

(2016) 08 PAT CK 0065

In the Patna High Court

Case No : Letters Patent Appeal No.543 of 2015 (Arising out of Civil Writ Jurisdiction Case No. 11001 of 2010)

M/s. S.K. Nasiruddin Biri Merchants Pvt. Ltd.

APPELLANT

Vs

Assistant Provident Fund Commissioner

RESPONDENT

Date of Decision : 08-08-2016

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, Section 5D

Citation : (2016) 4 PLJR 499

Hon'ble Judges : Mr. Hemant Gupta and Mr. Ahsanuddin Amanullah, JJ.

Bench : Division Bench

Advocate : Mr. Y.V. Giri, Senior Advocate and Mr. Maheshwar Prasad Srivastava, Advocate, for the Appellant; Mr. Prashant Sinha, Advocate, for the Respondents

Final Decision : Dismissed

Judgement

Mr. Hemant Gupta, J.(Oral) - Heard learned counsel for the parties.

2. The challenge in the present Letters Patent Appeal is to an order dated 9th of December, 2014 passed by the learned Single Bench of this Court in C.W.J.C. No. 11001 of 2010 filed by the respondent Assistant Provident Fund Commissioner (for short "the Commissioner").

3. The Commissioner has sought quashing of an order dated 8th of August, 2008 passed by Employees' Provident Fund Appellate Tribunal (for short "the Tribunal") in the writ petition whereby, the order passed by the Regional Provident Fund Commissioner (C & R), Bihar, Patna on 12th of October, 2004 was quashed awarding damages under Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "the Act"). The learned Tribunal set aside the imposition of damages on the ground that there was no wilful default on the part of the appellant as the appellant was availing legal remedies available to it.

4. Initially the Regional Provident Fund Commissioner issued a notice under Section 7A of the Act for assessment of Provident Fund dues for the period from June, 1977 onwards. Such proceedings were challenged by the appellant before this Court in C.W.J.C. No. 4089 of 1988. The writ application was dismissed on 27th of July, 1989 holding that the provisions of the Act are applicable in respect of Home Workers engaged in rolling of bidis of the appellant establishment through contractors. Appellant challenged the order passed by this Court before the Hon"ble Supreme Court when S.L.P. No. 10538 of 1989 was filed by it. The Hon"ble Supreme Court stayed the operation of the assessment order till the identification of the workers is made but in the meantime, the Regional Provident Fund Commissioner determined the amount due from the appellant as Rs. 66,84,930.50/- towards employers" and employees" contribution from July, 1977 to August, 1986. The appellant was further called upon to pay a sum of Rs. 28,72,383.85/-. The appellant challenged both the demands through separate writ applications before this Court i.e. C.W.J.C. Nos. 1114 and 1115 of 1990. The writ applications filed by the appellant before this court were dismissed on 19th of August, 1992 and Rs. 46,90,051/- was realised out of the total demand raised by the Provident Fund Commissioner.

5. The Special Leave Petition earlier filed by the appellant before the Supreme Court was disposed of with observation that the question involved could be settled by the High Court in the proceedings pending before it, including the question as to who are the employees under Section 2(f) of the Act. The Special Leave Petition against the order passed by this Court on 19th of August, 1992 was dismissed on 3rd of May, 1993 when the following order was passed.

"The SLPs are dismissed. It is open for the petitioner to collect the names of Bidi workers, who work for them through their contractors and furnish the names of all the workers to the Provident Fund Commissioner. The Provident Fund Commissioner thereafter will verify these names and calculate the liability of the petitioner. On the basis of such verification, if any excess amount is found due from the petitioner, the Provident Fund Commissioner will recover such amount from the petitioner. On the other hand, if any amount is found due to the petitioner, the Provident Fund Commissioner will refund the same. The petitioner to furnish the name of the workers within six months from today."

6. Thereafter, the appellant furnished the particulars of Home Workers said to be engaged by the contractors for final determination of its liability under Section 7A of the Act. The appellant made a request for waiver of payment of employees" contribution for the period October, 1985 to March, 1993 on the ground that he had not been able to collect the same. Such claim was disallowed. The total liability was assessed at Rs. 1,45,25,848/- out of which the appellant deposited a sum of Rs. 6,11,716/-. Certificate for recovery of the remaining amount was issued by the Regional Provident Fund Commissioner.

