

(2013) 09 KAR CK 0260

In the Karnataka High Court

Case No : Writ Petition No. 16304 of 2012 (L-PF)

M/s. Kirloskar Electric Co. Ltd.

APPELLANT

Vs

The Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 18-09-2013

Acts Referred:

Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 14B
Employees State Insurance Act, 1948 — Section 31C, 85B

Citation : (2014) 1 AKR 329 : (2014) ILR (Kar) 3184 : (2014) 3 KarLJ 498 :
(2014) 1 KCCR 490

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : S.N. Murthy, for the Appellant; Harikrishna S. Holla, for the
Respondent

Final Decision : Allowed

Judgement

Ram Mohan Reddy, J.—Petitioner aggrieved by the order dated 19.5.2004 of the Regional Provident Fund Commissioner, determining Rs. 91,54,160/- as damages u/s 14B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (for short "the EPF Act") preferred W.P. No. 14338/2005 whence a learned Single Judge by order dated 17th August 2007 -Annexure-B while quashing the endorsement dated 31.1.2005 of the Regional Provident Fund Commissioner, remitted the proceeding to the Central Board of Trustees, Employees' Provident Fund Organization, for re-consideration and until such time directed the Regional Provident Fund Commissioner not to precipitate any matter pursuant to the order dated 19.5.2004. The Central Board of Trustees rejected the petitioner's request for waiver of damages, in the light of the legal and factual position by letter dated 1st September 2008 - Annexure-C. Petitioner carried orders of the Central Board of Trustees and the Regional Provident Fund Commissioner in ATA No. 861(6)/2008 before the Employees' Provident Funds Appellate Tribunal, which dismissed the appeal by order dated 12th January 2009 on the premise that Section 7-1 of the Act was inapplicable. That order was called in question in W.P.

No. 12078/2009, whence a learned Single Judge by order dated 16th June 2010 - Annexure-F allowed the petition, quashed the order of the Appellate Tribunal and remitted the proceeding for fresh consideration. On remand, the Appellate Tribunal by order dated 25th August 2011 - Annexure-H while extracting portions of the observations of the Apex Court and that of the High Court of Orissa in reported opinions held, that in the absence of material on record it cannot be said that the delay caused any prejudice to the appellant i.e., the petitioner and accordingly, dismissed the appeal. Hence, this petition.

2. On 10.9.2012, the submission of the learned Senior Counsel for the petitioner was recorded in the matter of deposit of Rs. 46,18,000/- as against demand for Rs. 91,54,160/-, following which an interim order was granted.

3. Petitioner - an establishment covered under the Act was required to remit provident fund contributions u/s 6 of the Act read with paragraph-29 of the Employees' Provident Fund Scheme, 1952 (for short "EPF Scheme"). Respondent alleging that the petitioner -establishment failed to pay the contributions within time for the period March 2001 to February 2003, issued a notice dated 4.3.2004 to show cause as to why damage u/s 14B of the Act should not be recovered from the petitioner.

4. In response to the said notice, the representative of the petitioner appeared on the date of hearing and stated that the petitioner would remit the interest portion shortly and seek waiver of penal damages. The Regional Provident Fund Commissioner by order dated 19.5.2004 - Annexure-A observed that, a statutory obligation is cast on the petitioner to pay the contribution, while the Act, a social welfare legislation intended to provide social security cover to its members, dependent upon prompt compliance by employers, observed that damages is required to be levied to recoup the interest loss as also penalty, a deterrent to the defaulting employer, determined Rs. 91,54,160/- as damages for the period from 03/2001 to 02/2003, in exercise of jurisdiction u/s 14B of the Act.

5. As noticed supra, that order was questioned in a petition before this Court and thereafter in an appeal followed by an order of the Appellate Tribunal, which was quashed by this Court in another writ proceeding and remitted for consideration afresh following which is the order impugned of the Appellate Tribunal.

