

(2011) 07 MAD CK 0350

In the Madras High Court

Case No : Writ Petition No. 16150 of 2011 and M.P. No's. 1 and 2 of 2011

M/s. Damien Foundation India Trust

APPELLANT

Vs

Presiding Officer Employee's Provident Fund Appellate
Tribunal and Assistant P.F. Commissioner

RESPONDENT

Date of Decision : 25-07-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 10F,
14B, 17(2A), 20, 7(2)

Citation : (2011) 131 FLR 481 : (2012) 2 LLJ 217 : (2011) LLR 1156

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : Narmada Sampath, for the Appellant; K. Gunasekaran, for R2, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—The Petitioner Trust has filed the present writ petition, challenging an order passed by the Employees' Provident Fund Appellate Tribunal made in ATA No. 680(13)2008 dated 28.01.2011. The Tribunal heard the appeal filed by the Petitioner Trust at its camp sitting at Coimbatore and dismissed the appeal. Challenging the same, the writ petition came to be filed.

2. When the matter came up on 07.07.2011, this Court directed notice to be issued to the learned Standing Counsel for the second Respondent. Accordingly, Mr. K. Gunasekaran, learned Standing Counsel for the PF Department appears. He had also filed a counter affidavit dated 20.07.2011.

3. Heard the arguments of Ms. Narmadha Sampath, learned Counsel for the Petitioner and Mr. K. Gunasekaran, learned Standing Counsel for the second Respondent PF Department.

4. It is the stand of the Petitioner that the Trust was earlier exempted u/s 17(2-A) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952

(for short PF Act) for the period from 01.04.1990 to 31.03.1993. Subsequently, during the year 1994, the Trust had appointed staff on contract system and dispensed with the Provident Fund (for short PF) recovery with effect from 01.01.1994. The Trust had also sent a letter dated 02.06.1994 to the Department expressing their intention to close the account and settle the amount in respect of seven employees in whose case the PF amounts were deducted until then. It was also informed that the staff had opted to join the contract system to which the PF Act will not apply and they are voluntarily withdrawing the contribution towards PF. Subsequent to this, all the staffs employed directly by the Trust had got back their PF holdings.

4.a) Despite there being no employees having PF contribution, the Department was sending notices from time to time demanding PF contribution. The last such notice sent by the authorities was dated 09.09.1998. The Petitioner Trust sent a reply dated 11.11.1998. It was stated that the Petitioner Trust convened a meeting on 27.10.2001, wherein it had decided to cover the staff working in Chennai and Ranchi offices under the PF Scheme and to recover 12% on Basic plus DA towards PF. When this decision was informed to the PF authorities, it was informed by them that the action of the Trust that there was a change in the policy since April 1994 was not in order and fresh coverage ignoring the earlier one was not possible. Thereafter, the Petitioner Trust under the understanding that their proposal was accepted remitted a sum of Rs. 23,66,593/- to the PF Department towards arrears for the period from April 1994 to December 2003 and accordingly filed the returns. Even thereafter the Trust is continuing to file returns on time. They were also receiving the annual account slips up to the year 2007-2008 from the Respondent and they are yet to receive the slips for the year 2008-2009 and 2009-2010. It was informed that due to computerisation, there was a delay.

4.b. In the mean while, the Petitioner Trust received a Show Cause Notice dated 09.07.2008 from the second Respondent asking the Petitioner to remit a sum of Rs. 17,55,569/- towards penal damages and Rs. 6,71,635/- towards interest for the delayed payment of dues for the year 1994-1995 to 2004-2005. The Trust officials met the second Respondent on 23.07.2008 and explained their position. During the meeting, the second Respondent informed that he had no power to cancel the order and also informed that the Petitioner will have to approach either the Appellate Tribunal at Delhi or the Central Board of Trustees, Delhi. The second Respondent had also issued proceedings dated 28.07.2008 demanding damages in terms of Section 14-B and interest u/s 7-Q of the PF Act. The damages worked out to Rs. 17,55,569/- and the interest worked out to Rs. 6,71,635/-.

4.c. Aggrieved by the levy of damages and interest, the Petitioner Trust preferred an appeal to the first Respondent Tribunal u/s 7-I of the PF Act. In the memo of appeal grounds, the Petitioner had stated that the Trust is a non-profitable organisation. Most of its employees were doing voluntary work on contract basis.

They themselves had discontinued the coverage under the PF Act and that the impugned order came to be passed after a period of 14 years without considering their genuine hardship and difficulties. Along with the memo of appeal, they had also enclosed copy of the Trust Deed dated 04.12.1992 as Annexure B.

