

(2020) 12 OHC CK 0021

In the Orissa High Court

Case No : Writ Petition (Civil) No. 4105 Of 2010

M/S. Express Publications (Madurai) Ltd., Janpath,
Bhubaneswar, Represented Through Its Manager, Mr.S.N. Jha

APPELLANT

Vs

Regional Provident Fund Commissioner-II, Orissa,
Bhubaneswar And Another

RESPONDENT

Date of Decision : 15-12-2020

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Employees' Provident Funds & Miscellaneous Provisions Act, 1952 — Section 7Q, 14B,
15(2), 17, 17(5)

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2020) 12 OHC CK 0021

Hon'ble Judges : Biswanath Rath, J

Bench : Single Bench

Advocate : R.K. Mohanty, B.K.Nayak, D.K. Mohanty, S. Mohanty, P. Jena, S.K.
Mohanty, S. Mohanty, Bimbisar Dash, C. Mahanta

Final Decision : Allowed

Judgement

Biswanath Rath, J.

1. The writ petition involves a challenge to the order of the Appellate Authority involving Appeal under the provision of Employees' Provident

Funds and Miscellaneous Provisions Act, 1952 (in short 'the Act') vide Annexure-1 and the order at Annexure-2 being passed by the Original

Authority involving a dispute U/ss. 7-Q as well as 14-B of the E.P.F. and M.P. Act.

2. The short background involving the case is that petitioner being a covered establishment under the E.P.F. and M.P. Act, vide Code No.OR/5204

was going on paying the provident fund dues involving its employees. On the premises of sustaining financial losses during the period from 1997 till

2005, it is submitted that though petitioner made the P.F. contributions of their employees, but the contributions were made by petitioner's

company belatedly. For delayed payment of P.F. contribution there arose initiation of the proceeding U/ss.7-Q and 14-B of the Act for realization of

interest as well as damage on account of delayed payment. It is in the process, notice was issued on 27.06.2005 by the P.F. Authority indicating its

proposal to impose damage. Period involved therein was 5/97 to 2/01, 4/01, 7/01 to 2/02, 9/02 to 12/04. The notice was providing 15 days time to file

show-cause, the proceeding OR/PD/5204 being P.D. Case No.132/2005-06 was next posted to 07.07.2005. Petitioner appearing therein submitted that

delay in P.F. contribution occurred due to serious financial difficulty faced by the petitioner for over a long period. It is based on the objection of the

petitioner, the P.D. proceeding No.132 of 2005-2006 was closed on imposition of damages for the delayed remittance of P.F. dues for the period

involved therein on imposition of a sum of Rs.5,44,709/- as 14-B dues and a sum of Rs.1,13,038/-towards 7-Q as clearly borne out from Annexure-2.

Being aggrieved by the order dated 18.07.2002 vide Annexure-2, petitioner preferred appeal before the EPF Appellate Tribunal. The appeal being

numbered as 748/10 of 2005, the same was finally dismissed on contest by the order of the Appellate Tribunal on 21.01.2010 vide Annexure-1

resulting filing of the present writ petition.

3. Mr.Mohanty, learned Senior Advocate for the petitioner taking this Court to the plea of the party in the original proceeding contended that petitioner

company was facing financial hardship over a long period and the delay was attributable due to unavoidable circumstance and such action was neither

intentional nor deliberate. Further the branches of petitioner establishment in other part of the country also for some reasons suffering during the above

period. It is in this view of the matter, Sri Mohanty, learned Senior Advocate requested this Court for interfering in both the order under Annexure-2

and Annexure-1 and passing appropriate order.

4. Mr. Bimbisar Dash, learned counsel appearing for the Provident Fund Authority however taking this Court to the plea of the petitioner in the original

proceeding contended that there is no proper demonstration of reasons in landing in delay deposit except the petitioner has a mere statement that the

delay is attributable to uncontrolled situation. Mr.Dash thus claimed that in

absence of establishing such a situation in order to help its case both the Original Authority as well as the Appellant Authority have not committed any illegality and as such, both of them are justified in passing the impugned orders. It is in this view of the matter, Mr. Dash, learned counsel appearing for the EPF Authority submitted that there is no impropriety or illegality in the orders involved herein requiring interference of this Court.

5. Considering the rival contentions of the parties, this Court finds the dispute involved collection of interest for delayed deposit of P.F. dues by the employer applying the provision at 7-Q of the Act, 1952 and also recovery of damage on account of delay deposit applying the provision at Section 14-B of the Act, 1952. It is keeping in view the above two provisions, this Court first proceeds to consider the reason assigned by the employer, in the process from the impugned order at Annexure-2 this Court finds the Regional Provident Fund Authority has recorded the submission of the establishment that while admitting the delay deposit through details of deposit particulars, the establishment took the reason for delay attributable to unavoidable circumstance and which action was not intentional and deliberate which claim appears to have been rejected by the Original Authority. It is next going through the Memorandum of Appeal filed by the petitioner at Annexure-5, it appears the petitioner took the following grounds in appeal:

â??Grounds of Appeal

A. Annexure-A2 order of the respondent imposing damages of Rs.5,44,709/- is illegal, arbitrary and liable to be set aside.