7. The appellant challenged the said action again before this Court in C.W.J.C. No. 9880 of 1994 which was allowed on 29th of February, 1996. The said order

passed by the learned Single Judge was set aside by the Division Bench of this Court in L.P.A. No. 403 of 1996 on 12th of December, 1997. Such order was challenged before the Supreme Court in Civil Appeal No. 4285 of 1998. This Civil Appeal was dismissed on 30th of January, 2001. The order is since reported as S.K. Nasiruddin Beedi Merchant Ltd. v. Central Provident Fund Commissioner and another, (2001) 2 SCC 612. The amount of contribution was deposited but the Commissioner initiated the proceedings under Section 14B of the Act and imposed damages of Rs. 58,09,623/- vide order dated 12th of October, 2004. It is the said order which was set aside by the Tribunal in an appeal. The order of the Tribunal has been set aside by the learned Single Bench.

8. In the present Letters Patent Appeal, learned counsel for the appellant argued that the Assistant Provident Fund Commissioner, who has filed the writ application before this Court, was not competent to file the same being an Adjudicating Authority. He relies upon an order passed by the Hon'ble Supreme Court reported as Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate and another, (2007) 8 SCC 254. In the aforesaid case, in proceedings under Foreign Exchange Regulation Act, 1973, a question arose whether a Special Director, who was the Adjudicating Authority, can prefer an appeal before the High Court against an order passed by the Foreign Exchange Regulation Appellate Board. The Court held that an Adjudicating Authority exercises a quasi judicial power and discharges judicial functions. When its order had been set aside by the Board, ordinarily in absence of any power to prefer an appeal, it could not do so. Reliance is also placed upon Regional Provident Fund Commissioner v. Employees' Provident Funds Appellate Tribunal, and Another, 2014 LLR 1242 (Calcutta), Asstt. Provident Fund Commissioner, Visakhapatnam v. E.P.F. Appellate Tribunal, New Delhi and Another, 2013 LLR 437 (Andhra Pradesh) and Administrator, Cosmopolitan Hospitals (P) Ltd., Murinjapalam v. Regional Provident Fund Commissioner, 2016 LLR 148 (Kerala), wherein the judgment in Mohtesham Mohd. Ismail (supra) was relied upon to hold that the quasi judicial authority who has determined the liability cannot challenge the order passed by it.

9. We do not find any merit in the argument raised for two reasons. Firstly, the order of the imposition of damages is by Regional Provident Fund Commissioner and not by Assistant Provident Fund Commissioner. Therefore, factually, the writ application has not been filed by the Adjudicating Authority.

10. Secondly, in terms of sub-section (3) of Section 5D of the Act, the Central Board may appoint as many Additional Central Provident Fund Commissioners, Deputy Provident Fund Commissioners, Regional Provident Fund Commissioners, Assistant Provident Fund Commissioners. In exercise of such power, the Central Board of Trustees in its 119th meeting held on 4th of April, 1989 approved the resolution regarding delegation of powers of the Law Officers, Regional Provident Fund Commissioner and all Assistant Provident Fund Commissioners (Legal) to institute, file, conduct, execute and defend all Legal Proceedings by or against

the Central Board of Trustees, Employees Provident Fund. The said delegation is appended by the respondents in the counter affidavit filed on behalf of the respondents on 5th of April, 2016. In terms of such delegation, the Assistant Provident Fund Commissioner (Legal) is authorised and empowered to institute, file, conduct, prosecute and defend all civil and criminal proceedings. On the strength of such resolution, the appeal or the writ applications are filed but by the Assistant Provident Fund Commissioner (Legal), who is a distinct officer than the Adjudicating Authority. In the present case as well, the writ application was filed by Assistant Provident Fund Commissioner (Legal) who does not exercise quasi-judicial function at any stage of the proceedings. Therefore, we find that the reliance of the appellant on the aforesaid judgment is not tenable in the facts of the present case when the Adjudicating Authority has not taken any steps to dispute the order passed by the Appellate Tribunal.