5. The Tribunal took up the appeal as ATA No. 680(13)2008 and after due notice to the second Respondent heard the appeal in its Camp Sitting at Coimbatore. The appeal was rejected on the following grounds:

- a. The applicability of the Act was not in dispute.
- b. The term "Employee" includes an employee employed through a Contractor.
- c. The dominant feature of the definition was that the person engaged by the contractor in connection with the work of the establishment are also employees of the Petitioner Trust.
- d. Since the coverage u/s 7A of the Act was not in dispute, no further challenge can be made u/s 14-B of the Act. For this purpose, the Tribunal placed reliance upon the judgment of the Supreme Court in *Amarjit Singh v. Devi Rattanam* reported in 2010 1 SCC L&S 1108, wherein, it was held that challenging the consequential order without challenge to the basic order is not permissible. As no exemption under the Act was given, the Petitioner cannot seek any exemption under the Act.

6. After the dismissal of the appeal by an order dated 28.01.2011, the second Respondent sent a notice in terms of Section 8-F of the PF Act. Under the circumstances, the Petitioner had approached this Court.

7. Ms. Narmadha Sampath, learned Counsel for the Petitioner Trust contended that the persons who are under contract of employment cannot be said to be an employee for the purpose of the PF Act. Therefore, the Respondents were wrong in covering them under the Act. When the Trust voluntarily decided to cover the employees in view of the changed policy and had also paid arrears in respect of their contribution, it would not be open to the Respondent to demand damages and also interest on the alleged delayed payment. The delay is neither willful nor wanton. The Petitioner Trust being a charitable organisation should not be mulcted with such heavy payments. She had also produced the Activity Report 2010 published by the Trust to show their nature of activities. She had also submitted that merely because they have not challenged the coverage and the subsequent payment, that does not preclude them from challenging the coverage when there is challenge made regarding levy of damages and interest u/s 14-B and Section 7-Q of the PF Act. Without prejudice to the said submission, she had submitted that since u/s 7-I of the PF Act, an appeal is maintainable against the order passed under Section 14-B, the Tribunal ought to have considered their appeal and should have given waiver of damages and interest.

8. In the counter affidavit filed by the second Respondent, it was stated that the Act provides an obligation on the part of the employer to deposit the contributions

payable for this month before the 15th of the next month. The Petitioner Trust came voluntarily for a coverage u/s 1(4) of the PF Act and having got themselves covered and if there is any delayed payment, certainly, damages and interest for the delayed payment can be levied. u/s 14B r/w Section 7-Q of the PF Act, it is also mandatory on the part of the Respondent to levy damages in case of delayed payment.

9. Before proceeding to deal with the merits of the rival contentions, it is necessary to look into the activities of the Petitioner Trust which may have some bearing on the relief to be granted. The printed booklet containing the Activity Report 2010 (January-December) in its introductory remarks, reads as follows:

Introduction

Damien Foundation India Trust (DFIT) is a Charitable Non-Governmental Organisation involved in Leprosy and TB control activities in India supported by Damien Foundation Belgium. It offers Leprosy and TB related services either directly through its own projects or through local NGO projects. It is also involved in strengthening Leprosy and TB Control Programmes of the Government through various support activities like capacity building. The organisation started its chapter of leprosy control activities in a village in South India in 1955, TB control in 1996 and now covers a population of 112,159,849 in 8 states. The main character of Damien Foundation is the quality of services, which are delivered in close partnership with the community and the Government.

Damien Foundation India Trust supports 13 local Non Governmental Organisations (NGO) including 3 owned by DFIT for providing patient care in the hospital and field in defined populations in 7 states. Total population covered is 3,243,532. In addition, there are 38 District Consultancy Teams each consisting of a field team of experienced medical and non-medical personnel providing support to TB control done by the Government health system. Total population covered by such teams is 108916317. A total of 386 staff provide patient care services (Leprosy and Tuberculosis).

10. Thus, it is seen that the Trust is involved in the eradication of Leprosy and Tuberculosis and they are working in Tribal areas bordering Tamil Nadu and Kerala. These facts were very much within the knowledge of the second Respondent. When the appeal was filed before the first Respondent, in the Annexure B, a copy of the Trust Deed was also enclosed and the Tribunal had failed to look into the activities of the Petitioner Trust before deciding the levy of damages. Certainly, the levy of damages by the Respondent cannot be same in respect of Non Profitable Organisations and that of Commercial Organisations, which run on wholly profit motive.

