

(2015) 03 MP CK 0171

In the Madhya Pradesh High Court

Case No : Writ Petition No. 9845 of 2008

Naveen Vidya Bhawan

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 05-03-2015

Acts Referred:

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

Citation : (2015) 146 FLR 233

Hon'ble Judges : Rajendra Menon, J

Bench : Single Bench

Advocate : Vijay Tripathi, for the Appellant; J.K. Pillai, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Rajendra Menon, J—Petitions identical in nature in the matter of recovery of provident fund dues from the grant-in aid private educational institutes have been considered by a Division Bench of this Court in the cases of Madhya Pradesh Shikshak Congress v. State of M.P., in Misc. Petition No. 1551/1991 and 3040/1991 and have been disposed of by a common order passed on 15.4.1993 in the following manner:--

"3 Having considered the arguments on both sides, we are of the view that the provisions of the Employees Provident Fund Act, 1952 and Scheme are applicable being more beneficial and effective considering the interests of the employees of the non-government educational institutions. It is stated in the return that the deposits made by the twelve institutions against the provident fund and institutional funds are irregular and the institutions having control over the said accounts, there is no guarantee of the funds being not misused or deposit made at sweet-will without any control.

4. Section 1(3)(b) of the Provident Fund & Misc. Provisions Act defines Notified Establishment. Under Para 38 of the Scheme all educational institutions are

required to deposit the contributions of the employees as well that of employers in the Reserve Bank or the State Bank of India in E.P.F. Account by demand draft. In view of specific provisions of the Central Act & Scheme, it is difficult to hold that the non-governmental educational institutions are not covered by the provisions of the Act.

5. Question, therefore, to be considered is whether section 16(1)(b) can be said to exempt the petitioners, by reason of its being covered by the Central Provinces & Berar Education Manual (1928) Appendix XVIII. The above Rules in Appendix XVIII cannot be said to be surviving in view of specific provisions made in Act No. 21/78 and Institutional Fund Rules, 1983.

7. Section 16(1)(b) as amended can apply only if there is a finding that the institution is covered by some scheme. In the instant case as pointed out, the petitioners are required to abide by the provisions of Rule 10 of the M.P. Ashaskiya Shikshan Sanstha (Institutional Fund) Rules, 1983 and to make deduction towards the contributory fund and under clause (6) of Rule 10. Old procedure for deposit of the provident fund given in sub-rules (1) to (6) of Rule 10. The applicability of the Employees' Provident Fund & Misc. Provisions Act, 1952 has been specifically stated and the deposits have to be made to the accounts maintained as per scheme of the Act. Thus, it is amply clear that the provisions of the Central Provinces & Berar Manual Appendix XVIII do not apply to the present case.

Even if the petitioners are following the said arrangement, the said arrangement cannot continue as the petitioners are not covered by section 16(1)(b) of the Act, also in view of State Act of 1978 & Rules.

9. In the instant case, the petitioners submit that they have been depositing the provident fund as per Appendix XVIII of the C.P. & Berar Education Manual. The question is whether they can be allowed to continue with the said arrangement and the view which we have taken the petitioners cannot be allowed to retain the amount already collected and whatever amount has been collected will have to be deposited in the Reserve Bank or the State Bank as per the provisions of Employees Provident Fund & Misc. Provisions Act, 1952 & Scheme."

The matter travelled to the Supreme Court vide Civil Appeal No. 3969-70 of 1994 which came to be decided on 1.12.1998 (reported as M.P. Shikshak Congress and Others Vs. R.P.F. Commissioner, Jabalpur and Others, AIR 1999 SC 443(2) : (1999) 82 FLR 294 : (1998) 8 JT 308 : (1999) 1 SCC 396 : (1998) 3 SCR 198 Supp : (1999) 1 UJ 645) in the following terms--

"12. Secondly, as the preamble and other provisions of the State Act 20 of 1978 show the primary purpose of the State Act was to make provisions for regulating the payment of salaries to teachers and other employees of aided non-Governmental schools. The Act did not even provide for any scheme for setting up a provident fund. The Act incidentally required that the institutional contribution to any existing Provident Fund Scheme should be paid into the

institutional fund set up under the said Act. Looking to the pith and substance of the State Act of 1978 also, it cannot be said that it in any way made provisions which were repugnant to the Employees' Provident Fund and Miscellaneous Provisions Act, 1952.

13. It was by reason of the notification of 6th of March, 1982 that the Central Act was extended to educational institutions. The Employees' Provident Fund and Miscellaneous Provisions Act, 1952, therefore, became applicable to educational institutions in the State of Madhya Pradesh for the first time on 6th of March, 1982. This was much later than the enactment of the State Act 20 of 1978. The Parliamentary enactment, therefore, would prevail over the State Act 20 of 1978, assuming that the State Act of 1978 created or affected any scheme for provident fund. Article 254(2), therefore, has no application in the present case.

.....