6. Sri. S.N. Murthy, learned Senior Counsel for the petitioner submits that, in identical circumstances, in The Regional Provident Fund Commissioner Vs. Jamiyyatul Falah, Mr. Hazdullah Ismail and Employees' Provident Fund Appellate Tribunal, , this Court following the decision of the Apex Court in Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, , observed that the provisions of Section 85B of the Employees' State Insurance Act, 1948 read with Regulation 31C of the Employees' State Insurance (General) Regulations, 1950, in the matter of recovery of damages being *pari materia* with that of Section 14B of the Act and paragraph-32A of the Scheme, held that, 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, while rejecting the petition filed by the Regional Provident Fund Commissioner and confirmed the levy of damages at 15% per annum on the arrears of contribution by the Appellate Tribunal.

7. Learned Senior Counsel further submits that, the order when carried in W.A. No. 371/2010, a Division Bench of this Court by order dated 3rd March 2011 while not disturbing the finding on the applicability of mens rea or actus reus, in the matter of contravention of statutory provision, leading to levy and recovery of damages, nevertheless, set aside the order of the Appellate Authority imposing damages of 15% per annum and sequentially allowed the writ petition of the Regional Provident Fund Commissioner, in part, and remitted the proceeding for consideration afresh on the quantum of damages. According to the learned Senior Counsel, the finding that damages could be levied only if there is mens rea or actus reus in the matter of nonpayment of contribution within the time stipulated was not disturbed. Learned Senior Counsel submits that, learned Single Judge in W.P. No. 588/2012 and connected petitions in the case of (The Regional Provident Fund Commissioner and Another v. M/s. Kaytee Switchgear Limited) D.D. 21st August 2012, though referred the decision of the Apex Court in HMT Limited (supra), nevertheless, held that the provisions of the Act do indicate that the Commissioner has a discretion to levy damages and it does not confer power to waive damages, accordingly allowed the writ petitions in part, and remitted the proceeding for consideration over the quantum of damages.

8. Sri. S.N. Murthy places reliance upon the decision of the Apex Court in HMT's case (supra) more appropriately to paragraph-26 to submit that the existence of mens rea or actus reus to contravene a statutory provision must be held to be a necessary ingredient for levy of damages and/or the quantum thereof and in the present case, there being none of those conditions since the petitioner was subjected to proceeding before the Board for Industrial Financial Reconstruction, as a sick industry, contributions were not paid within the time stipulated, is entitled to the benefit of waiver of damages.

9. Per contra, learned Counsel for the respondent submits that, Section 14B of the Act invests in the respondent the right to impose damages by way of penalty while paragraph-32A of the PF Scheme provides for the scale of imposition of damages and the Regional Provident Fund Commissioner having exercised such a jurisdiction in the matter of levy of damages does not call for interference. Learned Counsel seeks to support the order of the Appellate Tribunal as being well-merited, fully justified and not calling for interference. Learned Counsel places reliance upon the decision of the Apex Court in Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others, wherein it is observed that, the Act is a beneficial welfare legislation to ensure health and other benefits to the employees and that there is no discretion left to the Commissioner to totally waive the penalty except the rate at which it is to be computed.

10. Having heard the learned Counsel for the parties, examined the orders impugned and the provisions of the Employees State Insurance Act, 1948, for short "ESI Act"; the Employees State Insurance (General) Regulations 1950, for short "ESI Regulations"; The "EPF Act" and the "EPF Scheme", what is apparent is, both enactments are social welfare legislations intended to provide social security cover to its members, dependent upon prompt compliance by employers.

11. Section 85B of the ESI Act reads thus:

85B. Power to recover damages-

(1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations:

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

Provided further that the Corporation may reduce or waive the damages recoverable under this section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established u/s 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in regulations.

(2) Any damages recoverable under Sub-section (1) may be recovered as an arrear of land revenue or u/s 45-C to section 45-I.

