
(2003) 06 KL CK 0006
In the High Court Of Kerala
Case No : O.P. No. 2359 of 1996 (E)

Puthiyara Tile Works

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-06-2003

Acts Referred:

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

Citation : (2004) 1 LLJ 202

Hon'ble Judges : A.K. Basheer, J

Bench : Single Bench

Advocate : Anil Xavier, for the Appellant; N.N. Sugunapalan, for the Respondent

Judgement

A.K. Basheer, J.—The short question that arises for consideration in this Original Petition is whether respondents 2 and 3 were justified in the facts and circumstances of the case, in initiating proceedings against the petitioner to recover damages u/s 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short, the Act).

2. Petitioner which is a partnership firm registered under the Indian Partnership Act, is engaged in the manufacture and sale of tiles and other allied clay products. It is admitted by the petitioner that there was default in making certain remittances to the Employees' Provident Fund, Family Pension Scheme etc., since the petitioner establishment had run into financial doldrums. It is contended by the petitioner that respondents 2 and 3 were very well aware of the predicament and the financial crisis that was being faced by the petitioner during the relevant period and therefore Exhibit P5 and P7 demand notices issued by respondents 2 and 3 directing the petitioner to pay Rs. 3,98,669/- by way of damages as provided u/s 14-B of the Act are liable to be quashed.

3. It is not disputed by respondents 2 and 3 that petitioner firm was in deep financial crisis starting from 1987-88. Respondents 2 and 3 also admit that petitioner was declared as a sick unit by the Department of Industries and

Commerce, Government of Kerala. However it is contended that so long as any scheme for rehabilitation had not been sanctioned by the Board for Industrial and Financial Reconstruction (BIFR) established u/s 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, petitioners could not claim any benefit or concession as a sick unit. It is also contended by respondents 2 and 3 that sufficient leniency was shown by them towards the petitioner inasmuch as damages were levied against the petitioner only at the rate of 25% per annum though petitioner was liable to be levied upto 100% of the arrears as damages for the delayed payment of the contribution,

4. It is not in dispute that petitioner's industrial unit was taken over by the Recovery Officer of the Employees' Provident Fund and the plant and machinery were also attached. However, according to respondents 2 and 3, though petitioner's establishment was under attachment by the Recovery Officer, the business was permitted to be conducted by the Managing Partner of the firm subject to certain terms and conditions. Exhibit P2 order dated November 19, 1991 issued by respondent No. 3, Recovery Officer will show that petitioner was permitted to conduct the business of the establishment subject to the following terms and conditions:

"1. All receipts received in connection with the business shall be remitted to EPF Account heads daily, after incurring only minimum expenditure incurred for running business.

2. If any unforeseen expenditure is incurred, prior sanction of the Recovery Officer should be obtained.

3. Proper accounts of all receipts should be maintained and produced for verification as and when required.

4. The attached Articles as per Seizure Memo shall continue to be under attachment, till the dues and cost are cleared by you.

5. The assets as mentioned in the superdnama should not be sold, given away, transfer, mortgage or otherwise alienate or encumber in any way, until the entire amount is paid to the Recovery Officer in full with costs."

The Seizure Memo annexed to Exhibit P2 will reveal that the entire plant and machinery were seized/attached by respondent No. 2. Clause 1 in Exhibit P2 extracted above will unambiguously show that all cash receipts in connection with the business had to be remitted by the petitioner to the Employees Provident Fund account every day, after meeting the minimum expenditure for running the business

5. It is pertinent to note that petitioner's unit was under attachment from 1991 for more than 3 years. Respondent No. 3 had taken over the unit since there was default in payment of the dues payable to the Employees' Provident Fund, Family Pension Fund, Scheme etc. It is also not disputed by respondents 1 and 2 that the entire dues payable by the petitioner were subsequently remitted, though

there was some delay. Exhibit P3 notice issued u/s 14-B of the Act will show that damages were proposed to be levied for the delay in making the remittances for the months of September 1 1990 to January 1993, September 1993 to February 1994 and also for the months of April, July and November 1994 and February, April and May 1995. Respondents 2 and 3 have admitted that the entire dues payable by the petitioner for the period/months mentioned above were remitted by the petitioner, though belatedly. It is in the above circumstances that petitioner has contended that there was no justification on the part of respondents 2 and 3 to levy damages from the petitioner as provided u/s 14-B of the Act and the Scheme.

Section 14-B reads as follows:

"14-B: 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 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.

....."

