

(2011) 12 CAL CK 0032
In the Calcutta High Court
Case No : Writ Petition No. 21454 (W) of 2010

M/s. Kanchrapara, Harnett English Medium School	APPELLANT
Vs	
The Regional Provident Fund Commissioner and Others	RESPONDENT

Date of Decision : 22-12-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 7I, 7Q

Citation : (2012) 2 CHN 111 : (2012) 2 LLJ 802

Hon'ble Judges : Sambuddha Chakrabarti, J

Bench : Single Bench

Advocate : Anant Kumar Shaw, Mr. Sabyasachi Mukhopadhyay, Mr. Ravi Kumar Dubey and Mr. Mainak Ganguly, for the Appellant; Bijay Kumar, for the Respondent

Final Decision : Allowed

Judgement

Sambuddha Chakrabarti, J.—This writ petition has been filed against orders and notices dated January 13, 2010 and February 3, 2010 being annexures P-4 and P-5 respectively to the petition praying for an order of setting aside the same.

2. The case made out by the petitioner, inter alia, is this that the petitioner, a registered society, is a English medium school and is a voluntary non-profit, non-government organisation which has been established for the development of poor children in rural areas. In April, 2007 the petitioner applied to the appropriate authority for registering the establishment under the coverage of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "said Act"). Thereafter the respondent no. 1 herein by a Memo, dated April 23, 2007 allotted a code number to the said establishment and the petitioner was directed to pay the provident fund dues for the period beginning from June 16, 1993 up to the date of the issuing of that letter within a period of 15 days. The petitioner states that by a demand draft dated September

1, 2007 the petitioner paid the entire provident fund dues, both arrear and the current which was within the stipulated period as extended by the Provident Fund authorities.

3. The case of the petitioner is this that by a communication, dated January 13, 2010, issued by the respondent no. 3 the petitioner was asked to pay simple interest u/s 7Q and damages u/s 14B of the Act to the tune of Rs. 7,06,278/- and Rs. 12,65,692/- respectively. The petitioner approached the respondents authorities for granting some time to pay the amount of interest and also to waive the payment of damages since the petitioner had paid the requisite dues within the specified date of demand. In response the respondents issued a notice dated February 3, 2010 asking the petitioner to show cause why damages should not be levied and recovered and further directed to deposit the interest dues u/s 7Q within seven days from the date of receipt of the notice. The petitioner thereafter paid Rs. 7,06,278/- towards interest to the respondents authorities.

4. The petitioner was thereafter served with a notice of hearing regarding the levy of damages. The petitioner approached the respondent authorities showing cause why the damages should not be levied on the ground that the entire amount was paid within the time. The further case of the petitioner is that it is entitled to get the benefit of the earlier Circular dated June 16, 2004 of the Employees' Provident Fund Organisation with regard to the levy of damages for the pre-discovery period. The petitioner invoked the second clause of the Circular by which it was provided that establishments which had paid the provident fund dues within the period prescribed in the coverage notice no damages would be levied but they should be required to deposit simple interest at the rate of 12 per cent per annum. According to the petitioner since the establishment had already paid the interest it was not required to make any further payment.

5. This Circular of 2004 was followed by a subsequent Circular dated February 13, 2009 on the levy of damages for the pre-discovery period wherein it was provided that it had been decided by the concerned authorities to withdraw the earlier Circular of 2004 prospectively and that in future all cases for levy of damages should be processed as per the provisions contained in Section 14B read with para 32A of the Act. The petitioner seeks to make out a case that since by this date it has already paid the entire provident fund dues the latter Circular is not applicable to it.

6. This was followed by a comprehensive representation by the petitioner requesting the respondent authorities to recall and set aside the proceeding initiated for the recovery of the damages. Since the authorities did not redress the grievances of the petitioner it served the respondents with a notice dated September 22, 2010 for demand of justice with the same request as made in the earlier representation. As the respondents had not taken any step the petitioners have come up with his present writ petition challenging the notices as stated earlier.

