority in not making contribution in time. The Legislature having intended for an opportunity of being heard before such damages are levied. This is obvious from the First proviso to Section 14-B which contemplates that provided before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard. The opportunity contemplated under the said provision cannot be construed to be one of formality and in our view, is not only a precondition but also mandatory. Failure to comply with the above condition would vitiate the very order passed u/s 14-B.

3. It has been held in *South India Floor Mills case (supra)*, by the Division Bench which reads as under *The Regional Provident Fund Commissioner, Tamilnadu Vs. The South India Flour Mills (Pvt.) Ltd.*, at p. 290:

11. The next question which arises is what is the obligation of the Provident Fund Commissioner when he determines damages. As already observed, the proviso to Section 14-B which was incorporated by Act 40 of 1973 clearly lays down that the employer has to be given a reasonable opportunity of being heard before the damages are levied and recovered. The proviso would emphasise the fact that the Provident Fund Commissioner is required first to determine, after hearing the defaulter, as to whether the defaulter is liable to pay any damages at all, and if he comes to the conclusion that the defaulter has given valid reasons acceptable to the Commissioner which explains the delay in depositing the contribution under the Scheme or the Act, then the further question of recovering any damages or determining the quantum of damages does not arise. However, if the Provident Fund Commissioner comes to the conclusion that the explanation for the delay in depositing the contribution is not acceptable and that there is liability to pay damages, then he will proceed to decide on the quantum of damages. Therefore, the hearing before the Provident Fund Commissioner in reply to the notice to show cause as to why damages should not be recovered from the defaulter is in respect of two matters, namely, first the liability to pay damages and secondly, the quantum of damages....

4. Infact, the Apex Court in *Organo Chemical case (supra)*, has held as follows *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, at p. 427:

35. The contention that Section 14-B confers unguided and uncontrolled discretion upon the Regional Provident Fund Commissioner to impose such damages" as he may think fit" is, therefore, violative of Article 14 of the

Constitution, cannot be accepted. Nor can it be accepted that there are no guidelines provided for fixing the quantum of damages. The power of the Regional Provident Fund Commissioner to impose damages u/s 14-B is a quasi-judicial function. It must be exercised after notice to the defaulter and after giving him a reasonable opportunity of being heard. The discretion to award damages could be exercised within the limits fixed by the statute. Having regard to the punitive nature of the power exercisable u/s 14-B and the consequences that ensue therefrom, an order u/s 14-B must be a "speaking order" containing the reasons in support of it. The guidelines are provided in the Act and its various provisions, particularly in the word "damages" the liability for which in Section 14-B on the "making of default". While fixing the amount of damages, the Regional Provident Fund Commissioner usually takes into; consideration, as he has done here, various factors, viz., the number of defaults, the period of delay, the frequency of defaults and the amounts involved....

5. The facts of the present case is illustrative one as on the one hand, the Assistant Provident Fund Commissioner had given an opportunity to the petitioner to appear before him for personal hearing within the period of 15 days, on the other hand, has passed the order determining the quantum of contribution even within the said period of fifteen days. The opportunity that was given in the impugned order, appears to have been given only for the purpose of record. Such practice cannot be accepted and it should be deprecated. As the impugned order was passed even without compliance of the provision of Section 14-B in relation to the failure to provide opportunity of personal hearing to the petitioner, we are of the view that the impugned order is liable to be set aside and accordingly, it is set aside. We are informed by the learned Counsel for the petitioner that infact, in one Region, similar orders are passed frequently in disregard to the provisions of Section 14-B. We take judicial, notice of the said fact and accordingly, direct the copy of the order along with suitable instructions should be communicated to all Regional Provident Fund Commissioner for compliance of the same in future. Accordingly, the writ petition is allowed. No costs. Consequently, W.P.M.P. No. 40442 of 2004 is closed.