B. The reasons stated by the respondent in Annexure-A2 order for imposing damages are unsustainable in law. The respondent has not considered the contentions

raised by the appellant in the correct perspective. The findings of the respondent are influenced by irrelevant considerations.

C. The respondent has no case that the appellant is a habitual defaulter in payment of the P.F. contributions. There is also no proof to show that there is intentional

default in payment of the P.F. contributions from the side of the appellant. Due to financial strains the appellant could not even pay the salary of the employees on time. The financial strain faced by the appellant was not for a short period. On the other hand the appellant was facing heavy financial strain for years and was

consistently incurring heavy loss. The accumulated loss of the appellant for the year ending 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003 and

2003-2004 are Rs.39,42,65,975/-, Rs.42,22,34,372/-, Rs.41,48,90,034/-, Rs.23,77,04,663/-, Rs.38,42,52,683/-, Rs.40,75,91,542/-and Rs.42,93,76,433/- respectively. The

appellant could not pay the contributions in respect of the above referred period on time due to the heavy financial strain and difficulties. Under the above

circumstance, the respondent should not have imposed damages on the appellant.

D. The finding of the respondent that since there were delay in depositing the contributions within the prescribed time limit, damages has to be imposed is

unsustainable in law. The above finding of the respondent is against the provisions contained in Section 14-B of the P.F. Act. The word used in Section 14-B of the

P.F. Act is "may recover" from the employer such damages, and the word used is not "shall recover". This itself shows that the authority under Section 14-

B of the P.F. Act has the jurisdiction to consider the facts and circumstances of each case and to take a decision whether damages should be imposed or not and if

damages to be imposed at what percentage etc. It is submitted that jurisdiction under Section 14-B of the PF Act is quasi judicial in nature and it is also discretionary.

It is submitted that the respondent has not considered the issue in the correct perspective and failed to exercise the jurisdiction properly and in accordance with law.

E. The stand taken by the respondent that once there is a delay in payment of PF contribution, then the employer is liable for damages mandatorily is perverse and

unsustainable. The damages provided under section 14-B of the PF Act is by way of penalty. It is a penal action. Hence it is necessary to consider the facts and

circumstances under which the employer could not pay the PF contributions in time. The respondent is liable to consider whether the default in payment of

contribution was intentional and there was wilful laches from the part of the employer and whether the appellant is habitual defaulter while exercising the jurisdiction

under Section 14-B of the PF Act. In the instant case the respondent has not

properly exercised its jurisdiction under Section 14-B of the PF Act. It is submitted that

Annexure-A2 order imposing damages on the appellant is arbitrary, unjustified and liable to be set aside.

F. The decision of the respondent to levy damages at the rate prescribed under para.32A of the Scheme is arbitrary and unsustainable in law in view of the facts and

circumstances of the case. It is submitted that whenever there is a delay in payment of the P.F. contributions it is not mandatory to impose damages as prescribed

under para.32A of the Scheme. It is stated by the respondent that he has imposed the damages as per Annexure-A2 order to take care of the alleged loss suffered by

the Department. The specific reasons stated by the respondent in Annexure-A2 order is that loss of interest caused to the statutory fund is required to be made good

and also increase in the cost of administration is to be taken into account and further the employer is to be penalised. It is submitted that the EPF organization is

collecting interest at the rate of 12% per annum for the delayed period from the employer under Section 7-Q of the PF Act. 7-Q of the P.F. Act was introduced w.e.f.

1.7.1997. It is submitted that the rate of interest provided under Section 7-Q is also higher than the Bank rates. Therefore the loss of the P.F. organization if any

caused due to delay in payment of contribution is compensated by the interest provided under Section 7-Q of the P.F. Act. Hence the decision of the respondent to

impose damages on the ground of loss of interest and cost of administration is unjustified, arbitrary and illegal. There is also no justification in penalising the

appellant in view of the facts and circumstances of the case. There is no intentional or deliberate delay from the side of the appellant. The delay was occurred due to

the financial strain and difficulties mentioned hereinabove. The appellant is also not a habitual defaulter. It is submitted that the imposition of damages at the rate of

17% and 37% per annum on the defaulted amount is arbitrary, excessive and unsustainable in law. It is also submitted that Annexure-A2 order is not a speaking order.

The respondent has not applied his mind to the facts and circumstances of the case properly and in accordance with law while imposing damages on the appellant.

G. The amount of damages imposed by the respondent is arbitrary and also highly excessive. The respondent should not have imposed damages on the appellant in

view of the facts and circumstances of the case.â??