15. However, after the application of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 to educational institutions, in 1983 new Rules were framed by the State of Madhya Pradesh under Act 20 of 1978. These are referred to as the State Rules of 1983. Under the State Rules of 1983, for the first time a scheme was set out for Contributory Provident Fund covering the teachers and employees of aided schools. The State Government, however, was conscious of the fact that the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 was applicable in the State of Madhya Pradesh. Therefore, by Rule 10(6) of the State Rules of 1983, it was provided that the scheme as set out in the State Rules of 1983 would not apply where the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 apply. Clearly, therefore, far from there being any conflict between the State and the Central Legislation, the State Legislation by Rules framed in 1983 has excluded from the operation of the State scheme as framed under the 1983 Rules, those employees to whom the Central Act applies.

16. In this view of the matter, there can be no doubt that for the period 1st August, 1982 to 1st August, 1988 the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 was applicable to such teachers and employees of the aided schools in the State of Madhya Pradesh who are covered by the provisions of the scheme framed thereunder. The orders of the Regional Provident Fund Commissioner, therefore, in so far as the orders cover the period 1st August, 1982 to 1st August, 1988 are valid.

17. The said orders, however, also refer to an additional period from 1st of August, 1988 to 1st of December, 1988. According to the appellants, on 1st of August, 1988, by virtue of the amended section 16(1)(b) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 coming into effect, the provisions of the 1952 Act are no longer applicable to them. Section 16(1)(b) provides that the 1952 Act will not apply to any establishment under the control of the State Government whose employees are entitled to the benefit of

Contributory Provident Fund in accordance with any scheme framed by the State Government conferring such benefits. Whether on 1st of August, 1988, there was any scheme in existence of the State Government which conferred Contributory Provident Fund benefit to the employees covered earlier by the Central Act of 1952 or not is a matter which the Regional Provident Fund Commissioner will have to examine if such a contention is raised before him by the appellants.

18. We, therefore, remit the matter to the concerned Regional Provident Fund Commissioner only for the limited purpose of examining whether for the period 1st of August, 1988 to 1st of December, 1988 the provisions of Employees' Provident Fund and Miscellaneous Provisions Act, 1952 are applicable to the concerned institutions. The orders, however, for the period 1st August, 1982 to 1st August, 1988 are upheld."

2. In pursuance to the directions, Regional Provident Fund Commissioner took a decision on 13.3.2000, holding:

"On the basis of above findings, I, M. Joseph Pushpam, Regional Provident Fund Commissioner, Jabalpur in exercise of powers under section 7-A(1)(a) of the Act and as per the direction of the Hon'ble Supreme Court in its order dated 1.12.1999 hold that the provisions of section 16(1)(b) of the Act are not applicable to the establishment and they continue to be covered under section 1(3)(b) of the Act even w.e.f. 1.8.1988 and onwards. Accordingly, all the aided non Govt. School run by the Societies/Managing Committee/Sansthan/Individual Employer/Individual Trustee situated in M.P. are directed to comply with the Employees' Provident Fund and Miscellaneous Provision Act, 1952 w.e.f. with the Employees Provident Fund and Miscellaneous Provisions Act 1952 w.e.f. 1.8.1982 or the date of coverage as the case may be, and continued to be covered even after 1.8.1988 onwards in respect of all employees employed in or in connection with the establishment including non-aided and casual contractual employees and also employees those who left their service within fifteen days of recent receipt of the order."

3. Pertinent it is to note that the Government of Madhya Pradesh issued direction to all the private aided schools/institutions vide order No. F-18-18/99/20-5 dated 10.3.2000 and No. Grants/C/JBL/5/97/704 dated 3.4.2000 confirming the application of Act of 1952 from April 1982 to February 1988 and to report compliance to Regional Provident Fund Commissioner.

4. It is also noticed that the order-dated 13.3.2000 passed by the Regional Provident Fund Commissioner is allowed to attain finality. And, since the statutory dues, as is apparent from the record of each petition, was deposited belatedly, led the Commissioner pass orders under sections 14-B and 7-Q of 1952 Act read with Para 32-A of Scheme, 1952.

5. Relevant provisions whereunder the action is taken are--

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 authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer such damages, not exceeding the amount of arrears, as it may think fit to impose:

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 (13 of 1986), subject to such terms and conditions as may be specified in the Scheme.

7-Q. Interest payable by the employer.--The employer shall be liable to pay simple interest at the rate of twelve per cent, 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.

32-A. 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 under section 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 below:

Period of default Rate of damages (% arrears per annum)

(b) Two months and above but,

(c) Four months and above but in these batch of writ petitions, there being no dispute regarding the breach having been committed by the petitioners attracting the penalty clause contained in section 14-B of 1952 Act and Para 32-A of the Scheme 1952, the decision taken by the respondent cannot be faulted with.

6. The issue, however, still looms is whether in the given facts of the present case, the damages to the extent of 100% would be just and proper.

