

(1979) 07 KL CK 0001

In the High Court Of Kerala

Case No : W.A. No. 287 of 1976 and O.P. No. 2311 of 1975

Regional Provident Fund Commissioner

APPELLANT

Vs

Bharath Plywoods and Timber Products (Pvt.) Ltd.

RESPONDENT

Date of Decision : 03-07-1979

Acts Referred:

Constitution of India, 1950 — Article 20(2), 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 10F,
14(A), 14B, 15(2), 17

Citation : (1979) 07 KL CK 0001

Hon'ble Judges : Viswanatha Iyer, J; Bhaskaran, J

Bench : Division Bench

Advocate : P.C. Chacko, for Central Government in W.A. No. 287/76 and O.P. No. 2311/75, Varghese Kalliath, Joseph A. Vadakkal and P. Santhalingam, in O.P. No. 2311/75, for the Appellant; V. Sivaraman Nair and V.M. Nayanar, in W.A. No. 287/76, for the Respondent

Final Decision : Allowed

Judgement

Viswanatha Iyer, J.—The writ appeal and the Original Petition raise a common question and hence are disposed of together. To understand the question, the facts in the Original Petition, O.P. 2976 of 1974, from which the writ appeal is filed, may be stated. The Petitioner is a company and an establishment coming within the ambit of the Employees' Provident Funds Act, 1952, (herein after called the Act) and a scheme framed thereunder. The employer made default in the payment of contribution to the fund for the periods from February 1967 to April 1971. Four notices covering the entire period were issued by the Government to the employer calling upon him to pay damages at the rate of 25 per cent of the amount of arrears alleged to be due from the Petitioner. The Petitioner did not comply with the notices of demand. So revenue recovery steps were taken against the Petitioner. At that time the Petitioner came forward with the writ petition challenging the levy of damages and the steps taken to recover the same under the Revenue Recovery Act. The Petitioner's grievance is that at

the time when the provisions of Section 14B of the Act were invoked there were no arrears. No doubt contributions and administrative charges were not paid in time and for the delay the Petitioner had been proceeded against u/s 14(A) of the Act and therefore there is no jurisdiction to the Government to proceed again u/s 14B of the Act long after the amounts in respect of which damages are sought to be recovered have been paid. Further it was contended that what is provided for u/s 14B is levy of damages. That requires an ascertainment of the loss incurred on account of the delay in the payment of contributions and administrative charges. This has not been done. What has been done is a mechanical application of the section which gives power to the concerned authority to levy damages not exceeding 25 per cent of the amount in arrears. The mechanical imposition of 25 per cent of the amount due is contrary to the provisions of Section 14-B and as such invalid. The later plea was accepted by Kochu Thommen, J., and the Original Petition was allowed. The Writ Appeal is filed by the Government challenging the correctness of the decision.

2. In the other Original Petition also the facts are similar. Remittances towards Employees Provident Funds and family Pension Fund dues for two months in 1967, four months in 1969, four months in 1970 and the amount due by way of arrears in 1971 and upto September, 1972 were delayed. So a show cause notice was issued to the Manager of the Petitioner-company to show cause why Government may not order levy of damages u/s 14B of the Act. Though a reply was sent showing cause against the proposed step, the Government passed an order on 16th June 1973 levying damages at the rate of 25 per cent of each amount in default. The amount was quantified by the Regional Provident Fund Commissioner and he issued a notice of demand calling upon the Petitioner to pay the amount specified in the notice. Though the Petitioner made a representation against it nothing was done by the authorities. At the same time steps were taken under the Revenue Recovery Act to realise the amount from the Petitioner. So the Petitioner has moved the writ petition challenging the levy of damages against him. According to the Petitioner Section 14B gives a discretion to the authority to impose damages at the rate not exceeding 25 per cent. That is no reason to impose damages, at that rate in every case. Further damages, being in the nature of compensation for the loss sustained by the default or delay in the payment, without quantifying or ascertaining the loss an arbitrary imposition of damages at the rate of 25 per cent of the amount is contrary to Section 14B and invalid.

3. The answer of the Employees Provident Fund Commissioner in both the cases is two-fold. Firstly it is contended that the order imposing damages was passed in 1973 and only in 1975 when the writ petition was filed this has been challenged and hence on the ground of delay the High Court shall not exercise the discretion under Article 226. Secondly it is contended that the nature and character of the imposition is not by way of compensation for the loss, to some extent it is punitive in character and therefore the contention of the Petitioner that without ascertaining the loss incurred, the damages cannot be ordered to be

paid, is incorrect. In the light of this we have to see which of the stand taken by the contending parties is correct.