It is true that 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, if the employer makes default in the payment of any contribution to the Fund under the Act and the Scheme. It cannot also be disputed that the petitioner had not made certain remittances within the stipulated time during the period in question. It has to be noted that the authority concerned which is vested with the power to recover damages has been given the discretion to decide whether or not damages by way of penalty should be recovered, in case of default by the employer in making the contributions to the fund, scheme, etc. The words "may recover" occurring in Section 14-B will clearly show that the authority under the Act is vested with the discretion to decide whether damages are liable to be recovered from the defaulter, and if so to what extent.

6. The question whether the term "damages" used in Section 14-B of the Act denotes compensation or penalty has been considered by this Court on earlier occasions. In *Regional Provident Fund Commissioner v. Bharat Plywood & Timber Products .(P) Ltd.* 1979 KLT 653, a Bench of this Court held that the damages

contemplated under the Act is in the nature of penalty of punishment and the provisions of the Act and the Scheme do not provide for any ascertainment of the loss which an employee suffers on account of the delay in non-payment of the contribution by the employer.

7. While interpreting a corresponding provision in the Employees' State Insurance Act, 1948 in *ESI Corporation v. Meecos Ltd.* 1980 KLT 179 another Division Bench of this Court had considered the question whether the damages contemplated u/s 85-B of the above Act was not compensation for loss on account of default of a party or whether it was a penalty for non-compliance of the statute to the extent indicated. While holding that the term "damages" denoted penalty, the Division Bench further held as follows:

"..... The imposition of damages is a matter for judicial exercise. To put it in other words that damages is not related to actual loss does not mean that it could be arbitrarily imposed. If it be compensation for loss, the question, such as reason for the default and the justification that the defaulter may be able to show for non-compliance, may be not relevant. But where damages, do not actually depend on the loss suffered by the defaulting party and is in the nature of a deterrent imposed to enable proper enforcement made of the Act, the circumstances of the default will have relevance. The justification that a party may be able to urge for failure to pay may have to be taken into account in determining the quantum."

In *Bharat Plywood's* case (supra) also the Division Bench took the view that the decision making process cannot be a mechanical one and the authority which orders recovery of damages must apply its mind to the question and also take into account the various factors like the financial position of the employer, the duration of the default etc.

8. In *E. S. I. Corporation's* case mentioned supra, this Court had referred to the decisions in *Bharat Plywood's* case (supra) and *Atlantic Engineering Services v. Union of India* 1979 Lab IC 695 which had considered the scope of the ambit of Section 14-B of the Act. After considering the above two decisions, the Division Bench held that the term "damages" used in Section 14-B of the Act is intended to denote something in the nature of penalty and therefore damages could be claimed from the defaulter even without any proof of loss to the provident fund authorities. Thus, it has been the consistent view of this Court that the term "damages" used in Section 14-B of the Act is akin to penalty.

9. Reference has been made to the above decisions in view of the contention raised by the learned counsel for the petitioner that a mere failure to comply with a statutory mandate due to reasons beyond one's control cannot entail a liability to pay penalty or damages. In *Hindustan Steel Ltd. Vs. State of Orissa*, , the Supreme Court held that "an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty would 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 would 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 a bona fide belief that the offender is not liable to act in the matter prescribed by the statute.

10. It is contended by the learned counsel for the petitioner that the recovery u/s 14-B being a penalty, respondents 2 and 3 ought to have exercised the discretion vested in them in a proper and legal manner after taking into view all the attendant circumstances, especially the fact that petitioner unit was under orders of attachment.

11. It is urged by the learned counsel that penalty could be imposed only if there was a wilful failure and/or default and the conduct of the defaulter was contumacious or dishonest. In the case of the petitioner it was not a wanton act of defiance of the statutory mandate, but the financial position of the petitioner was so precarious that there was no way that the petitioner could have remitted the dues payable every month under the Act and the Scheme regularly. It is also pointed out by the learned counsel that petitioner had remitted the entire dues, though belatedly.

12. Learned counsel for the petitioner has relied on a decision reported in Regional Director, E.S.I. Corpn. Vs. Sakthi Tiles, . While considering the question whether the damages imposed on the defaulter in remitting the dues payable in respect of the contributions under the Employees' State Insurance Act and the question whether the Corporation was empowered to recover damages for such default the Division Bench held that at p. 1199:

"3..... An order levying damages for failure to pay the amount due in respect of any contribution payable under the Act is a quasi-judicial proceeding. Since the failure to carry out the statutory obligation should be adjudicated by a quasi-judicial enquiry and the levy of damages is quasi-penal in character, we are of the view that such damages will not ordinarily be imposed unless the party obliged to pay the amount due, acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation. The mere fact that the Corporation is empowered to recover damages, does not mean that the Corporation can act mechanically and without taking into account the facts and circumstances of each case....."