7. The respondent no. 3 has affirmed an affidavit-in-opposition on behalf of the respondents. The stand taken by the answering respondents is that the writ petition is not maintainable and is liable to be dismissed in limine. The specific case made out by the respondents is that the petitioner, i.e., the school, was established in the year 1985 and failed to remit the provident funds and other dues from the beginning of the establishment of the school in accordance with the Act and the relevant Schemes. About 22 years after the establishment of the school the petitioner had filed an application in 2007 for registering itself under the Act. It had paid only the provident fund dues without calculating the mandatory interest and the damages. As the petitioner had failed to pay the damages the authorities had directed the establishment either to pay damages or to avail itself of the opportunity of being heard for the payment of damages. Therefore, the authorities had no option but to serve a show-cause notice which they did requesting the employer to appear either in person or through an authorised representative before it on the date as mentioned in the notice. The specific case made out by the respondents is that opportunity of hearing was provided to the establishment on various dates but its representative appeared before the authorities only on the second day of hearing praying for time to make submission. The respondents have further taken the stand that the petitioner if feels aggrieved may file an appeal u/s 7-I of the Act to the Employees' Provident Funds Tribunal. The respondents have also disputed the contention of the petitioner that it is a voluntary non-profit organisation as it had not produced any supporting document before the authorities. The respondents further contended that the authorities had to serve seven notices to the petitioner and as per the provisions of the Act it is bound to pay both interest as well as damages for the delayed payment as the establishment had intentionally defaulted in payment of contributions. The further contention of the respondents is that the Circular, dated June 16, 2004 is not applicable to the petitioner and that the same had already been withdrawn on February 13, 2009. The hearing regarding the liability of the petitioner to pay damages is still pending before the respondents authorities and instead of placing all the facts and records before them the petitioner have approached this Court. The respondents have prayed for dismissal of the writ petition.

8. To this the petitioner has filed an affidavit-in-reply wherein it has denied the allegations contained in the affidavit-in-opposition and the petitioner has reiterated its earlier stand as contained in the writ petition itself. The petitioner has particularly repeated its consistent stand that it is liable to pay only the interest but not the damages as it is entitled to get the benefit of the Circular, dated June 16, 2004. The subject-matter of challenge in the present petition is the validity and legality of the impugned notices being annexures P-4 and P-5 respectively to the writ petition to the extent of claiming damages u/s 14B of the Act which, according to the petitioner, was issued in complete deviation of the earlier policy as enunciated in the Circular dated June 16, 2004. The petitioner has also taken a point that since it had already been admitted by the respondents that no order

has been passed at the hearing and since no notification has been issued by the Central Government the question of preferring an appeal to the Tribunal does not arise at all. The petitioner also wants to make its position very clear that it had applied for coverage under the Act immediately after it had come to know of the requirement of being so covered. It had further asserted that the Circular dated June 16, 2004 is very much applicable to the petitioner. On the contrary by the latter circular the earlier circular was withdrawn prospectively making the latter one inapplicable to the petitioner.

9. The main thrust of the petitioner's submission is that in view of the Circular dated June 16, 2004 the petitioner is only liable to pay interest on the belated deposit of the provident funds dues from June 1993 till December 2007 and is not liable to pay damages. According to the petitioner at the time of its coverage in the year 2007 the former circular was in force and as such the petitioner was not liable to pay the damages for the pre-discovery period. This Circular was withdrawn long after the coverage of the establishment entitling it to have the benefit of the statutory Circular. The question of paying damages for the pre-discovery period arises when an establishment is covered on a particular day with retrospective effect. When the petitioner became covered the circular dated June 16, 2004 prohibited the Provident Funds authorities from realising any damages for the pre-discovery period from any organisation which has been covered belatedly under the Act. The petitioner has interpreted that the said two circulars as clearly indicating that all those organisations which have been belatedly covered during the interregnum of these two periods are covered by the first circular making them not liable to pay damages u/s 14B of the Act. Otherwise the exemption granted by the earlier circular will become nugatory.

10. It has been further submitted by the petitioner that since the circular exempting an establishment from payment of damages has been withdrawn only prospectively, all actions of the authorities concerned during this period would be covered by this first circular of exemption.