4. His Lordship Dr. Kochu Thommen, J. who heard the earlier original petition allowed the same taking the view that Section 14B only provides for recovery of damages not exceeding 25 per cent of the amount in arrears and therefore without ascertaining damage sustained either by the employees or by the authorities who administer the Act, imposition of penalty at the flat rate of 25 per cent in every case is clearly unsustainable. The correctness of this view is challenged in the writ appeal. No doubt in the law of contracts the concept of damages and award of it for breach of contract are very well-known and the expression damages in that branch of the law is always understood to mean compensation equivalent to the damages sustained. In that branch if any amount is fixed as payable for a breach of contract which has no relation to the loss sustained or is in excess of the loss which has to be compensated, that amount will be characterised as a penalty and a court will not help the party entitled to compensation to enforce the penal provision. Damages is a well-known concept in the law of Torts also. There also it is awarded for the breach of a duty, and damage is in the nature of a compensation and hence the measure of damages is also a measure of the loss sustained. But these are not the only cases where damages are awarded. Damages can be awarded in a case where there is a violation of a statutory duty, to enforce a statutory obligation or as a deterrent measure the law can provide for damages by way of a penalty in the case of a violation of any statutory provisions. In other words, levy of damages in the nature of a punishment for the violation of a statutory duty is also a well-known concept recognised by courts of law.

5. In what sense the law provides for imposition of damages can be understood only on an appreciation of the provisions of the concerned statute and the social background forming the basis of the statute. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, is enacted by the Parliament for the benefit of workers and it is a social security measure enacted for the protection of the workers. The Act provides for contributions to be paid by the employer to a fund constituted under the Act from which fund the workers are paid some amount at the time of termination of their services by retirement or resignation or retrenchment, etc. The employer and the employee are required to contribute to this fund. The employee has to pay from out of his wages a certain amount compulsorily towards this fund. This has to be realised by the employer from out of the wages before the wage is paid to the employee. The sum so realised has to be paid by the employer to the fund and over and above this, the employer has to make his own contribution as prescribed by the Act or the scheme. So the success of this scheme in other words, the benefit intended to be conferred on a worker, depends largely on the active co-operation of the employer and if he defaults in that the enforcement of the provisions of the Act will become impossible. So the Act has provided for the imposition of penalties. The breach of the provisions may in some cases entail criminal action against the employer. If

the employer contravenes or fails to comply with the provisions of the Act, he can be prosecuted and punished with imprisonment and/or fine. This will not very much help for the realisation of the contributions and other payments which an employer have to make. So the statute also provides a power to the authorities who are entrusted with the administration of the Act to impose and recover damages for the default of the employer in complying with the provisions of the Act. In this connection it will be useful to read Section 14B before its amendment by Act 40 of 1973:

14B. Power to recover damages. -- -Where an employer makes default in the payment of any contribution to the Fund the Family 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) or 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 such damages not exceeding twenty-five per cent of the amount of arrear, 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.

It will be seen that the competent authority is given a power to impose or levy damages. In the case of a breach of contract or a tort the court determines the loss and the compensation payable and award damages to the aggrieved party. The court does not "impose" any damage. The situation or the circumstance of the default is not generally taken into account. But as seen from the section a power is given on the authority to "impose" damages. The imposition is something in the nature of a penalty for the breach, or violation of any provision of law. The authority concerned may take into account the facts and circumstances of the case, the position of the employer and impose damages not exceeding 25 per cent of the arrears. To impose damages it is not necessary to find out the loss suffered by the department or the employee. That this is so will be clear from the various provisions of the Provident Fund scheme which will be useful to state.

6. Para 38 of the Employees' Provident Funds Scheme provides for the mode of payment of the contribution. Sub para (1) of that paragraph reads as follows:

38. Mode of payment of contributions. -- (1) The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable deduct the employee's contribution from his wage which together with his own contribution as well as administrative charge of such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee and in respect of

which provident fund contributions are payable, as the Central Government may fix, he shall within fifteen days of the close of every month pay the same to the fund by separate bankdrafts or cheques on account of contributions and administrative charge:

Provided that if payment is made by a cheque on an outstation bank, the actual bank collection charges in respect of both the contributions and the administrative charges shall be included in the amount for which the cheque is drawn in respect of the administrative charge:

Provided further that where there is no branch of the Reserve Bank or the State Bank of India at the station where the factory or other establishment is situated, the employer shall pay to the fund the amount mentioned above by means of Reserve Bank of India Governmental Drafts at par separately on account of contributions and administrative charge.

Chapter VII of the scheme provides for the administration of the fund. Three accounts are directed to be maintained under paragraphs 49 to 55 of the scheme. Paragraph 52 provides for the investment of moneys belonging to fund. Paragraph 59 provides for opening in the office of the fund an account in the name of each member in which it shall be credited his contributions, the contributions made by the employer in respect of him and the interest as provided in paragraph 60, and paragraph 60 provides for crediting interest to the account of each member at such rate as may be determined by the Central Government in consultation with the Central Board. The interest is worked out on the basis of the return which the investments get from the various securities. This is evident from the accounting procedure mentioned in the Employees' Provident Fund Act. Damages levied and recovered u/s 14B do not go into the accounts of the employees. It goes into the general account of the fund. Thus 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 or non-payment of the contribution by the employer. It is in the nature of a penalty or punishment and the only safeguard provided for in the Act is that before recovering damages an opportunity must be given to the employer for being heard in the matter. What is significant is that the damages are "imposed" the idea being a compulsory levy for the default of the employer.