11. With reference to the contention raised by Ms. Naramadha Sampath, learned Counsel for the Petitioner Trust that the persons engaged by them work on contract cannot be accepted in the light of the decision taken by the Trust to

cover the employees once again and had also paid the arrears of dues for the period from April 1994 to December 2003. Therefore, the Tribunal was right in stating that if there is a voluntary coverage and there is no dispute about such coverage, the said question cannot be re-agitated in a challenge made towards the recovery of damages and interest. This leaves out the second question viz, whether the second Respondent was justified in levying damages and interest. As can be seen from the provisions of Section 7-I of the PF Act, an appeal is also available against the levy of damages under Section 14-B. Therefore, when the Petitioner Trust had filed an appeal against the demand of damages, it is incumbent upon the Tribunal to have considered that issue. A perusal of the order impugned in the writ petition does not show that there was any application of mind on the part of the Tribunal on the said issue raised by the Petitioner Trust. In fact, in the grounds of appeal, the Petitioner Trust had stated that the Trust was a non-profit charitable organisation and they have voluntarily covered their employees in the Trust under the PF Act and they have never given room for any complaint whatsoever in the past and the levy of damages and interest was an erroneous act on the part of the second Respondent.

12. With reference to nature of power vested u/s 14-B of the Act for levy of damages and the scope for levying such damages came to be considered elaborately in the judgment of the Supreme Court in *M/s. Hindustan Times Limited Vs. Union of India and Others*, . In paragraphs 15 and 17, the Supreme Court observed as follows:

15. In *Commr. of Coal Mines Provident Fund v. J.P. Lalla & Sons*³, interpreting Section 10-F of the Coal Mines Provident Fund and Bonus Scheme Act, 1948, it was stated by this Court that by the use of the words "may levy damages", in case of default in payment of contribution, and the words "as it may think fit to impose", it was clear that the determination was not based on the inflexible application of a rigid formula and that by these words, the authorities were to apply their mind to the facts and circumstances of the case. As a duty was judicially imposed on the authority, principles of natural justice were implied. In *Organo Chemical Industries v. Union of India*⁴ where the vires of the Act were upheld, this Court laid down that while passing orders u/s 14-B, the authority was acting in a "quasi-judicial" capacity and was bound to give reasons for its orders. The levy was not necessarily proportionate to the loss incurred by the employee inasmuch as it was partly compensatory and partly penal.

17. As to the manner in which the authority concerned could arrive at the "damages", A.P. Sen, J. stated that the authority usually takes into consideration, - as was done in that case - the number of defaults, the period of delay, the frequency of defaults and the amounts involved. The damages were to be compensatory and penal as well and hence principles of estimation of damages under the law of contract or torts, were not applicable.

13. The Supreme Court ruled out that if there was any long delay in making the claim by the Department also cannot come to the rescue of the employer and

there cannot be any limitation in such circumstances. In the very same judgment, in paragraphs 22, 24 and 25 these issues have also been dealt with:

22. The reason is that while in the above cases decided by this Court the exercise of powers by the authority at a very belated stage was likely to result in the deprivation of property which rightly and lawfully belonged to the person concerned, the position u/s 14-B of the Act of an employer is totally different. The employer who has defaulted in making over the contributions to the Trust Fund had, on the other hand, the use of monies which did not belong to him at all. Such a situation cannot be compared to the above line of cases which involve prolonged suspense in regard to deprivation of property. In fact, in cases u/s 14-B if the Regional Provident Fund Commissioner had made computations earlier and sent a demand immediately after the amounts fell due, the defaulter would not have been able to use these monies for his own purposes or for his business. In our opinion, it does not lie in the mouth of such a person to say that by reason of delay in the exercise of powers u/s 14-B, he has suffered loss. On the other hand, the defaulter has obviously had the benefit of the "boon of delay" which "is so dear to debtors", as pointed out by the Privy Council in *Nagendranath De v. Sureshchandra De*¹⁰. In that case, it was observed that equitable considerations were out of place in matters of limitation and the strict grammatical construction alone was the guide. Sir Dinshaw Mull stated:

Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined there is nothing to prevent his paying what he owes into court.

(emphasis supplied)

The position of the employer in case of default u/s 14-B is no different.

