
(1995) 01 GAU CK 0021
In the Gauhati High Court
Case No : Civil Rule No. 1222/89

Popular Saw Mills

APPELLANT

Vs

Regional Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 25-01-1995

Acts Referred:

Constitution of India, 1950 — Article 226

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 5, 6

Citation : (1996) 1 LLJ 201

Hon'ble Judges : D.N. Baruah, J

Bench : Single Bench

Advocate : G.K. Talukdar and D.K. Talukdar, for the Appellant; C.G.S.C., for the Respondent

Judgement

D.N. Baruah, J.—In this writ application under Article 226 of the Constitution the petitioner has challenged the order dated May 11, 1988 passed by the Regional Provident Fund Commissioner respondent No. 1 by Annexure - XIII and also notices of demand dated May 12, 1988 and April 27, 1989 (Annexures - XIV & XV) of the writ petition and prays for issuance of appropriate writ or direction.

2. The facts of the case for the purpose of this Civil Rule may briefly be stated as follows:-

Shri Hemraj Agarwala is the proprietor of a saw mill known as "Popular Saw Mills". This proprietorial concern was converted into a partnership firm with other partners, namely, Onkarmal Agarwala and Smt. Sushila Devi Agarwala. Partnership business continued upto March 31, 1988. But, thereafter it became a proprietorial concern of which Shri Hemraj Agrwala was the sole proprietor on and from April 1, 1988.

During the period of partnership particularly during the period from 1979-80 some of the employees wanted to have the benefits of the Provident Fund and Miscellaneous Provisions Act 1952 (for short, the Act) and its schemes.

Accordingly, there was a discussion between the employer and the employees about the scope of such benefits and the employees had expressed their willingness to contribute from their salaries. The number of employees working therein was less than 20 and the name of the industry was also not included in Schedule-I of the Act. The provisions of the said Act was not applicable under the proviso to Section 1, Sub-section (1)(2) and (3). However, as the majority of the employees were willing to contribute their shares from their salaries, the employer also agreed to pay the share of the contribution from the employer. An application along with the consent form was filled in and signed by the willing employees before the Regional Provident Fund Commissioner - respondent No. 1 with a request for issuing notification u/s 1(4) of the Act to enable the willing employees to get the benefit of the scheme of the Act. The 1st respondent by Annexure-III dated January 21, 1981 informed the said saw mill that the Act was made applicable to the establishment of the saw mill with effect from January 1, 1980 subject to the conditions that the voluntary coverage as prayed for would be considered in satisfactory compliance of the establishment with the statutory provisions of the aforesaid Act and the scheme framed therein and accordingly, directed to deposit all the dues and submit all the returns from January, 1980 onwards failing which the prayer for coverage u/s 1(4) would not be acceded to. The letter was received by the petitioner's said mill in the last week of January, 1981 and as per the direction given therein the petitioner was to realise the share of the contribution from the employees and to prepare a return and deposit the amount along with the share of the employer.

3. Monthly emolument of each employee varies and, therefore, sufficient time was necessary for preparation of the return. Besides the letter dated January 21, 1981 was sent with a direction to deposit the money for the month of January. Order itself will indicate that from the date of passing of the said order there was a backlog of 13 months. The petitioner came to know about the acceptance of their prayer only in the last week of January, 1981 and the petitioner was required to prepare the returns of all the 13 months. Thereafter, returns for the months of January and February, 1980 were submitted on April 20, 1981 after depositing the required amount by challans in the State bank of India. Similarly, for the months of March and April were submitted on April 20, 1981. Those of May, June and July, 1980 were submitted on June 29, 1981. Being backlog of 13 months at the very beginning the petitioner tried its level best to clear up the backlog and by 2nd of February, 1983 almost cleared all the backlogs clearing upto months of July 1982. During the period of 1983-1984 and 1985 the functioning of the mill was very irregular. Because of frequent bandhs called by the AASU in connection with the Assam movement, mill could not function properly and as a result there had been delay by one or two months in the submission of returns and depositing the required amounts. However the petitioner continued to deposit the amounts months after months even though there had been some delay. Dues for the month of August, 1985 which was normally to be paid in September was, however, deposited in time. Show cause

notice dated April 30, 1986 was issued as to why the damages should not be imposed and to appear before the 1st respondent on May 27, 1986. But the said notice was received after the date fixed. Ultimately the 1st respondent by his letter dated May 11, 1988 levied a damage to the tune of Rs. 17,403.93 with a direction that the amount should be paid within 15 days from date of receipt of the order. Thereafter, the 1st respondent issued yet another notice dated May 12, 1988 directing the petitioner to deposit the amount of damages within 20 days from the date of receipt of the said order. The Provident Fund Commissioner while passing the aforesaid order dated May, 11, 1988 did not consider all the aspects pointed out by the representative of the petitioner and failed to consider the submissions made on behalf of the petitioner. Petitioner further states that from the very beginning the number of employees were below 20 and in some cases the number went down to 5 and the existing employees are not interested to contribute their provident Fund. The petitioner, therefore, informed the Regional Provident Fund Commissioner and prayed for cancelling the order for payment of damages. Petitioner further states that the impugned order was illegal without jurisdiction inasmuch as there could not be a default or delay in payment of the contribution to the Provident Fund before the date of granting permission by order dated January 21, 1981 and the 1st respondent in fact imposed damages calculating from the date more than a year before the date of permission which was in violation of the law. By Annexure - XIII the Regional Provident Fund Commissioner of N.E. Region levied an amount of Rs. 17043/93 as a total amount of damages for the period from January, 1982 to August, 1985. The Regional Provident Fund Commissioner respondent No. 1 did not mention how the amount of Rs. 17,403.93 was assessed as damage. While passing the impugned order the 1st respondent did not consider the reason for delay.