11. Learned counsel for the appellant refers to a judgment reported as Employees State Insurance Corporation v. HMT Ltd. and another, (2008) 3 SCC 35 to contend that existence of mens rea or actus reus to contravene a statutory provision must also be held to be necessary ingredient for levy of damages and/or the quantum thereof. Though the said judgment was dealing with the Employees' State Insurance Act, 1948 but keeping in view the analogous provisions of the said Act with that of the Act in question, the principle laid down would be applicable to the facts of the present case as well.

12. Learned counsel for the appellant also refers to another judgment reported as Bharat Heavy Electricals Ltd. v. Employees State Insurance Corporation, (2008) 3 SCC 247 to support such an argument that the purport and object of both the statutes, for all intent and purport is the same.

13. Reference is also made to Supreme Court judgment reported as M/s. Hindustan Steel Ltd. v. The State of Orissa, A.I.R. 1970 Supreme Court 253 to contend that the penalty should 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.

14. On the other hand, learned counsel for the respondents refers to a Supreme Court judgment reported as Ogano Chemical Industries and another v. Union of India and others, (1979) 4 SCC 573 wherein, the legality of insertion of provisions of Section 14B of the Act was upheld and it was held that since the object and purpose of Section 14B is to authorise the Regional Provident Fund Commissioner to impose exemplary or punitive damages and thereby prevent employers from making defaults, therefore, the provision of Section 14B of the Act cannot be said to be illegal. The Court concluded as under:-

"21. The traditional view of damages as meaning actual loss does not take into account the social content of a provision like Section 14-B contained in a socio-economic measure like the Act in question. The word "damages" has different shades of meaning. It must take its colour and content from its context, and it

cannot be read in isolation, nor can Section 14-B be read out of context. The very object of the legislation would be frustrated if the word "damages" appearing in Section 14-B of the Act was not construed to mean penal damages. The imposition of damages under Section 14-B serves a two-fold purpose. It results in damnification and also serves as a deterrent. The predominant object is to penalise, so that an employer may be thwarted or deterred from making any further defaults.

22. The expression "damages" occurring in Section 14-B is, in substance, a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty under Section 14-B is not merely "to provide compensation for the employees". We are clearly of the opinion that the imposition of damages under Section 14-B serves both the purposes. It is meant to penalise defaulting employer as also to provide reparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements of Section 6, but at the same time it is meant to provide compensation or redress to the beneficiaries i.e. to recompense the employees for the loss sustained by them. There is nothing in the section to show that the damages must bear relationship to the loss which is caused to the beneficiaries under the Scheme. The word "damages" in Section 14-B is related to the word "default". The words used in Section 14-B are "default in the payment of contribution" and, therefore, the word "default" must be construed in the light of Para 38 of the Scheme which provides that the payment of contribution has got to be made by the 15th of the following month and, therefore, the word "default" in Section 14-B must mean "failure in performance" or "failure to act". At the same time, the imposition of damages under Section 14-B is to provide reparation for the amount of loss suffered by the employees.

23. The construction that we have placed on the word "damages" appearing in Section 14-B of the Act, is in accord with the intent and purpose of the legislation. It was brought on the statute book by Act 37 of 1953. The objects and reasons so far material, reads:

There are also certain administrative difficulties to be set right. There is no provision for inspection of exempted factories nor is there any provision for the recovery of dues from such factories. An employer? can delay payment of Provident Fund dues without any additional financial liability. No punishment has been laid down for contravention of some of the provisions of the Act.

(emphasis supplied).

24. There appears to be a misconception that the object of imposition of penalty under Section 14-B is not "to provide compensation for the employees" whose interest may be injured, by loss of interest and the like. There is also a misconception that the damages imposed under Section 14-B are not transferred to the Employees' Provident Fund and the Family Pension Fund, of the

employees who may be adversely affected, but the amount is transferred to the General Revenues of the appropriate Government. We find that this assumption is wholly unwarranted. In assessing the damages, the Regional Provident Fund Commissioner is not only bound to take into account the loss to the beneficiaries but also the default by the employer in making his contributions, which occasions the infliction of damages. The learned Additional Solicitor-General was fair enough to concede that the entire amount of damages awarded under Section 14-B, except for the amount relatable to administrative charges, must necessarily be transferred to the Employees' Provident Fund and the Family Pension Fund. We hope that those charged with administering the Act will keep this in view while allocating the damages under Section 14-B of the Act to different heads. The employees would, of course, get damages commensurate with their loss i.e., the amount of interest on delayed payments; but the remaining amount should go to augment the "Fund" constituted under Section 5, for implementing the Schemes under the Act."

