
(2010) 05 P&H CK 0296

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No's. 14811, 20036, 21871 of 2008

Regional Provident Fund Commissioner

APPELLANT

Vs

Kay Iron Works Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 27-05-2010

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 15(2), 17, 17(5), 6
Employees State Insurance (General) Regulations, 1950 — Regulation 31C
Employees State Insurance Act, 1948 — Section 85B
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2010) 127 FLR 499 : (2010) 4 LLJ 858 : (2010) 159 PLR 689

Hon'ble Judges : George Augustine Masih, J

Bench : Single Bench

Judgement

George Augustine Masih, J.—Costs as ordered by this Court, deposited. By this Order, I propose to decide CWP No. 14811 of 2009 Regional Provident Fund Commissioner v. Kay Iron Works Pvt. Ltd. and Anr. CWP No. 20036 of 2008 Regional Provident Fund Commissioner v. Kay Iron Works Pvt. Ltd. and Anr., and CWP No. 21871 of 2008 Regional Provident "Fund Commissioner v. Haryana Sheet Glass Limited, as common question of law is involved in all the writ petitions. Counsel for the parties have also addressed arguments in these cases together.

2. These three writ petitions have been preferred by the Regional Provident Fund Commissioner, Karnal, challenging the Orders passed by the Employees' Provident Fund Appellate Tribunal, New Delhi, (hereinafter referred to as "the Tribunal"), vide which the damages imposed by the Assistant Provident Fund Commissioner, Karnal, u/s 14-B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, (hereinafter referred to as the "EPF and MP Act") @ 37% of the amount of arrears stands reduced to 20% in C.W.P. No. 14811 of 2008 and C.W.P. No. 20036 of 2008 and 17% in C.W.P. No. 21871 of 2008. It is not in dispute that respondents in the writ petitions defaulted in

making payments to the Fund as provided u/s 6 of the EPF and MP Act. The Orders passed by the Assistant Provident Fund Commissioner, Karnal, imposing the damages u/s 14-B of the EPF and MP Act @ 37% of the amount of arrears was challenged before the Tribunal by respondents primarily on the ground that the Authority had not held any inquiry or recorded finding of fact that respondent-Companies had willfully and deliberately withheld the Employees' Provident Fund Contribution. This was contended basically on the ground that the Assistant Provident Fund Commissioner, Karnal, had merely relying upon Para-32-A of the Employees' Provident Fund Scheme, 1952, (hereinafter referred to as the "EPF Scheme") mechanically imposed the damages as envisaged under the said Para, i.e., 37%. The Appellate Tribunal considered the submissions made by the parties and held that ,Para-32-A of the EPF Scheme was only a guideline and the Assistant Provident Commissioner, Karnal, while deciding the quantum of damages u/s 14-B of the EPF Act should have taken into consideration the reasons for delay in depositing the contribution to the Fund and then impose the damages, but cannot be as per straight jacket formula. The delayed payment of contribution does not ipso facto, call for levying the damages as it was a quasi judicial" function, which was conferred on the Competent Authority as per the EPF and MP Act to consider the reasons for delay, if any submitted by the defaulters and then come to a conclusion on the quantum of damages to be imposed u/s 14-B of the EPF and MP Act. The Appellate Tribunal proceeded to hold that no inquiry or finding of fact has been returned that the respondents herein had willfully and deliberately withheld Provident Fund contribution and the Enquiry Officer had not exercised his discretion viz-a-viz delay for remittance of Provident Fund dues. Keeping in view these reasons and circumstances, the damages were reduced at the rates as detailed above.

3. Counsel for the petitioner contends that a bare reading of Section 14-B of the EPF and MP Act and second proviso thereto read with Para-32-A of the EPF Scheme clearly envisage that in every case of default, damage can be imposed and the discretionary power has been taken away by amendment carried out in Section 14-B of the EPF and MP Act by Act No. 33 of 1988 with effect from 01.09.1991. Para-32-A of the EPF Scheme was added to EPF and MP Act with effect from 01.09.1991. The conjoint amendments brought out in the Act and the Scheme, leaves no manner of doubt that the rate of damages (percentage of arrears per annum) as provided in Para-32-A, are the minimum rate of damages, which cannot be tampered with. He contends that Section 14-B of the EPF and MP Act clearly spells out that the damages would be recovered as per rate specified in the EPF Scheme, i.e., Para-32-A. His further contention is that the second proviso to Section 14-B of the EPF and MP Act details out the circumstances . under which the Central Board may reduce or waive the damages levied under this Section and therefore, to be eligible for such reduction or waiver, an establishment is required to fulfil the conditions as specified in the second proviso. His further contention is that Para-32-A of the EPF Scheme is rigid and the rate of damages as prescribed thereunder cannot be reduced below

the rates specified therein. On the basis of these legal submissions, he contends that the impugned Orders passed by the Appellate Tribunal cannot be sustained.