7. In this view the decision of the learned Single Judge against which the writ appeal is filed with respect, is not correct. No doubt that decision has been followed in *S.I. Flour Mills v. Regl. P.F. Commissioner* (1978) 1 LL.J. 101 without any discussion of the principle evolved. But a contrary view has been taken by a Division Bench decision of the Patna High Court reported in *R.B.H.N. Jute Mills v. Provident Fund Commissioner* (1958) 1 LL.J. 598 Ramaswami, C.J. after quoting the section and the relevant rules at page 600 has stated the principle thus:

In other words, the infliction of the damages u/s 14B is not meant to provide compensation or redress to the employees whose interest may be injured. It is

not meant to provide reparation to such employees and the quantum of damages imposed has no relation to the amount of loss suffered by the employees. I consider that the infliction of the damages u/s 14B is penal in nature. It is a warning to employers in general not to commit a breach of the statutory rule. It is a documentum as the Roman lawyers called it. The object of the legislature in enacting Section 14B is clearly to punish the recalcitrant employers and not to provide compensation for the employees. I consider that the expression "damages" occurring in Section 14B is in substance a penalty imposed on the employers for the breach of the statutory obligation.

Though the learned Judge mentioned the damages as a punishment, the imposition of damages is not by a court of law or by a judicial tribunal to attract Article 20(2) of the Constitution. This decision has been followed by two learned Judges of the Madras High Court one in Madras-Bangalore Transport Company Vs. Regional Provident Fund Commissioner, and another in Popular Transport (Registered) Vs. Regional Provident Fund Commissioner, . In Bharat Barrel and Drum Manufacturing Company (Private), Ltd. Vs. Raval (B.N.) and Another, Justice K.K. Desai of the Bombay High Court had dealt with and rejected the contention put forward on behalf of the employer that damages payable by the defaulted employer must correspond with the injuries suffered and exemplary and/or punitive damages cannot be demanded under the section. The learned Judge has stated his conclusion thus at page 814:

It is also clear having regard to the scheme of the Act and the other provisions in the Act when read with the section that the reason for enactment of the section was to provide the Government with authority to make it difficult for the employers to make defaults in payments to be made under the Act and the scheme. The intention was to enable the Government to impose such damages as an employer may not find it profitable to make defaults in payment.

with respect we agree with the view taken in these cases and hold that the damage referred to in Section 14B is not by way of compensation, but by way of penalty.

8. This takes us to a further question, namely, whether a competent authority can irrespective of any circumstance impose a penalty not exceeding 25 per cent of the amount in arrears. There is a similar provision in the Coal Mines Provident Fund and Bonus Scheme Act, 1948. Section 10F of that Act corresponds to Section 14B of the employees' Provident Funds Act. In interpreting that section the Supreme Court in The Commissioner of Coal Mines Provident Fund, Dhanbad and Others Vs. J.P. Lalla and Sons, observed thus:

The words of importance in Section 10F of the Act are "such damages not exceeding 25 per cent of the amount of arrears as it may think fit to impose". Here the two important features are these. First the words of importance are "damages not exceeding 25 per cent". These words show that the determination of damage is not an inflexible application of a rigid formula. Second, the words

"as it may think fit to impose" in Section 10F of the Act show that the authorities are required to apply their mind to the facts and circumstances of the case.

The same principle applied here also. Exts. P-3, P-6, P-8 and P-11 orders (in O.P. 2976 of 1974) of the Government show that in all these cases damages at the rate of 25 percent of the amount in arrears has been imposed by the Government. They were imposed after notice to the employers and no mitigating circumstance was pointed out by the employers why the proposed imposition of 25 per cent of the arrears will be either excessive or unjustified. That, being so though we hold that the decision on the question of damages is not a mechanical process and the authority must apply its mind to the question and take into account various factors, namely, financial position of the employer, the duration, etc., no interference is called for regarding the amount of damages imposed in these cases.

(sic)rs are challenged after a lapse of (sic) Revenue Recovery steps were (sic) realisation of the amounts. (sic) the inordinate delay in questioning the orders now challenged in the writ appeal. So on the facts and circumstances of this case we do not think that any interference is called for in the orders passed by the Government and challenged in the Original Petition. Therefore the writ appeal is allowed, the order passed by the learned Single Judge is set aside and O.P. 2964 of 1974 is dismissed. But in the circumstances we make no order as to costs.

The prayer in O.P. 2311 of 1975 to quash Exts. P-3 and P-4 orders is also dismissed, but it is made clear that this will not preclude the consideration and decision of Exts. P-5 and P-7 representations by the third Respondent. The third Respondent will dispose of the petition within three months from today. Subject to the above observations and directions O.P. 2311 of 1975 is also dismissed. There will be no order as to costs in this Original Petition.