15. Learned counsel for the respondents also argues that the judgment reported as *Mohtesham Mohd. Ismail (Supra)* is not applicable to the facts of the present case as the Adjudicating Authority has not filed writ application before this Court but an Assistant Regional Provident Fund Commissioner (Legal) in terms of the delegation of powers has filed a writ application. Therefore, the said judgment has no applicability. Similarly, the Andhra Pradesh, Kerala and Calcutta High Courts were not apprised of the delegation of powers conferred by the Central Board to the Assistant Regional Provident Fund Commissioner (Legal). Therefore, the said judgments are not applicable to the facts of the present case.

16. It is also contended that the Hon'ble Supreme Court in the judgment reported as *S.K. Nasiruddin Beedi Merchant Ltd. v. Central Provident Fund Commissioner and another*, (2001) 2 SCC 612 has recorded a categorical finding in the case of the appellant itself that the dispute raised by the appellant from September, 1985 cannot be said to be bona fide at all. It was held as under:-

"7. Inasmuch as the appellant is protected for the period of coverage by the general stay order given by this Court on the applicability of the Act to the industry in question till the date of the final judgment, otherwise steps would have been taken in terms of the formal notice issued to the appellant in 1977 itself. Thus in respect of period from June 1977 to September 1985 there was waiver of the liability by reason of the clarification issued by the Government under para 78 of the Scheme. On the disposal of the matter by this Court in September 1985 the liability to deposit the employees' contribution became very clear. Though in law the respondents were entitled to recover even for the period from June 1977 in view of the directions issued by the Government but that was not demanded. For period up to September 1985 and for subsequent period there is no manner of doubt and the dispute raised by the appellant cannot be stated to be bona fide at all. In the circumstances, we fail to understand as to how the appellant can rely upon his own laches in not deducting the wages from

1985 onwards to enable him to make employees' contribution to the fund."

17. We have heard learned counsel for the parties and find no merit in the present Letters Patent Appeal.

18. The Central Board is constituted under Section 5A of the Act. Such Central Board is to administer the Fund vested in it in such manner as may be specified in the Scheme. The Board shall perform such other functions as it may be required to perform by or under any provisions of the Scheme, the Pension Scheme and the Insurance Scheme. Section 5D of the Act empowers the Central Board to appoint a Central Provident Fund Commissioner and also the Additional Central Provident Fund Commissioners, Deputy Provident Fund Commissioners, Regional Provident Fund Commissioners and Assistant Provident Fund Commissioners. The Central Board has been empowered in terms of Section 5E of the Act to delegate any of its functions to any of its officers. Sections 5D and 5E reads as under:-

"5D. Appointment of Officers.- (1) The Central Government shall appoint a Central Provident Fund Commissioner who shall be the Chief Executive Officer of the Central Board and shall be subject to the general control and superintendence of that Board.

(2) The Central Government may also appoint a Financial Adviser and Chief Accounts Officer to assist the Central Provident Fund Commissioner in the discharge of his duties.

(3) The Central Board may appoint, subject to the maximum scale of pay, as may be specified in the Scheme, as many Additional Central Provident Fund Commissioners, Deputy Provident Fund Commissioners, Regional Provident Fund Commissioners, Assistant Provident Fund Commissioners and such other officers and employees as it may consider necessary for the efficient administration of the Scheme, the Pension Scheme and the Insurance Scheme.

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5E. Delegation.- The Central Board may delegate to the Executive Committee or to the Chairman of the Board or to any of its officers and a State Board may delegate to its Chairman or to any of its officers, subject to such conditions and limitations, if any, as it may specify, such of its powers and functions under this Act as it may deem necessary for the efficient administration of the scheme, the Pension Scheme and the Insurance Scheme."