7. A Division Bench of this Court in Assistant Provident Fund Commissioner v. Ashram Madhyamik 2007 (114) FLR 154 (MP) , Writ Appeal No. 454/2006 decided on 2.1.2007 had an occasion to dwell upon the aspect as raised and after taking into consideration the decision by the Supreme Court in Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others, (1996) 9 AD 275 : AIR 1997 SC 3645 : (1997) 75 FLR 530 : (1997) 10 JT 638 : (1997) 2 LLJ 55 : (1996) 8 SCALE 438 : (1997) 1 SCC 241 : (1997) SCC(L&S) 449 : (1996) 8 SCR 27 Supp : (1997) 1 UJ 304 : (1997) AIRSCW 842 : (1997) 1 Supreme 54 and Halwasia Vidya Vihar (Sr. Sec. School) Haryana Vs. The Regional Provident Fund Commissioner, AIR 2006 SC 1767 : (2006) 4 JT 110 : (2006) 2 LLJ 497 : (2006) 3 SCALE 548 : (2006) 4 SCC 46 : (2006) SCC(L&S) 639 : (2006) 3 SLJ 209 : (2006) AIRSCW 1938 : (2006) 3 Supreme 214 , the Division Bench affirmed the verdict by learned Single Judge of reducing the damage to 25%. It was held--

"2. This appeal under section 2 of the M.P. Uchcha Nyayalay (Nyayalaypeeth ko Appeal) Adhiniyam, is directed against the order dated September 5, 2006 passed in W.P. 2564/2005 by the learned Single Judge whereby learned Single Judge has reduced the damages imposed by the Assistant Provident Fund Commissioner to 25% on deposit of dues of provident fund by the employer (petitioner before the Single Judge). The original petitioner was granted coverage under the Act for payment of Employees Provident Fund as per the provisions of Act. It was not disputed that pursuant to the letter dated January 27, 2000 (Annexure P/1) the petitioner was asked to deposit the contribution for the period July 10, 1983 to September 22, 1997 on or before April 15, 2000 whereas it was actually deposited on June 30, 2000 that too a small sum of Rs. 13,303/-. Further, a sum of Rs. 43,362/- was deposited on July 17, 2000. Learned Assistant Commissioner, finding that admittedly there was delay in depositing the provident fund, invoked the provisions of section 14-B of Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for short the Act) and impose the damages in the sum of Rs. 37,590/-. This amount was reduced by the learned Single Judge to 25% of the damages and the interest charged under section 17-Q of the Act was maintained. In doing so, learned Single Judge fortified his order by the decision in Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others, (1996) 9 AD 275 : AIR 1997 SC 3645 : (1997) 75 FLR 530 : (1997) 10 JT 638 : (1997) 2 LLJ 55 : (1996) 8 SCALE 438 : (1997) 1 SCC 241 : (1997) SCC(L&S) 449 : (1996) 8 SCR 27 Supp : (1997) 1 UJ 304 : (1997) AIRSCW 842 : (1997) 1 Supreme 54 , and Halwasia Vidya Vihar (Sr. Sec. School) Haryana Vs. The Regional Provident Fund Commissioner, AIR 2006 SC 1767 : (2006) 4 JT 110 : (2006) 2 LLJ 497 : (2006) 3 SCALE 548 : (2006) 4 SCC 46 : (2006) SCC(L&S) 639 : (2006) 3 SLJ 209 : (2006) AIRSCW 1938 : (2006) 3 Supreme 214 . Contention of learned Counsel, however, is that once there was violation/delay in deposit of employees provident fund, there is no choice but to impose damages to the maximum extent under said provision. Section 14-B of the Act reads as under:

"Power to recover damages.--Where an employer makes default in the payment of any contribution to the Fund (The Family 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 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 to impose."

8. Thereafter taking note of this order on 17th September 2014, a Coordinate Bench of this Court has disposed of more than 10 identical writ petitions and in those cases, following directions were issued in para 3:--

"3. From perusal of provisions as extract herein above, though it is clear that the department has power to impose damages in case of non-deposit/delayed deposit of the provident fund, it is only discretionary to impose damages as is clear from the word "may" used in the Provision. We are, therefore, not impressed by the submission that full damages are compulsory under section 14-B of the Act. Learned Judge has maintained the damages to the extent of 25% of the original demand and has maintained the interest charge under section 17-Q. We are, therefore, of the view that the learned Single Judge in his discretion, has rightly acted within the parameters of the provisions. We, therefore, do not find any substance in this appeal. Both the appeals are, therefore, dismissed."

To maintain parity with the decision in Assistant Provident Fund Commissioner v. Ashram Madhyamik (supra), the damages levied in these batch of writ petitions is reduced to 25%.

The petitions are partly allowed to the extent above. No costs.

Let a copy of this order be retained in connected Writ Petitions.

This petition is also disposed of in terms of order already passed on 17.9.2014 in W.P. No. 1065/2006 and other cases.