4. In support of this contention, counsel for the petitioner relies upon the Single Bench Judgment of this Court in the case of Nav Bharat Industries Vs. Regional Provident Fund Commissioner and Another, , a Division Bench Judgment of this Court in the case of Avon Scale Company Vs. Regional Provident Fund Commissioner, , Single Bench Judgments of Calcutta High Court in the case of Andrew Yule and Co. Ltd. Vs. Regional Provident Fund Commissioner and Others, , and Atal Tea Company Ltd. and Anr. v. Regional Provident Fund Commissioner 1998-III L.L.J. (Supp.) 370, Judgments of Hon"ble the Supreme Court in the case of Halwasia Vidya Vihar (Sr. Sec. School) Haryana Vs. The Regional Provident Fund Commissioner, , and Organo Chemical Industries and Another Vs. Union of India (UOI) and Others, . His further submission is that in the given facts and circumstances of the cases of respondent-Companies, no reduction in damages was called for and, thus, the impugned orders deserve to be set aside.

5. On the other hand, counsel for respondent-Companies submit that Section 14-B of the EPF and MP Act and Para-32-A of the EPF Scheme use the word "may", which shows that the discretion is with the Authority to levy the damages. When there is a discretion provided in the statute as well as in the scheme, it cannot be said that in all cases of default in payment of any contribution to Fund by the establishments, damages has to be imposed, and the same would be true with regard to rate of damages as well. They further submit that the powers of the Appellate Tribunal have been provided u/s 7-L of the EPF and MP Act, which empowers the Appellate Tribunal to pass such orders on an Appeal preferred by the aggrieved party as it thinks fit, confirming, modifying or annulling the order, appealed against or may refer the case back to the Authority, which may pass such order as the Appellate Tribunal may think fit for afresh adjudication or order, as the case may be, after taking additional evidence, if necessary. The Appellate Tribunal has vast powers and, therefore, exercise of power by the Appellate Tribunal while reducing the damages imposed u/s 14-B of the EPF Act is fully justified and does not call for any interference by this Court. They submit that the Appellate Authority has in the given facts and circumstances of the cases, come to the conclusion that the interest of justice would be duly served by reducing the damages from 37% to 17% and 20% respectively as stated above. Their submission is that subordinate legislation cannot override the principle legislative provisions. The penal provision should be construed strictly and when a discretionary jurisdiction has been conferred on a Statutory Authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. The provisions which are discretionary, unless the statute holds it to be mandatory in character cannot be, by way of subordinate legislation, made mandatory in character. Counsel relies upon the judgment of Bombay High Court in the case of Cable Corporation of India Ltd. and Anr. v. Union of India and Anr. 2006 (III) C.L.R. 349, Division Bench Judgment of this

Court in the case of *Elsons Cotton Mills Ltd. v. Regional Provident Fund Commissioner, Haryana* 2001 (1) S.C.T. 1101. They further rely upon the judgment of Hon'ble the Supreme Court in the case of *Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another*, .