6. This Court here getting into the reasons for delay as assigned by the establishment find it is a fact that petitioner did not fully demonstrate the

reasons for delay deposit except saying that it had financial constraint and later on developed on saying even the salary of the employees are not paid

in time. But however looking to the pleadings in the Memorandum of Appeal, this Court finds most of the grounds taken therein have not been

attended to by the Appellate Authority. This Court here also observes in the event the establishment did not demonstrate the reason of delay by

producing materials and for the pleadings therein Appeal in the interest of justice, the matter could have been remanded to the PF Authority to re-

determine after giving opportunity to the petitioner to establish its case. Be that as it may, this Court looking to the provision of the Act, 1952 finds the

provident fund contribution is a contribution mixed both by employer as well as employee. There remains no dispute that the P.F. contribution has not

been deposited in time. The controversy remains here as to whether the deposit is made in time? And if not made in time if the action of the petitioner

in depositing after lapse of time is bonafide and in such event what should be the quantum of damage and interest based on the provision at Sections

14-B and 7-Q of the Act?

7. This Court here taking note of the provisions in the Act need to be taken into account. The provision at Section 7-Q dealing with interest reads as

follows:

â??7-Q. Interest payable by the employer â?" The employer shall be liable to pay simple interest at the rate of twelve percent per annum or at such higher rate as may

be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment.

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

Similarly, the provision at Section 14-B dealing with power to recover damages reads as follows :

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 [or sub-section(5) of section 17]or in the payment of

any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [the

Central Provident Fund Commissioner or such other officer as may be authorized by the Central Government, by notification in the Official Gazette, in this behalf may

recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme.

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

Provided further that the central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company

and in respect of which a Scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the

Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme."

8. Section 7-Q of the Act empowers the department recovery of simple interest @12% per annum or at such higher rate as may be specified in the

scheme on any amount due. Similarly, Section 14-B of the Act prescribes if an employer makes a default, the department may recover penalty such

damages not exceeding the amount of arrears but after giving the employer reasonable opportunity of being heard. Section 14-B of the Act has also

the rider with the Central Board to either reduce or waive the damages lying under this section, though, of course, to the establishment, which is sick

Industrial Company.

In the circumstance, it appears even though there is no scope in the statute for the reduction in the interest part keeping in view the employee did not

suffer for the delayed payment by the employer as the deposit position has to be maintained on the contribution of the provident fund authority but

however under the provision of Section 14-B there is scope for reduction in the damages. Dealing with the case of M/s. Shanti Garments Private

Limited vrs. Regional Provident Fund Commissioner, reported in 2003 (1) Labour Law Journal 467 (Madras.) Dealing with such case, the Madras

High Court has come to hold when there is no apparent fault the quantum of damage should be compensatory rather than penal in nature. From the

pleading of the employer, this Court finds the employer has the minimum pleading that it was not in a position to pay the employees their salary during

this period and it has a specific case that for its facing financial hardship, it was not in a position to deposit the PF contribution in time.

9. No doubt the repartition element takes in the loss of interest which would have otherwise been credited to the individual member account but if at

the same time it is to be noted that this is not only loss suffered by the fund, fund also suffers the loss, as a result of being deprived of the interest on

money which are not coming on due dates by way of contribution but at the same time it is also to keep in view out it may also be a circumstance

beyond control of the employer, as in the present case, the employer has taken the plea of financial hardship.

10. In the case of M/s. Hindustan Steel Ltd. Vrs. The State of Orissa, reported in AIR 1970 SC 253, Honâ??ble Supreme Court held as follows :

â??.... An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed

unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its

obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a

matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the

authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or

where the breach flows from a bona fide belief that the offender is not liable to

act in the manner prescribed by the statute.....â??

11. Similarly, coming to another decision Honâ??ble apex Court in the case of Organo Chemicals Industries and another Vrs. Union of India,

reported in AIR 1979 SC 1803, the apex Court observed that while fixing amount of damage the RPFC generally takes into account various factors

vis-a-vis the number of defaults, the period of delay, the frequency of defaults and the amount involved. Therefore, while dealing this aspect the

employer has to be given due opportunity of heard and has to be given due opportunity of hearing and this hearing would not mean mechanical

hearing.

12. For loss of substantial time and looking to the fact that in the meantime 50% of amount due already deposited, this Court instead of responding the

matter directs calculation of damage @15% of the defaulted on both account no.1 and account no.10. P.F. Authority is directed to have a fresh

calculation only in respect of collection under 14-B on the above accounts and then add it to the due under 7-Q and after adjusting the payment

already made by the petitioner issue notice to the petitioner for payment of balance amount, if any to the petitioner. The entire exercise shall be

concluded within four weeks, notice will be served on the petitioner within one week thereafter and petitioner shall also pay the amount under notice

within one month. Failure of which, the balance amount shall again carry interest @8% per annum from the date due.

13. With the above direction, the Writ Petition succeeds but to the extent indicated hereinabove. There shall be no order as to cost.