

(2012) 12 AHC CK 0235

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 41498 of 2011

Regional Provident Fund Commissioner

APPELLANT

Vs

Presiding Officer, Employees' Provident Fund Appellate
Tribunal and Another

RESPONDENT

Date of Decision : 05-12-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B,
17, 7I, 7Q
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2013) 2 ADJ 270

Hon'ble Judges : Dilip Gupta, J

Bench : Single Bench

Advocate : Prashant Mathur, for the Appellant; Bhuwal Vishvkarma and Samir Sharma, for the Respondent

Final Decision : Allowed

Judgement

Dilip Gupta, J.—The Regional Provident Fund Commissioner, Meerut has filed this petition for quashing the order dated 2nd February, 2011 passed by the Employees Provident Fund Appellate Tribunal, New Delhi (hereinafter referred to as the "Appellate Tribunal") by which the matter has been sent back to the Employees Provident Fund Authority with a direction to assess the dues at the rate of 22% (inclusive of interest). It is seen that an order u/s 14-B of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act") was passed by the Regional Provident Fund Commissioner on 27th February, 2006 for levy of damages for delayed payment and for payment of interest u/s 7-Q of the Act against the Uttar Pradesh State Road Transport Corporation, Garh Mukteshwar Depot, Ghaziabad. The relevant portion of the order is as follows:

In exercise of the power conferred on me by Section 14B of the Act read with Government notification No. SO/548(E) dated 17.10.1973 I.M.S. Kalia, Regional

Provident Fund Commissioner, Meerut think fit and accordingly order. The levy of the damages for delayed payment as under:

The order mentions that a notice dated 26th September, 2007 was issued to the employer to show-cause as to why the damages may not be recovered and the employer was also advised to appear before the Regional Provident Fund Commissioner, Meerut on 13th October, 2005 but even though the matter was adjourned to 22nd November, 2005, neither any reply was filed nor the employer appeared.

2. An appeal was filed by M/s. U.P. State Road Transport Corporation u/s 7-I of the Act to the Appellate Tribunal against the aforesaid order and the Appellate Tribunal remanded the matter to the Authority with a direction to assess the dues at the rate of 22% (inclusive of interest) and the relevant observations are as follows:

9. It is contended that after bifurcation the manager of the Corporation of Uttarakhand State is liable to pay and not the present appellant. The object of the Provident Fund Act is the benefit of the employees so the liability to pay continues even after the change of management. Whether it is the manager of Uttarakhand or Uttar Pradesh who is liable to pay is immaterial. Dispute between the states is not sufficient to make the employee suffer. In the case of Vinson Engineering Company Vs. Regional Provident Fund Commissioner, , the Hon"ble High Court of Madras held that, "in no case however the interest of the employee can be ignored and that would be for the obvious reason which may for any recalcitrance of the competent authority or the employees the employee should not be made to suffer."

10. The document filed show that the appellant deposited the money whenever the same was available and the default does not appear to be intentional. In the case of M/s Shanti Garments v. Regional PF Commissioner, 2003 (1) CLR 228, the Hon"ble High Court of Madras held that, "where default is found but no apparent fault the quantum of damage should be compensatory rather than penal in nature."

11. Thus, in view of the discussion held above, the default does not appear to be intentional and imposing the damage at a higher rate does not appear to be proper one. Hence ordered, the matter is remanded back to the EPF Authority with direction to assess the dues @ 22% (inclusive of interest).

3. Sri Prashant Mathur, learned counsel appearing for the petitioner has submitted that the Tribunal has, while upholding the order passed under Sections 14-B and 7-Q of the Act, illegally altered the rate of damages and interest from the prescribed rate to 22% inclusive of interest. In this connection he has pointed out that as the default was committed for the period August, 1998 to July, 2002 the statutory rates for levy of the damages w.e.f. 9th January, 1991 would be in accordance with the; paragraph 32-A of the Employees Provident Funds Scheme, 1952 (hereinafter referred to as the "1952 Scheme"), paragraph

5 of the Employees Pension Scheme, 1995 (hereinafter referred to as the "1995 Scheme") and paragraph 8-A of the Employees Deposit Linked Insurance Scheme, 1976 (hereinafter referred to as the "1976 Scheme") and there is no provision for alteration of the rates of damages. Learned counsel has pointed out that the damages to be levied would be as follows:

4. It is also his contention that the Tribunal was not justified in reducing the rate for the reason that the default did not appear to be intentional and in support of his contention, learned counsel for the petitioner has placed reliance upon the decision of the Supreme Court in *Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others*, .