6. I have heard counsel for the parties and have gone through the record of the case with their able assistance.

7. The Employees' Provident Fund and Miscellaneous Provisions Act, 1952, was enacted as a beneficial legislation with an intention to secure the future of the industrial worker after he retires or for his dependents in the event of his early death. The Fund was primarily in the form of contribution, which shall be paid by the employer towards his share as also deduction from the employee's wages. Section 6 of the EPF and MP Act details the contributions and matters which may be provided for in the Schemes. The employer is mandated to deposit the Provident Fund dues of its employee after deducting the same from the wages of the employee and contributing his share thereunder as provided under this Section within 15 days from the close of every month with the concerned Provident Fund Commissioner. Para-29 of the EPF Scheme provides that the contribution payable by the employee shall be equal to the contribution payable by the employer in respect of such employee. Para-38 of the EPF Scheme provides the mode of payment. According to this para, the employer shall, before paying the employee his wages in respect of any period or part of period for which contributions are payable, deduct the employee's contribution from his wages, which together with his own contribution as well as an administrative charge shall pay within fifteen days of close of every months to the Fund by separate bank drafts or cheques on account of contribution and administrative charge. In case the employer fails to deposit the contributions within the prescribed period, the Central Provident Fund Commissioner or Officer Authorised is competent to recover the damages by way of penalty u/s 14-B of the EPF and MP Act after issuing show cause notice to the concerned employer and considering the reply, if any, submitted by it. In the case in hand, respondent-Companies admittedly failed to deposit the provident fund dues of its employees within the time stipulated and accordingly, notices were issued to them. Thereafter, the Assistant Provident Fund Commissioner, Karnal, proceeded to impose damages on delayed payments u/s 14-B of the EPF and MP Act by relying upon Para-32-A of the EPF Scheme, which according to the petitioner, prescribes the rate of damages, which is to be imposed u/s 14-B of the EPF and MP Act. As the default was for more than six months, damages imposed upon respondent-Companies was 37% of the amount of arrears.

8. For answering the questions as has been raised by counsel for the petitioner, the relevant provisions of the EPF and MP Act and relevant paras of the EPF Scheme need to be referred here, which read as follow:

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 u/s 17, the Central Provident Fund Commissioner or such other officer as may be authorized 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;

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 u/s 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.

Para-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 u/s 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 (% of arrears per annum)
(a) Less than two months	17
(b) Two months and above but less than four months	22
(c) Four months and above but less than six months	27
(d) Six months and above	37

The damages shall be calculated to the nearest rupees, 50 paise or more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored.

9. A perusal of the above provisions would show that for the main section, Para-32-A of the EPF Scheme would be relevant and for second proviso to the Section 14-B, Para-32-B would be relevant.

10. First, dealing with the contention of counsel for the petitioner that there is no discretionary power with the officer authorised to impose damages and the rate thereof in the light of Para-32-A of the EPF Scheme. The word, which would determine the nature of mandate while determining the damages to be imposed u/s 14-B of the EPF Act would be "may" used in the said section as also in Para-32-A. The use of this word shows the discretion which has been vested with the Commissioner or officer authorised to impose and recover from the employer

by way of penalty damages. Section 14-B of the EPF and MP Act, when read brings out that in default of payment by the employer of any contribution to the Fund, he becomes amenable to the imposition of penalty and recovery of the same by way of damages as may be specified in the EPF Scheme, which, however, shall not exceed the amount of arrears. Para-32-A of the EPF Scheme also uses the word "may" recover from the employer by way of penalty as damages at the rates mentioned above.

11. This also shows the discretion vested with the Commissioner or the officer authorised. This para merely acts as a guiding light and does not mandate the rate of damages as provided therein. Hon"ble the Supreme Court in the case of M/s. Hindustan Times Limited Vs. Union of India and Others, , has held as follows:

The authority u/s 14-B has to apply his mind to the facts of the case and the reply to the show cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually take into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages u/s 14-B.

12. Hon"ble the Supreme Court in the case of Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, , while dealing with *pari materia* provisions under the Employees" State Insurance Act, 1948, and Employees" State Insurance (General) Regulation, 1950, wherein Section 85-B and Regulation 31-C were under consideration. In paras-14, 15, 16,17, 18, 21, 24, 25, and 26 held as follow:

14. Section 85-B of the Act empowers the Corporation to recover the damages in the event an employer fails to make the payment of the amount due in respect of contribution; subject, however, to the condition that the amount thereof would not exceed the amount of arrears as may be specified in the Regulations. The proviso appended thereto incorporates the principles of "natural justice".

15. Obligation on the part of the employer to deposit the contributions of both the "employer" and the "employee" is not in dispute. What is in dispute is as to whether the amount of damages specified in Regulation 31-C of the Regulations is imperative in character or not.

16. It is a well-known principle of law that a subordinate legislation must conform to the provisions of the legislative Act. Section 85-B of the Act provides for an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages in the manner prescribed under the Regulations.