4. Respondent No. 1 - Regional Provident Fund Commissioner did not clearly mentioned why the grounds mentioned by the petitioner for making delay in remitting the amount to the fund was not accepted. According to the petitioner, respondent No. 1 - Regional Provident Fund Commissioner only took into consideration while assessing the damage that failure to remit the amount in time had caused loss to the fund and to the ultimate beneficiaries i.e. the workmen. Respondent No. 1 only for that reasons imposed penalty by way of damages to compensate the loss occurred. The contention of the petitioner was that the petitioner's mill was under obligation to contribute the employer's share only from the date when the permission has been given by the authorities. But in the present case the damages were calculated also for the period prior to the date of according permission. Therefore, the petitioner submitted that the order for payment of damages was illegal, without jurisdiction and liable to be set aside. The petitioner further submitted that the provisions of the Act not being applicable in view of the fact that it does not come within the purview of the aforesaid Act, the authority could not have imposed penalty.

5. On the basis of the submission of the counsel for the petitioner it is to be seen

whether the impugned notices of demand dated May 12, 1988 and April 27, 1989 (Annexure - XIV and XV) can sustain in law. Records of the case have not been produced before this Court. A thorough scrutiny and examination regarding the averments made by the petitioner is necessary. This cannot be done by this Court in exercise of the power under Article 226 of the Constitution. Section 7-1 provides a statutory appeal before the Tribunal. It has been informed that the Tribunal has not been constituted.

6. As per Section 6 of the Act, an employer is liable to make contribution to the fund as envisaged under the said Section. u/s 14-B of the Act, where an employer makes default in payment of any contribution to the fund, 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. The expression "make default" is synonymous with failure to pay. The employer's liability for damages is attracted the moment he makes default, but the explanation or excuse for such default good or bad, will be relevant for the purpose of recovery and assessment of damages varying from 100% to nil. The meaning of the word "default" has been explained by the Supreme Court in *Organo Chemical Industries and Anr. v. Union of India and Ors.*, reported in 1979 LLJ 416 . In the said case the Supreme Court observed that the object and purpose of Section 14-B is to authorise the Regional Provident Fund Commissioner to impose exemplary or punitive damages and thereby prevent employers from making defaults. It is also meant to provide reparation for the amount of loss suffered by the employees. The word "default" in Section 14-B must be construed to mean failure in performance or failure to act. In assessing 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 entire amount of damages awarded u/s 14-B except for the amount relatable to administrative charges, must necessarily be transferred to the Employees' Provident Fund and Family Pension Fund. The employees would, of course, get damages commensurate with their loss i.e. the amount of interest on delayed payment, but the remaining amount should go to augment the "Fund" constituted u/s 5 for implementing the Schemes under the act. The expression "damages" is neither vague nor over-wide. It has more than one signification. But the precise import in a given context is not difficult to discern. 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 measures 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 is not construed to mean penal damages. Imposition of damages u/s 14-B serves a two-fold purpose. It results in damnification and also serves as deterrent. The predominant object is to penalise so that an employer may be thwarted or deterred from making any further default. 1979 LLJ 416 (supra).

7. However while imposing damages the Court has to take into consideration of various aspects including the reason for failure. It is true, the authority may levy damages the moment there is default. But before assessing damages the authority must exercise on a reasonable basis having regard to all the facts and circumstances of the case. It must take in to all the loss suffered or likely to be suffered by the beneficiaries of the fund and also the reason for delay. If damages are levied without considering these aspects, it will not be just and proper. It may become arbitrary. Such assessment must be made after proper application of mind and must not be arbitrary. A non-speaking order shall also be regarded as bad order of levying damages.

8. In the instant case the authority, however, assessed damages without considering all these aspects as argued by the learned counsel for the petitioner. All these require thorough scrutiny and examination. In exercise of the power conferred under Article 226 of the Constitution, this Court cannot embark upon such type of enquiry.

9. In view of the above, I am constrained to hold that the present assessment of damages cannot be regarded as just and proper and, therefore, it is set aside. The entire matter is sent down to the Regional Provident Fund Commissioner for reconsideration after taking into consideration of all the relevant facts and circumstances appearing in the record of the case and in the light of the observations made herein above. The Regional Provident Fund Commissioner shall also try to dispose of the matter as early as possible, at any rate within a period of 4 months from the date of receipt of this order.

10. In the facts and circumstances of the case, I make no order as to costs.