Learned counsel for the respondents has however contended that respondent No 2, the Regional Provident Fund Commissioner had considered all the attendant circumstances and relevant materials before Exhibit P5 order was issued for

recovery of damages from the petitioner. It is contended that sufficient leniency was shown in the case of the petitioner inasmuch as only 25% was levied from the petitioner though damages upto 100% of the arrears could have been recovered from the petitioner. I do not propose to go into the quantum of damages that has been proposed to be levied from the petitioner, since, as rightly observed by the Division Bench in E.S.I. Corporation's case (supra), "to lay down any rule as to determination of quantum would be to add to the provisions of the Act and circumscribe or limit the discretion of the Corporation in determining the quantum of damages." I am in respectful agreement with the distinction drawn by the Division Bench between the damages arising out of a breach of contract or tortious conduct of a person and "penalty" that is imposed as a penal consequence for violation of a statutory obligation.

13. There is no doubt that commission of a default is enough to attract imposition of penalty and recovery of damages as prescribed u/s 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act. The first proviso to Section 14-B makes it mandatory that the employer shall be given a reasonable opportunity of being heard before levying and recovering such damages. This implies that an effective adjudicatory process must be completed before the defaulter is mulcted with the liability to pay damages. Necessarily therefore, the authority which decides to impose penalty and recover damages has to apply its mind in a proper and legal manner with specific reference to all the facts and circumstances of the case. Though the quantum of damages that can be levied has been indicated in the statute, the question as to whether any recovery of damages has to be made by way of penalty is entirely at the discretion of the authority which proposes to impose such a penalty. The said discretionary power vested in the authority has to be exercised in a fair, reasonable and just manner. If the authority which is vested with the discretionary power as indicated in Section 14-B does not act with an open mind, the entire adjudicatory process will lose its authenticity and judicial approval. Though this Court in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India will not go into the question of the quantum of damages proposed to be recovered from the petitioner in terms of the statutory mandate, the decision making process, especially with reference to the exercise of the discretionary power vested with the authority which takes such a decision can always be subjected to judicial scrutiny. Viewed in this perspective, it cannot be said that respondent No. 2 had exercised the discretionary jurisdiction vested in the said authority in its true spirit.

14. As rightly contended by the petitioner, respondents 2 and 3 were aware that petitioner's industrial unit was in financial crisis. More importantly respondent No. 3 had attached the plant and machinery and other assets of the industrial unit of the petitioner, though the conduct of business of the unit was entrusted with the Managing Director under certain stringent conditions. Petitioner was bound to remit the entire receipts obtained from the business to the account of respondent No. 2 every day after meeting the expenditure involved for running

the business. There is also no dispute that the petitioner had remitted the entire dues payable to the Fund and the various Schemes under the Act. The management of the erstwhile establishment was taken over by the petitioner and the partnership was reconstituted thereafter. It is also on record that a revival programme was thereafter implemented with the help of the Entrepreneurship Development Cell of the Regional Engineering College, Calicut. It was during the revival period that the arrears had fallen due. Under such circumstances respondent No. 2 ought to have considered all these circumstances before passing Exhibit P5 order. A perusal of Exhibit P5 order will show that there was no proper application of mind while the said order was passed.

15. It is contended by the learned counsel for the respondents that since Exhibit P6 representation is stated to have been filed by the petitioner before the Union Minister for Labour, the petitioner can pursue his remedies before the said authority. Exhibit P6 is seen submitted in December 1995 and the respondents have no case that any order has been passed by the Minister on the above representation submitted by the petitioner. It is not a statutory representation either. Under such circumstances I am not inclined to accept the contention of the learned counsel for the respondents that the petitioner may be directed to get his grievances redressed through the Ministry of Labour, Government of India. At this distance of time, it may not be just or proper to relegate the petitioner to that non-existent or illusory remedy.

16. Having regard to the entire facts and circumstances of the case and having considered the contentions raised by the petitioner and the respondents, I am satisfied that Exhibits P5 and P7 are not liable to be sustained. Therefore Exhibit P5 and P7 are not liable to be sustained. Therefore Exhibits P5 and P7 are quashed. However, it is made clear that respondent No. 2 will be at liberty to consider the question of recovery of damages for the period mentioned in Exhibit P5 afresh, if so advised. Any proceedings to be initiated in this regard shall be strictly in accordance with law and only after affording an opportunity to the petitioner for a personal hearing. Respondent No. 2 shall pass orders in the recovery proceedings in the light of the observations made above, without any delay.

17. Original Petition is disposed of in the above terms.