24. We shall now refer to the judgments of some of the High Courts to cull out some broad guidelines. The Orissa High Court in *Orissa Forest Development Corpn. Ltd. v. R.P.F. Commr.*¹³ and a Single Judge of the Punjab & Haryana High Court in *Amin Chand & Sons v. State of Punjab*¹⁴ have held like the Single Judge of the Bombay High Court in *K.T. Rolling Mills* case¹¹, that if there was undue delay in initiating action under Section 14-B which the Court thought was unreasonable, on that sole ground the demand could be struck down. With great respect, this view is, as already stated, clearly wrong. The judgment of this Court in *K.T. Rolling Mills* case¹² having been reversed by this Court, the above view is no longer good law. In fact, the Punjab judgment was rightly reversed in appeal in *State of Punjab v. Amin Chand & Sons*¹⁵. The view taken by the learned Single Judge of the Punjab & Haryana High Court in 1965 has also been rightly dissented by the Delhi High Court in *Birla Cotton Spg. & Wvg. Mills Ltd. v. Union of India*¹⁶; by the Gujarat High Court in *Gandhidham* case¹⁷; the Patna High Court in *Inter State Transport Agency v. R.P.F. Commr.*¹⁸ and the Allahabad High Court in *Northern India Press Works v. R.P.F. Commr.*¹⁹

25. The Gujarat High Court in *Gandhidham Spg. & Mfg. Co. Ltd. v. R.P.F.*

Commr.¹⁷ (to which one of us Majmudar, J. was a party), laid down a principle that "prejudice" on account of delay could arise if it was proved that it was "irretrievable". There it was observed that for purposes of Section 14-B, there is no period of limitation prescribed and that for any negligence on the part of the Department in taking proceedings the employees, who are third parties, cannot suffer. It was further observed:

The only question that would really survive is the one whether on the facts and circumstances of a given case, the show-cause notice issued after lapse of time can be said to be issued beyond reasonable time. The test whether lapse of time is reasonable or not will depend upon the further fact whether the employer in the meantime has changed his position to his detriment and is likely to be irretrievably prejudiced by the belated issuance of such a show-cause notice."

(emphasis supplied)

It was also stated that such a defence of irretrievable prejudice on account of delay, was to be pleaded and proved in the reply to the show-cause notice. We may add that if such a plea is rejected by the Department, it cannot be raised in the High Court unless specifically pleaded. The above principle of prejudice laid down by the Gujarat High Court in *Gandhidham Spg. & Mfg. Co. Ltd.*¹⁷ (Guj) has been followed by the Bombay High Court in *Saoner Taluka Ginning, Pressing and Dal Mill Prakriya v. R.P.F. Commr.*²⁰; *Super Processors v. Union of India*²¹.

14. The Supreme Court also held that if an employer wants relief, necessary pleadings must be raised before the Department and must be strictly proved as found in paragraph 26 of the same judgment, which is as follows:

26. A different aspect of prejudice was referred to in *Sushma Fabrics (P) Ltd. v. Union of India*²² by a learned Single Judge of the Bombay High Court. It was stated that in some cases there could be serious prejudice on account of abnormal delay in taking proceedings u/s 14-B, either because the records or accounts of the defaulter are lost or on account of the personnel concerned acquainted with the facts of a bygone period no longer being available for unearthing the facts. But such pleas must be raised before the Department and strictly proved. In cases such facts are proved it is possible in some cases that there is irretrievable prejudice.

15. The judgment in *Hindustan Times*'s case (cited supra) came to be quoted with approval in the subsequent judgment in *M/s. K. Streetlite Electric Corporation Vs. Regional Provident Fund Commissioner, Haryana*, In paragraph 4, the Supreme Court observed as follows:

4..... The High Court adverted to the decision of this Court in *Hindustan Times Ltd. v. Union of India*¹ to reach this conclusion. In that case, this Court examined the scheme of the provisions of the Act in relation to delay in passing of the order. It was stated that the mere fact that the 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 u/s 14-B would be taken and mere delay in initiating such action cannot amount to prejudice inasmuch as such delay would result in allowing the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest on such amount. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action u/s 14-B he has altered his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an irretrievable nature, and such prejudice can also be established by stating reason of non-availability of records of the personnel by which evidence it could be established that there was some basis for delay in making the payments. Therefore, this Court was of the opinion that such delay, by itself, would not result in any prejudice. In the present case, the High Court found that no such prejudice was either pleaded or proved. Hence the first contention stands rejected.

16. At the same time, in the *Streetlite Electric Case* (cited *supra*), the Supreme Court also interfered with an order passed by the PF Authorities mechanically by levying damages u/s 14B of the Act based upon a Central Government's circular. While setting aside the order passed by the authorities, the Supreme Court did not remit the matter for fresh consideration. On the other hand, on an overall consideration, the Court itself reduced the damages to 25% of the amounts claimed. In paragraph 5, the Supreme Court held as follows:

5. The second contention need not be examined in the view we propose to take in the matter. Even if we hold that the Central Government instructions issued under Section 20 of the Act are not binding on the Respondent, still in assessing the damages it will be necessary for us to take note of the manner in which the amounts of damages have been levied and appropriately consider as to what would be the correct rate of damages to be imposed u/s 14-B of the Act. The statement of calculation prepared by the Respondent regarding delay in payments discloses that the Respondent has imposed damages at different rates, for example, for the month of July 1976 the rate of damages is 50% whereas the period of default is over a month, while in case of December 1976 the damages imposed upon the Appellant are at the rate of 20% though the period of delay is over two months, in the case of delay for April 1988 damages imposed are at the rate of 30% though the period of delay is only one month. In certain cases, even for a delay of below 15 days, like October 1977, damages at the rate of 85% have been imposed, while for another period though the delay is for six months 65% damages have been levied. Therefore, it is not possible to discern the rationale adopted by the Respondent in the matter of imposition of penalty. In the circumstances, therefore, it would have been appropriate for us to set aside the order and remit the matter to the Respondent, but we do not think that such an exercise is necessary after such a long period. In this case, the amount due towards provident fund has already been deposited and this Court, by order dated 18-12-1998, granted an interim relief to the extent of 75% of the amount of

damages sought to be recovered, while out of the disputed amount of damages (that is, Rs.88,731.25) 25% had already been directed to be deposited. In that view of the matter, we think, it is appropriate to confine the damages leviable in this case on an overall consideration to the extent of 25% of the total damages imposed.

17. In this context, it is necessary to refer to the second proviso to Section 14B of the PF Act wherein, the Central Board was given power to reduce or waive the damages levied u/s 14B of the PF Act if it is a sick industrial company and in respect of which a scheme for rehabilitation was sanctioned by the BIFR. The parliament did not stop with giving power only to Central PF Board alone in dealing with the question of damages. By the amendment introduced by the Central Act 33/1988 also clothed the power on the EPF Tribunal to entertain appeals against the order levying damages u/s 14B of the Act. The Tribunal was not only given an appellate power but also u/s 7(2), it was also entrusted with the same power which are vested with the officers u/s 7A of the PF Act. Further, under Section 7L(1) of the PF Act, the Tribunal has also been given power either to determine, modify or annul the order appealed against. It can also refer the case back to the authority which passed the order for fresh adjudication.

18. If it is seen in this context, it must be held that the Tribunal has the power to go into all aspects of an appeal including the power to modify the orders passed by the authorities in levying damages. The question in this writ petition is whether the Tribunal had discharged its duty vested u/s 7-I of the PF Act?

19. In the present case, the Respondents have not stated any particular reason for levying damages at the maximum rate. On the other hand, they did not even take into account the nature of activities done by the Petitioner institution, especially the fact that they were working for the eradication of leprosy in India and taking care of the health of such patients and running the institution with public donations.

20. Once there is power vested with the Tribunal to grant relief and the Tribunal does not even address the issue even though, it was specifically raised before it, then the order of the Tribunal certainly calls for interference by this Court. The decision relied on by the Tribunal has no relevance to the case on hand. The Tribunal failed to note that there were two issues before it; one relating to the coverage and the second relating to the levy of damages and interest. Therefore, the question of any interim order getting merged with the final order as found in the decision cited in Amarjit Singh's case (cited supra) has no relevance to the facts on hand.

21. Though the second Respondent had taken a stand that he had no power to grant waiver of damages and interest and the parties must either approach the Tribunal or Central Board of Trustees, the first Respondent being an Appellate Authority, empowered to entertain the appeal u/s 7-I even against the order

passed u/s 14-B had not applied its mind and rendered proper findings on the levy of damages and interest.

22. As to the scope of levy of damages and interest came to be considered by the Supreme Court in its decision in *Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another*, . In paragraphs 25 and 26, it was held as follows:

25. The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with no discretion. The legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinarily, even such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance with the principles of natural justice is necessary thereunder.

26. Existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.

23. Further, as noted in the *Hindustan Times*'s case (cited supra), the second Respondent, though being a quasi-judicial authority failed to consider that the levy of damages and interest was not necessarily proportionate to the loss incurred by the employees.

24. In view of the above, the writ petition stands allowed. The order of the Tribunal, dated 28.01.2011 dismissing the appeal filed against the order passed by the second Respondent levying damages and interest against the Petitioner Trust is set aside. Since the second Respondent recovered the amount in terms of Section 8-F of the PF Act, the second Respondent is hereby directed to refund the amount of Rs. 24,27,204/- to the Petitioner Trust within a period of four weeks. The order of attachment made in respect of the Petitioner Trust u/s 8-F of the PF Act dated 04.03.2011 will also stand raised. However, there will be no order as to costs. Consequently, connected miscellaneous petitions are closed.