11. The respondents have sought to counter the submissions of the petitioner by taking recourse to the existence of an alternative remedy of appeal to the Tribunal. The respondents have relied on a Division Bench judgement of this Court in the case of Eastern Coalfields Limited -Vs.- Sushil Bouri & Ors. (Appeal no. 410 of 1996) dated November 20, 1997 for a proposition that when a statute provides for an alternative remedy the Writ Court normally asks the parties to avail themselves of that remedy so that the statutory remedy available may not be bye-passed.

12. The respondents have also submitted that the circular dated June 16, 2004 is also not applicable to the petitioner inasmuch as it was mentioned therein that it would apply only to such cases where the code number was allotted belatedly by the respondents and the establishment was prevented from remitting the contribution in the absence of a code number allotted by the authorities. The respondents have further relied on the decision of Employees' Provident Fund

Organisation -Vs.- Westend Time (P) Ltd., reported in 2011 (III) C.L.R. 757 wherein it has, inter alia, been held that ignorance of law is no excuse. Once an establishment is coverable under the provisions of the Act the employer has to apply to get the establishment registered under the Act and start depositing the contributions as required under the Act.

13. After hearing the learned Advocates for the respective parties and perusing the records it is necessary to consider the effect of the circular dated June 16, 2004 and its withdrawal by another circular dated February 13, 2009. Relevant portion of the circular dated June 16, 2004 is as follows:

The matter was discussed in detail by the CBI in its 165th procedure held on 3.12.2003. It has been decided that no damages shall be levied for the pre-discovery period where the code number was allotted belatedly by the EPFO and the establishment was prevented from remitting the contributions in the absence of a code number allotted to it by the EPFO. In order to have uniformity of approach by different field offices and with a view to alleviate the difficulties experienced by the establishments, the following guidelines are issued in the matter of levy of damages in respect of establishment covered belatedly:

1. Levy of damages or workers share for pre-discovery period

No damages shall be levied if the workers share for pre-discovery period has been waived

2. Establishment which paid dues within the time prescribed in the coverage notice.

No damages shall be levied, however, to compensate the interest loss to the EPFO only simple interest @ 12% p.a. shall be levied.

3. Establishments which paid PF dues beyond the date fixed in the coverage notice.

No damages shall be levied till the date of payment fixed in the coverage notice. Only simple interest @ 12% upto the date mentioned in the coverage letter and damages at appropriate rates for the period of delay beyond the date fixed in the coverage letter be levied.

4. Establishments which were having their own private PF system before coverage and who deposited the PF in banks or finance establishments.

Only difference of interest amount between 12% simple interest p.a. and the actual interest earned by the private PF shall be levied if the latter is less than 12% p.a. Beyond the date fixed in the coverage notice. Damages shall be levied at the appropriate dates.

However, the past cases already decided may not be reopened. To avoid confusion and inconvenience in the matter of remittance of PF dues where the establishments are covered belatedly, the coverage notices shall henceforth

contained instructions that payments of P.F contributions and allied dues shall be made within 15 days from the date of receipt of the coverage notice.

14. It appears that in the first circular of exemption (annexure P-8 to the writ petition) it was specifically observed that the Provident Funds authorities had received representations from many establishments against the levy of damages for the pre-discovery period that they were prevented from making remittance in the absence of a code number allotted to them and various High Courts also had taken strong exception to this and more particularly after the introduction of Section 7Q of the Act. The circular records that the Central Board of Trustees had decided that no damages should be levied for the pre-discovery period when the code number was allotted belatedly and where the establishment was prevented from remitting the contributions in absence of a code number and thus to bring about a uniformity of approach by different field offices and to alleviate the difficulties experienced by the establishments a certain guidelines were issued in the matter of levy of damages in respect of the establishments covered belatedly.

15. IT appears that the petitioner falls in the category of cases covered by serial no. 2 which is applicable in respect of an establishment which paid dues within the time prescribed in the coverage notice. It was provided that for these establishments no damages shall be levied to compensate the loss of interest to the Provident Funds Organisation but only a simple interest at the rate of 12 per cent. per annum should be levied. There is thus absolutely no doubt that on the day the petitioner was allotted a code number this circular clearly stood in the way of claiming damages for an establishment. Thus a benefit was clearly conferred on the establishments which have been belatedly covered making them not liable to pay only interest at the rate of 12 per cent.