17. The statutory liability of the employer is not in dispute. An employee being required to be compulsorily insured, the employer is bound to make his part of the contribution. An employee is also bound to make his part of the contribution. An employee is also bound to make his contribution under the Act. But the same does not mean that levy of damages in all situations would be imperative.

18. Section 85-B of the Act uses the words "may recover". Levy of damages thereunder is by way of penalty i.e. not exceeding the amount of arrears. Regulation 31-C of the Regulations, therefore, in our opinion, must be construed keeping in view the language used in the legislative Act and not de hors the same.

21. A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85-B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an endeavour should be made to construe such penal provisions as discretionary, unless the statute is held to be mandatory in character.

24. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions.

25. The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with no discretion. The legislation does not provide that adjudication for the purpose of levy of penalty proceedings would be a mere formality or imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinarily, even" such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance with the principles of natural justice is necessary thereunder.

26. Existence of mens rea or actus reus to contravene a statutory provision must" also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.

13. In view of the above, it can safely be said that the power to impose damages u/s 14-B of the EPF and MP Act is a quasi judicial power. Section 14-B of the EPF Act does not mandate that an order of damages may not follow in the event of every default, meaning thereby that it confers discretion upon the Commissioner or the officer authorised to impose damages not exceeding the amount of arrears. The exercise of discretion mandates proper appreciation and consideration for coming to a decision. Para-32-A of the EPF Scheme being in the form of subordinate legislation cannot override the principle legislative provisions and, therefore, it can only be termed to be of guiding nature with no mandate attached thereto, especially when it itself uses the expression "may" while

invoking the powers of the Commissioner or officer authorised to recover from the employer by way of penalty such damages. Accordingly, the first contention of counsel for the petitioner that Para-32-A of the EPF Scheme leaves no discretion with the Commissioner or officer authorised to reduce or waive the imposition of damages, cannot be sustained.

14. As regards the contention of counsel for the petitioner that power of reduction and waiver can only be exercised, where specific conditions provided under the second proviso to Section 14-B are specified, suffice it to say that it deals with establishments which are industrial companies and it recognises and gives due weightage to the scheme for rehabilitation, which has been sanctioned by the Board for Industrial and Financial Reconstruction establishment u/s 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in the Scheme. It cannot be invoked or pressed into service to contend that it is the only exception under which waiver and reduction in the rate of damages can be exercised. Accordingly, this contention of the counsel for the petitioner also cannot be accepted.

15. A perusal of the impugned Orders passed by the Employees' Provident Fund Appellate Tribunal, New Delhi, i.e., Order dated 29.01.2008 (Annexure-P-4) in C.W.P. No. 14811 of 2008, Order dated 30.04.2008 (Annexure-P-3) in C.W.P. No. 20036 of 2008 and Order dated 04.09.2008 (Annexure-P-4) in C.W.P. No. 21871 of 2008, would show that the Appellate Tribunal came to a conclusion that no inquiry or finding of fact that respondents had willfully and deliberately withheld the Provident Fund contribution and also that the Enquiry Officer had not exercised its discretion viz-a-viz delay in remittance of the Provident Fund dues, Orders passed u/s 14-B of the EPF and MP Act, which were impugned in the Appeal, suffered from legal infirmities, but still the Appellate Tribunal interfered with regard to the rates at which recovery from respondents by way of penalty as damages was to be effected. Once the Appellate Tribunal had come to a conclusion that no inquiry was held by the Enquiry Officer, the matter should have been remanded to the Competent Authority for fresh decision in accordance with law. The impugned Orders passed by the Appellate Tribunal, qua this aspect, cannot be sustained and deserve to be set aside.

16. In view of the above, the abovementioned writ petitions are partly allowed. The impugned Order dated 29.01.2008 (Annexure-P-4) in C.W.P. No. 14811 of 2008, Order dated 30.04.2008 (Annexure-P-3) in C.W.P. No. 20036 of 2008 and Order dated 04.09.2008 (Annexure-P-4) in C.W.P. No. 21871 of 2008, are hereby set aside to the limited extent as mentioned above.

17. The matter is remanded to the Assistant Provident Fund Commissioner, Kamal, for fresh decision by giving respondents reasonable opportunity of being heard. Respondents are directed to appear before the Assistant Provident Fund Commissioner, Karnal, on 12.07.2010.

18. A photocopy of this Order be placed in the connected files.