12. Regulation 31-C of ESI Regulations reads thus:

31C. Damages or contributions or any other amount due, but not paid in time If an employer who fails to pay contributions within the periods specified under regulation 31, or any other amount payable under the Act, the corporation may recover damages, not exceeding the rates mentioned below, by way of penalty:

Provided that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may-

(a) in case of a change of management including transfer of undertaking (s) to workers' cooperative(s) or in case of merger or amalgamation of sick industrial company with a healthy company, completely waive the damages levied or leviable;

(b) in other cases, depending on its merits, waive up to 50 percent damages levied or leviable;

(c) in exceptional hard cases, waive either totally or partially the damages levied or leviable.

13. Sec. 14B of the EPF Act reads thus:

14B. 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 u/s 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.

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 u/s 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.

Paragraphs 32-A and 32-B of the EPF Scheme read thus:

32A. Recovery of damages for default in payment of any contribution -

(1) Where an employer makes default in the payment of any contribution to the 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 of the Act or in the payment of any charges payable under any other provisions of the Act or Scheme or under any of the conditions specified u/s 17 of the Act, the Central Provident Fund Commissioner or such 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, damages at the rates given in the table below:--

32B. Terms and conditions for reduction or waiver of damages - The Central Board may reduce or waive the damages levied u/s 14B of the Act in relation to an establishment specified in the second proviso to section 14B, subject to the following terms and conditions, namely:--

(a) in case of a change of management including transfer of the undertaking to workers' co-operative and in case of merger or amalgamation of the sick industrial company with any other industrial company, complete waiver of damages may be allowed;

(b) in cases where the Board for Industrial and Financial Reconstruction, for

reasons to be recorded in its schemes, in this behalf recommends, waiver of damages up to 100 percent may be allowed;

(c) in other cases, depending on merits, reduction of damages up to 50 percent may be allowed.

14. The provisions of Section 85B of the E.S.I. Act read with Regulation 31-C of the ESI (General) Regulations, 1950, relate to recovery of damages for failure of the employer to pay contributions while Section 14B of the EPF Act read with paragraphs 32-A and 32-B of the EPF Scheme, also relate to recovery of damages for default in payment of any contribution. The aforesaid provisions are *pari materia* relating to the recovery of damages by way of penalty for failure of the employer in not paying the contributions. The rates of damages and the terms and condition for reduction or waiver of damages are identical, while the statutes state "may recover".

15. The interpretation and application of Sec. 85-B of "ESI Act" and "Regulation 31-C of the ESI Regulations fell for consideration of the Apex Court in *Employees State Insurance Corporation v. HMT Ltd. & Another*, *supra*. The following question arose for determination:--

(a) Whether the amount of damages specified in Regulation 31-C of the ESI Regulations is imperative in character or not?

(b) Whether from Sec. 85-B of the ESI Act, it is decipherable that the intention of the legislature is to levy penalty in all situations?

(c) Whether the statute states that penalty has to be levied only in the manner prescribed?

(d) Whether "mens rea or actus reus" is a necessary ingredient for levy of damages and/or the quantum thereof when the statutory provision is contravened?

The Apex Court's attention was drawn to the decisions in,

(i) *M/s. Hindustan Times Limited Vs. Union of India and Others*, , wherein the court was concerned over levy of damages after a long time, and whether the employer can claim the benefit of "irretrievable prejudice".

(ii) *M/s. Prestolite of India Ltd. Vs. The Regional Director and another*, reads thus:

5. Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the uppermost limit of the table. In the instant case, it appears to us that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment were not to be accepted. There is no indication as to why the imposition of damages at the rate specified

in the order was required to be made. Simply because the appellant did not appear in person and produce materials to support the objections, the employee's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits.

(iii) In *Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another*, , while noticing a line of authorities clearly laying down that in considering a question of penalty, mens rea is not a relevant consideration, nevertheless held that an element of mens rea is needed before penalty can be imposed, when reliance is placed on some valuation of an approved valuer and furnishing inaccurate particulars was not deliberate.