16. The learned Advocate for the respondents have tried to interpret this circular as applicable only to such cases where a code number had been allotted belatedly by the Provident Funds Organisation and in this case since immediately after the application of the establishment a code number was allotted it cannot be said that the establishment was prevented from making remittance of the contributions in the absence of a code number. Relying upon a Single Judge judgement of the Gujrat High Court it has been sought to be argued that it was the duty of the petitioner to get itself registered and the fact that it was not aware of the requirement to be covered under the Act is hardly any excuse for an establishment.

17. As a proposition of law this is very well settled. But reading the circular, date June 16, 2004, it appears that in the guideline issued by the respondents authorities no such distinction has been made between cases where an employee made a belated application and where there was delay on the part of the respondents authorities to allot a code number after an application was made. To accept the contention of the respondents will, thus, mean that the whole purpose of the circular for exemption will be frustrated by devising an artificial distinction. The relevant operative portion of the said circular where the guidelines have

been set out the establishments falling in the category of serial no. 2, i.e., "establishment which paid dues within the time prescribed in the coverage notice" are liable to pay only interest and that no damages are leviable in terms of the said circular.

18. This exemption was subsequently withdrawn prospectively by a notification, dated February 13, 2009. The word prospectively appears to have been very consciously used in the subsequent notification. If the Provident Fund, authorities had meant to levy damages in respect of the pre-discovery period as well the authorities could make it very clear or at least would not have mentioned the word prospectively. Withdrawal of the earlier notification prospectively clearly means that the establishments would be required to pay damages only with effect from the date of the withdrawal of the earlier notification. The Provident Funds authorities have abused their power by issuing notice upon the petitioner asking them to pay damages ignoring the true import of the earlier notification and in the process it had also not appreciated that a benefit conferred upon an establishment by a notification could not be taken away by a subsequent notification and that too in respect of a period which was covered by the earlier notification. The respondents have, thus, failed to appreciate the true import of the subsequent notification and have improperly demanded damages from the petitioner.

19. It is true that Section 7-I of the Act provided for approaching the Tribunal as an alternative remedy. The Division Bench judgement of our Court relied on by the respondents was passed in connection with a dispute relating to Industrial Disputes Act. It is true that when an alternative remedy exists at times it has been emphasized that a petitioner should exhaust the same before approaching the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India. But existence of alternative remedy is not an absolute bar for a High Court to entertain a writ petition. There were authoritative pronouncements by the Supreme Court as well as various High Courts that even when an alternative remedy exists the High Court is not without power from entertaining an application under Article 226 of the Constitution of India. This will also be evident from the language employed by the Division Bench judgement in the case referred to above that when a statute provides for an alternative remedy the Court "normally" asks the parties to avail themselves of this of that remedy. Thus, the Division Bench also did not lay down any such rigid rule that existence of alternative remedy is a complete bar for invocation of the jurisdiction under Article 226 of the Constitution of India. That apart in view of the earlier circular issued by the competent authority to all the Regional Provident Funds Commissioners that in respect of the establishments falling in the category of serial no. 2 as mentioned in the guideline the Provident Funds authorities lacked jurisdiction to levy and to initiate any proceeding for the imposition of the damages.

20. A three Judge Bench of the Supreme Court in the case of the Comptroller and

Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, had laid down the power of the High Court to issue a writ of or in the nature of Mandamus in exercise of the jurisdiction under Article 226 of the Constitution of India. The Supreme Court held:

There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority and in a proper case, in order to prevent injustice resulting to the concerned parties, directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.

21. In view of the principle of law laid down by the Supreme Court this is a fit and proper case for the High Court to issue an appropriate order to prevent injustice resulting from the Acts of the respondents authorities.

22. The petitioner is thus entitled to the benefit of exemption from paying damages as was conferred by the Circular dated June 16, 2004 and the subsequent Circular withdrawing the earlier Circular prospectively with effect from February 16, 2009 cannot take away the benefit which was granted earlier.

23. The writ petition is, thus, allowed. The impugned notices being annexures P-4 and P-5 to the writ petition are set aside and quashed.

24. There shall, however, be no order as to costs.

25. Urgent photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.