

(2016) 05 OHC CK 0014

In the Orissa High Court

Case No : W.P.(C) No. 5107 of 2011 (In the matter of application under Articles 226 and 227 of the Constitution of India)

M/s Cuttack Electrical Division

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 18-05-2016

Acts Referred:

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

Citation : (2016) 2 CLR 788 : (2016) 150 FLR 321 : (2016) 150 FLR 170 :
(2016) LabLR 936 : (2016) 3 LLJ 479

Hon'ble Judges : S.N. Prasad, J.

Bench : Single Bench

Advocate : M/s B.K. Nayak and D.K. Mohanty, Advocates, for the Appellant; Mr. Sisir Sundar Mohanty, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

S.N. Prasad, J.—This writ petition is against the order dated 24.2.2010(Annexure-4) passed by the Presiding Officer, EPF Appellate Tribunal, New Delhi in A.T.A.No.49(10)2006.

2. According to the petitioner, the order dated 24.2.2010 has been challenged on the following grounds,-

(i) There is inordinate delay in passing order under Section 14-B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, however there is no period of limitation but the proceeding under section 14B of the Act, 1952 is to be initiated within a reasonable period.

(ii) The establishment Orissa State Electricity Board has been exempted from the purview of the Act, 1952 w.e.f. 1.4.1990 although the facts have been brought to the notice of the concerned authority while deciding the matter under sections 7A and 14B of the Act, 1952 but this aspect of the matter has not been taken into consideration.

3. While on the other hand learned counsel for the opposite party has submitted regarding first ground that it cannot be said that only on the ground of delay proceeding under section 14B of the Act, 1952 will be said to be vitiated ipso facto, rather petitioner has to show prejudice caused to him due to delay. He contends that since the petitioner is not aggrieved with the order passed under section 7A of the Act, 1952 rather he has paid the amount under section 7A of the Act which means that he has admitted his fault in not depositing the statutory amount in time and as such proceeding under section 14B of the Act, 1952 has been initiated and accordingly the liability has been casted upon the petitioner to deposit the said amount under section 14B of the Act.

It has been contended that if on the ground of delay if a proceeding is initiated by the authority under section 14B of the Act, 1952 would be quashed, then scope of purpose for which Section 14B has been inserted in the Act, 1952 will become redundant for the reason that Section 14B has been inserted in the Act in order to put deterrent and also damage upon the erring establishment so that they may not do in future for whose benefit of the section has been promulgated.

4. Second contention regarding the order having been passed without any jurisdiction so far it relates to 1.4.1990, learned counsel for the petitioner has fairly submitted that the petitioner may be permitted to approach the authority and if any amount the petitioner is found to be entitled to get, the authority will take decision in accordance with law and same shall be disbursed in favour of the petitioner along with admissible interest.

5. Heard learned counsel for the parties and perused the documents on record.

6. So far as first ground taken by the petitioner in assailing the order under section 14B of the Act, 1952 is concerned, it is relevant here to quo the relevant provision of section 14B of the Act, 1952.

"14.B. Power to recover damages.- 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 of 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 under Section 17, the Central Provident Fund Commissioner or such other 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."

7. Vires of section 14B of the Act, 1952 has been challenged before the Hon'ble Supreme Court in the case of Organo Chemical Industries & Anr v. Union of India & Ors reported in (1979) 4 SCC 573 wherein their Lordships after king into consideration intent of the legislation has been pleased to hold that in assessing damages, the Regional Provident Fund Commissioner 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. In this regard reference may be made to paragraph-43 of the said judgment which is being quoted herein below:

"I am clearly of the view that "damages", as imposed by Section 14-B, includes a punitive sum quantified according to the circumstances of the case. In "exemplary damages" this aggravating element is prominent. Constitutionally speaking, such a penal levy included in damages is perfectly within the area of implied powers and the legislature may, while enforcing collections, legitimately and reasonably provide for recovery of additional sums in the shape of penalty so as to see that avoidance is obviated. Such a penal levy can take the form of damages because the reparation for the injury suffered by the default is more than the narrow computation of interest on the contribution."

8. From the facts of this case it is evident that the petitioner has not challenged the order passed under Section 7A of the Act, 1952 rather he has paid contribution which itself goes to suggest that the petitioner has defaulted in making payment in time as per the provision made in the statute and as such proceeding under section 14B of the Act, 1952 has been initiated, now the same is being questioned by the petitioner that on account of delay in initiation of the proceeding, same is fit to be vitiated merely on the ground of delay. As to whether proceeding under section 14B of the Act, 1952 is to be vitiated or not on the ground of delay, the same has been answered by the Hon'ble Supreme Court in the case of *Hindustan Times Ltd. v. Union of India and others* reported in (1998)2 SCC 242 wherein their Lordships has been pleased to hold that merely on the ground of delay cannot be by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under Section 14B would be take; merely delay initiating action under Section 14B cannot amount to prejudice inasmuch as the delay on the part of the Department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest. In this regard, relevant paragraph of the said judgment needs to be referred to herein below:

"29. From the aforesaid decisions, the following principles can be summarized: The authority under section 14-B has to apply his mind to the facts of the case and the reply to the show cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under section 14-B. The fact that proceedings are initiated or demand for damages is made after several

years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under section 14-B would be taken; mere delay in initiating action under section 14B cannot amount to prejudice inasmuch as the delay on the part of the Department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under section 14-B, he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an "irretrievable" nature; he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to "irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defence in the reply to the show cause notice and must satisfy the authority concerned with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect."

9. From the entire pleadings nowhere has been mentioned by the petitioner that the petitioner has been prejudiced due to delay in initiation of the proceeding under Section 14B of the Act, 1952 since nothing has been stated in the writ petition by the petitioner that in between the period of date of initiation of proceeding under section 14B he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an irretrievable nature, hence in absence of such pleading in the writ petition, mere on the ground of delay the proceeding under section 14B of the Act, 1952 cannot be said to be vitiated relying upon the proposition laid down in the case of *Hindustan Times Ltd. v. Union of India and others* (supra). Hence, the ground raised by the petitioner is not fit to be accepted, accordingly the same is rejected.

10. So far as second ground is concerned, it is evident from the order passed by the authority dated 28.1.1997 as contained in letter no. 1107 the petitioner-establishment has been exempted from the purview of Section 14B of the Act, 1952 with effect from 1.4.1990. It transpires that the period of damages is from 1983-84 to 1990-91. It further transpires from the impugned order that the petitioner has paid damages up to month of February, 1991 and as such in view of the exemption order having been passed by the competent authority of the State Government dated 18.1.1997 (Annexure-1), the petitioner is entitled for refund. This contention has not been disputed by learned counsel for the opposite party.

11. Hence, in view of the fact that the petitioner-establishment has been exempted from the purview of the Act, 1952 as would be evident from the letter no. 1107 dated 28.1.1997 and since as per the petitioner amount has been

deposited up to the period of Month of February,1991, as such petitioner is directed to approach the opposite party in this regard by raising all points along with supporting documents within two weeks from the date of receipt of copy of this order.

12. If representation will be filed before the competent authority, he will examine the matter and take decision in accordance with law within four weeks from the date of receipt of the representation.

13. Needless to say if the petitioner is found to be entitled for refund, consequential monetary benefit along with admissible interest shall be refunded back in favour of the petitioner within three weeks from the date of such decision.

14. If, however, the authority will dispute the claim on any ground whatsoever, he will pass reasoned order in this regard within the aforesaid period.

15. Accordingly, the writ petition is accordingly disposed of.