

(2012) 12 KL CK 0020

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 10181 of 2010

Sreekamakshy Agency (P) Ltd.

APPELLANT

Vs

Employees Provident Fund and Another

RESPONDENT

Date of Decision : 20-12-2012

Acts Referred:

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

Citation : (2013) 137 FLR 963 : (2013) 2 ILR (Ker) 158 : (2013) 1 KLJ 500 : (2013) LLR 504

Hon'ble Judges : A.M. Shaffique, J

Bench : Single Bench

Advocate : A.D. Ravindra Prasad and Alex Varghese, for the Appellant; Thomas Mathew Nellimoottil (SC), for the Respondent

Judgement

A.M. Shaffique, J.—The petitioner having failed to pay the contribution under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 in time and the various other contributions payable under the pension fund and deposit link insurance fund contributions for the period between 4/95 and 12/2000, the Regional Provident Fund Commissioner by Ext. P1 order dated 22.7.2002 assessed damages u/s 14B of the Act for an amount of Rs. 11,17,495/- and petitioner was called upon to pay the said amount. It is the contention of the petitioner that it was only on account of the serious financial crisis that was faced by the petitioner that the contributions could not be paid in time. The petitioner preferred an appeal before the Employees Provident Fund Appellate Tribunal as A.T.A. No. 675 (5) 2002. The appellate authority, however, did not interfere with the order passed, having come to the conclusion that the financial loss suffered by the petitioner is not a ground for interfering with the damages.

2. Petitioner, therefore, challenges Exts. P1 and P4 orders.

3. Learned counsel for the petitioner also relies upon Division Bench judgments of this Court Employees" State Insurance Corporation and Another Vs. K.N. Premanandan and Another, , Emp. State Insurance Corporation Vs. H.M.T. Ltd.

and Another, and another judgment of the learned Single Judge in *Harrisons Malayalam Limited (M/s.) v. Regional Provident Commissioner and Others*, 2012 (1) KHC 243.

4. Relying upon the above judgments and the statutory provisions contained under S. 14B, it is contended that unless the party obliged to pay the contribution deliberately or in defiance of law or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation, there cannot be any levy of damages.

5. On the other hand, learned counsel appearing for the respondent-Department, relying upon the counter affidavit filed inter alia contends that since the appellate authority had not exercised the jurisdiction to waive any portion of the damages, the judicial review is not possible in order to set aside the said view taken by the appellate authority. Learned counsel also relied upon the judgment in *Indian Telephone Industries Ltd. Vs. Asstt. P.F. Commr. and Others* to indicate that the financial problem suffered by the assessee is not a sufficient ground for waiving damages for the delay in depositing various contributions. It is further contended that damages had been computed in terms of para 32A of the Scheme and there is no justification to waive any such amount.

6. Eventhough the statutory authority had imposed damages as per the rate prescribed under the Scheme, the appellate authority ought to consider whether there was deliberate attempt on the part of the employer to avoid payment of contribution within the specified time. The question therefore to be considered is whether such a jurisdiction should be exercised in the present case.

7. An appeal was filed as Ext. P5 indicating the reasons for not paying the contribution in time stating that the factory has not been functioning and that all the particulars relating to the non-payment of contribution was specifically mentioned in the memorandum of appeal. The appellate authority, seems to have made only a cursory glance at the memorandum of appeal and the grounds raised thereunder and had only considered the matter as if financial loss was the only ground. In fact, this is an instance where the petitioner was not in a position to function the company and even the salary could not be paid. It is stated that during the period 1995-2000, the industry suffered an unprecedented set back mainly due to the bad industrial atmosphere throughout Kerala State which restricted the flow-back of money from purchasers of the product and also Kerala Water Authority who has really consuming 95% of the products manufactured by it. It is also stated that the influx of PVC pipes in the market during the period has adversely affected the marketing of stone ware pipes of the appellant company. Therefore, they were purely depending on the Government of Kerala i.e. Kerala Water Authority and since the Government could not effect the payment in time on account of the financial crisis faced by the Government, the contributions could not be paid in time. The petitioner had also produced the balance sheet during the relevant years to show the net loss of the company amounted to Rs. 51,17,370.10. Various reasons like the unprecedented recession

is also stated as a reason for non-payment of contribution. Though the appellate authority having found that there is no violation of natural justice as sufficient opportunity had been granted for hearing, relied upon a judgment of the Orissa High Court to find that financial crunch is not a reason for waiving damages for delay in payment of contribution.

8. Damages is levied for the deliberate non-payment of the contributions in time as held in the judgments referred above. Therefore, the authorities under the Act has to assess as to whether the damages is not paid due to any deliberate inaction on the part of the employer concerned or if his actions are contumacious or dishonest. If the reasons stated by the employer are correct, wherein financial constraints is also a matter relevant to be looked into in considering whether the damages can be levied at all. Each case will have to be dealt with under the special facts of that particular Case. In the present case the petitioner had shown that the Company had suffered a loss of more than 51 lakhs for a period which apparently is the reason for non-payment of contribution. The fact that stone ware pipes lost a market during the relevant time and the main consumer Kerala Water Authority could not pay the value of the pipes purchased from the petitioner company are all matters which are relevant to be considered while exercising the jurisdiction given to the original authority and appellate authority for demanding damages. Therefore, the authorities under the Act were under the obligation to consider the levy of damages objectively and in relation to the peculiar facts and circumstances of the case. In most of the cases, I am sure that the financial constraints will be a factor which also has to be treated as a relevant factor in imposing damages. If one has the money to pay and he deliberately withholds payment of contribution, there is scope for the authorities to impose damages. But if it is shown that one was under severe financial constraints on account of reasons stated and the documents in support of the said fact is produced, the authorities are bound to consider the same in a pragmatic manner and not taking a pedantic approach. Hence, I do not think that the reasoning of the appellate authority was justified. The authorities under the Act had failed to consider relevant matters and therefore judicial review is possible.

9. The judgment relied upon by the appellate authority is by a Division Bench of the Orissa High Court which does not persuade me to think that financial constraint is not a ground to exercise the right to waive or reduce the damages.

10. When it is admitted that the contribution and interest under S. 7Q is paid, damages though a statutory right available to the Department to be recovered in terms of paragraph 32A of the Scheme, the law does not mandate that in all cases damages should be imposed. The decisions on the point supports my view that imposition of damages in the present case was not warranted.

11. The facts disclosed in the present case especially the grounds raised in the memorandum of appeal and the documents produced thereunder as Exts. P5 and P6 would prove the factual situation which enables the petitioner to get

substantial deduction in the damages payable. In so far as the unit is not functioning and since this matter relates to a period between 1995-2000, I do not think that remitting the matter back to the appellate authority will serve any purpose as it will cause additional financial burden to the petitioner. Therefore with a view to secure substantial justice between the parties, I am of the view that the damages levied by the Department in terms of Ext. P1 can be reduced to 10% of the amount so levied which will be an appropriate damages under the facts and circumstances of the case. 14. In the result the writ petition is allowed as follows:

(i) Exts. P1 and P4 are set aside.

(ii) The 2nd respondent shall make a fresh demand to the petitioner u/s 14B of the Act for 10% of the amount as specified in Ext. P1.

(iii) The petitioner shall pay the said amount within one month from the date of demand failing which he will be liable to pay interest on the said amount @ 9% per annum from the date of judgment till realization.