19. In terms of the powers conferred under Section 5D read with Section 5E of the Act, the Central Board of Trustees in its 119th meeting held on 4th of April, 1989 delegated its powers to Law Officers, Regional Provident Fund Commissioners and all Assistant Provident Fund Commissioners (Legal) to institute, file, conduct and defend legal proceedings. Relevant resolution reads as under:-

"Resolved that the Law Officer, the Regional Provident Fund Commissioner, and the Assistant Provident Fund Commissioner (Legal) are hereby authorised and empowered to institute, file, conduct, prosecute and defend all Civil and Criminal Proceedings whether original appellate or revisional, instituted or launched by or against the Central Board of Trustees, Employees Provident Fund and/or Central Provident Fund Commissioner and/or any Regional Provident Fund Commissioner to act and appear in all the aforesaid proceedings for and on behalf of the Central Board of Trustees, Central Provident Fund Commissioner, or as the case may be, Regional Provident Fund Commissioner, to conduct and prosecute the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed therein, including proceedings in taxation and applications for review, to file and obtain return of the Central Board of Trustees, Central Provident Fund Commissioner or as the case may be, Regional Provident Fund Commissioner in all petitions and in applications for review and to represent them jointly or singularly and to take all necessary steps on behalf of them in all matters in case of need, to engage, appoint and instruct pleaders, advocates, barristers and attorneys to file and take back documents from courts, administrative tribunal and all other Tribunals, authorities to withdraw from or abandon wholly or partly the suit/appeals/revision/claim/defence/proceedings against all or any defendants/ respondents/ appellants/ plaintiffs/ opposite parties, to enter into any agreement, settlement or compromise whereby the suit/appeal proceedings is/are wholly or partly adjusted to refer all or any matter or matters arising or in dispute therein, to arbitration, to withdraw or deposit any money for and on behalf of the Central Board of Trustees, Employees Provident Fund from or in any court or before any officer or authority and generally to do all that is necessary and proper for the aforesaid purpose including assigning and verifying pleadings, petitions, applications, appeals and complaints."

20. In view of such statutory provisions and the resolution, the Assistant Provident Fund Commissioner (Legal) is the person authorised by the Central Board to institute proceedings for and on behalf of the Central Board of Trustees who represent the Statutory Body. Therefore, the writ application has been filed not by the Adjudicating Authority but by a delegatee of the Central Board of Trustees, which is, thus, a competent writ application.

21. The judgments referred to by learned counsel for the appellant are distinguishable and have no applicability to the facts of the present case as the provisions of the Act and the delegation conferred in favour of Assistant Provident Fund Commissioner (Legal) was not brought to the notice of the High Courts, whereas the judgment of the Hon"ble Supreme Court is under different Statute, where there was no pari materia provisions of delegation of powers brought to the notice of the Court, if any. Therefore, it cannot be said that the writ application filed by the Assistant Provident Fund Commissioner (Legal) was not a properly constituted petition.

22. The purpose and object of the Act has been explained in *Organo Chemical Industries* and another (*supra*) which upheld the provisions of Section 14B of the Act as amended. Such provisions have been again restated in a three Bench judgment reported as *Maharashtra State Cooperative Bank Limited v. Assistant Provident Fund Commissioner and others*, (2009) 10 SCC 123. The Court has said to the following effect:-

"18. Soon after enforcement of the Constitution, the Government of India promulgated the Employees' Provident Funds Ordinance on 15-11-1951, which was replaced by the Act, which belongs to the family of legislations enacted by Parliament in furtherance of the mandate of Articles 38 and 43 of the Constitution and is intended to give social security to the workers employed in the factories and other establishments. The Act provides for institution of provident funds, pension fund and deposit-linked insurance fund in factories and other establishments. It requires the employers of the factories and specified establishments to deduct certain amount from the wages payable to the employees and also make contribution to various funds, which are administered by the Central and Regional Provident Fund Commissioners."

23. Therefore, the provisions of the Act are for the benefit of the employees and that imposition of damages is for benefit of the employees. Therefore, the action of imposition of damages has to be examined in the light of intent and object of the Statute.

24. In respect of damages imposed upon the appellant, the Supreme Court has held that though the respondents were entitled to recover damages even for the period from June, 1977 but for the period from September, 1985 and for subsequent period the dispute raised by the appellant cannot be said to be bona fide at all. Once such finding has been returned, the argument that there was no mens rea is not tenable as the finding recorded is that the action of the appellant is not bona fide. If the action is not bona fide, the appellant is liable to pay damages having failed to deposit the same within the time granted by the Scheme.

25. In view thereof, we do not find any error in the finding recorded by the learned Single Bench, which may warrant interference in the present Letters Patent Appeal. The same is, thus, dismissed.