The Apex Court answered the questions thus:--

(a) at the threshold, the well known principles of law that a sub-ordinate legislation must conform to the provisions of the legislative Act;

(b) Section 85B of the ESI Act provides for an enabling provision and does neither envisage a mandatory levy of damages, not contemplate quantum of damages in the manner prescribed under the ESI Regulations;

(c) The employer and employee though liable statutorily to pay the contributions, nevertheless, does not mean that the levy of damages in all situations would be imperative;

(d) Regard being had to the words "may recover" in Section 85B, the levy of damages by way of penalty and the legislature having limited the jurisdiction of the authority to levy penalty not exceeding the amount of arrears, hence regulations 31-C must be construed keeping in view the language used in the legislative Act and not de hors the same;

(e) When a discretionary jurisdiction is conferred on a statutory authority to levy penal damages by reason of an enabling provision, cannot be construed as imperative and an endeavour should be made to construe such penal provisions as discretionary, unless the statute is held to be mandatory;

(f) While agreeing with the view expressed in *Dilip N. Shroff's* case, observed that a subordinate legislation cannot override the principle legislative provisions.

(g) At paragraphs 25 and 26 observed thus:--

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.

16. In Hindustan Steel Ltd. Vs. State of Orissa, a three judge bench of the Apex Court, while considering the plea as to whether persons in-charge of affairs of a Company failing to register it as a dealer in honest and genuine belief that it was not a dealer under the Orissa Sales Tax Act, 14 of 1997, the imposition of penalty was justified, observed thus:

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.

17. Applying the very same principles to the provisions of the EPF Act i.e. Sec. 14-B and paragraphs 32-A & 32-B of the EPF scheme, it cannot but be construed as being directory and not mandatory, while the levy of damages by way of penalty is discretionary and not imperative in all situations, and the use of the words "May recover" in Sec. 14B, the legislature having limited the jurisdiction to levy damages not exceeding the arrears, the said section must be construed regard being had to the language deployed and not de hors the same. Thus paragraphs 32-A & 32-B cannot have overriding effect on Sec. 14B the legislative provision. In the view taken by the Apex Court in HMT's case supra, existence of mens rea or actus reus to contravene Section 14B must be held to be a necessary ingredient for levy of damages and for the quantum thereof.

18. There is no doubt that paragraph 32-A and 32-B of the EPF Scheme prescribes general guidelines over the limits to which the imposition of damages is permissible and mitigating circumstances can be taken into consideration by the adjudicating authority in fully deciding the quantum of damages and is not bound to mechanically apply the uppermost or lowermost table as the limit. It is submitted that the appellate authority has in many an appeal restricted the damages to 15% on arrears of contribution to meet the ends of justice, which consideration is not forthcoming from the order impugned.

19. It is no doubt true that the Apex Court in S.D. College's case supra observed that there is no discretion left to the commissioner to totally waive the penalty while the discretion is only with regard to the rate at which it is to be computed.

20. There is force in the submission of the learned Standing Counsel for the petitioner that the Division Bench in W.A. No. 371/2010 in the order dated 3.3.2011 did not disturb the findings recorded in Regional Provident Fund Commissioner's case supra over the applicability of mens rea or actus reus in the matter of contravention of statutory provision leading to levy and recovery of damages while setting aside the order of the Appellate Authority imposing damages of 15% and remitting the proceeding for consideration afresh.

21. In that view of the matter the orders impugned levying damages by way of penalty, for non-payment of contribution within time, by rejecting the reasons assigned by the petitioner, are illegal and unsustainable. The petition is allowed, the orders impugned are quashed and the proceeding remitted to the original authority to extend to the petitioner a reasonable opportunity of hearing and pass an order in accordance with law and in the light of the observations supra.