5. Sri Samir Sharma, learned counsel appearing for the Corporation, however, submitted that the order passed by the Tribunal does not suffer from any illegality which may call for interference by the Court under Article 226 of the Constitution. He has, however, placed reliance upon paragraph 32-A of the 1952 Scheme and Section 14-B of the Act and has submitted that the use of the word "may" clearly denotes that the rate could be reduced and in support of his contention, learned counsel for the respondents has placed reliance upon the decision in *Regional Provident Fund Commissioner Vs. Kay Iron Works Pvt. Ltd. and Another*, and *Terrace Estate, Unit of United Plantation Ltd. Vs. The Assistant Provident Fund Commissioner*, .

6. I have considered the submissions advanced by the learned counsel for the parties.

It is seen from the order passed by the Appellate Tribunal that the relevant provisions have not been examined at all and while remanding the matter to the Authority, a direction has been issued to assess the dues @ 22% (inclusive of interest).

In *Regional Provident Fund Commissioner (supra)*, relied upon by the learned counsel for the petitioner, the Supreme Court pointed out that the employer is under an obligation to deposit the amount every month and the Regional Provident Fund Commissioner is given discretion only to reduce a percentage of damages and he has no power to waive penalty altogether and the observations are:

10. A reading of Section 14-B of the Act would indicate that the employer is under an obligation under the statute to comply with the payment of the amount. In the event of his committing default in the payment of the contribution to the fund or in the payment of any charges payable under any other provisions of the Act or any scheme or insurance scheme or any of the conditions specified in Section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government may, by notification in the official Gazette in this behalf, recover from the employer, by way of penalty, such damages not exceeding the amount of arrears, as may be specified in the scheme. The second proviso only lifts the embargo in the event of the industry

becoming sick and it was reconstructed under the provisions of Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 subject to such terms and conditions as may be specified in the scheme of rehabilitation. In other words, the Act envisages the imposition of damages for delayed payments. The Act is a beneficial welfare legislation to ensure health and other benefits to the employees. The employer under the Act is under a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and matching contribution, the entire amount is required to be deposited in the fund within 15 days after the date of the collection, every month.

11. Thereby the employer is under a statutory obligation to deposit the amount to the credit of the Fund every month. In the event of any default committed in that behalf, Section 14-B steps in and calls upon the employer to pay damages by way of penalty, the maximum of which is the accumulated arrears. The Regional Provident Fund Commissioner is given discretion only to reduce a percentage of damages and he has no power to waive penalty altogether. In this case, admittedly, after the judgment, there was no reason for the respondent to deposit the amount with the University. We can understand that, since there was a scheme framed by the University and the respondent was under an obligation to comply with the scheme, they can have a feeling of doubt as to whether they should abide by the scheme framed by the University or under the Act. Since they had filed the writ petition in this Court, this Court gave direction on January 29, 1988 directing the respondents to deposit the contribution with the appellant. Thereby the respondents have a statutory obligation to deposit the amount from February 1988 onwards. Therefore, there is no justification whatsoever to deposit and keep depositing the amount in the University account after the judgment of this Court. The mere fact that the University has given permission to redeposit the amount with the appellant does not enable the respondents to take shelter thereunder for non-deposit of the amount in the Fund.

(emphasis supplied)

The Punjab and Haryana High Court in Regional Provident Fund Commissioner (*supra*), relied upon by learned counsel for the respondents, the Court observed:

9. 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.

10. 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.

7. The Court then considered the decision of the Supreme Court in Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, and observed:

12. 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.

13. 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.

(emphasis supplied)

8. In Terrace Estate (supra), also relied upon by the learned counsel for the respondents, the Madras High Court observed:

7. In view of the law laid down by the Hon'ble Supreme Court in Prestolite (India) Limited v. Regional Director (supra) case, the regulation relied on by the learned Counsel for the respondent can be termed only as a guideline and it cannot be stated that the authority can pass the order mechanically applying the regulations. As held by the Hon'ble Supreme Court in Employees State Insurance Corporations. HMT Limited and another (supra), the 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. In the instant case, a perusal of the impugned order would go to show that there is no finding in respect of mens rea or actus reus. It is also not stated how the quantum was arrived at. The order would go to show that there was no adjudication at all made by the respondent as required under law.

According to the petitioner the statutory rates for levy of the damages w.e.f. 9th January, 1991 would be in accordance with the paragraph 32-A of 1952 Scheme, paragraph 5 of the 1995 Scheme and paragraph 8-A of the 1976 Scheme and there is no provision to alter the rates of damages in any manner whatsoever.

According to the respondents the use of word "may" in paragraph 32-A indicates that the rate of damages are not mandatory and they only prescribe the highest rate of damages.

As noticed hereinabove, the Tribunal has not examined these issues and without discussion has concluded that the matter should be examined by the Authority with a direction to the Authority to assess the dues @ 22% (inclusive of interest).

It is, therefore, not possible to sustain the impugned order dated 2nd February, 2011 passed by the Employees Provident Fund Appellate Tribunal, New Delhi. It is, accordingly, set aside. The Tribunal shall now decide the appeal after taking into consideration the relevant provisions and the decisions referred to above.

The writ petition is allowed to the extent indicated above.