

(1991) 10 BOM CK 0043
In the Bombay High Court
Case No : Writ Petition No. 150 of 1986

Super Processors

APPELLANT

Vs

The Union of India (UOI) and Another

RESPONDENT

Date of Decision : 16-10-1991

Acts Referred:

Constitution of India, 1950 — Article 14

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

Citation : (1992) 2 BomCR 468 : (1994) 3 LLJ 564

Hon'ble Judges : Ashok Agarwal, J

Bench : Single Bench

Advocate : Cama, for the Appellant; Shan, for the Respondent

Final Decision : Allowed

Judgement

Ashok Agarwal, J.—The petitioners are a partnership firm carrying on business inter alia of calendering of cotton clothes. The first respondent is the Union of India and the second respondent is Regional Provident Fund Commissioner for Maharashtra and Goa. By this petition, the petitioners, seek to impugn the order dated 15th March, 1985 passed by the Regional Provident Fund Commissioner u/s 14-B of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (19 of 1952) (hereinafter referred to as "the Act") claiming damages in the sum of Rs. 1,18,057.60 P. for delayed payment of provident fund contributions. The impugned order is annexed at Exhibit-"X" to the petition. The aforesaid order was preceded by a show cause notice dated 31st March, 1984 which called upon the petitioner to show cause in regard to the default committed in respect of payment of Employees' Provident Fund contributions, the Family Pension Fund and the Deposit Linked Insurance Fund contributions. The period of default was August, 1978 to March, 1982. A copy of the show cause notice is annexed at Exhibit-X to the petition. The representatives of the petitioners appeared before the Regional Provident Fund Commissioner but end not file any reply, though it secured 10 adjournments for the purpose. Hence the impugned order levying

damage was passed ex parte. Taking exception to the said order, the petitioners have preferred the present petition.

2. The impugned order shows that the petitioners had committed default in making contributions towards the aforesaid fund for the period from August 1978 to March 1982. The default consisted of delayed payments which ranged from 8 days to 2 months and 24 days. The Regional Provident Fund Commissioner has levied damages ranging from 2% to 100% of the amount in arrears. The said order is impugned on several grounds and I will presently deal with each of these grounds.

3. Shri Cama, the learned counsel appearing in support of the petition has contended that the rate of imposition of penalty is excessive and the same cannot be sustained in view of the circular dated 3rd November, 1982, Exhibit-D to the petition and the clarifications thereto dated 13th May, 1983, Exhibit-2 to the petition. According to Shri Cama the maximum rate of penalty that can be imposed under the aforesaid circulars would be to the extent of 25% of the amount in arrears. The impugned order insofar as it levies damages at a rate higher than 25% is liable to be struck down.

4. Prior to the issue of the aforesaid circulars, the second respondent, the Regional Provident Fund Commissioner used to levy damages in the light of the standard table for levy of damages which had been prescribed by the department. The said table prescribes different percentages of penalty for each successive default and for the duration of each default. The damages under the said table ranged from 2% to 100% on the amount found to be in arrears. The Central Provident Fund Commissioner on 3rd November, 1982 issued a circular for the imposition of damages at uniform rates. The circular inter alia took into account the report of the Employees' Provident Fund Review Committee which recommended that instead of imposing damages on employers for belated payment the defaulting employer should be asked to pay penal interest at the maximum lending rate of bank plus 3% if the employers are occasional defaulters and at the maximum lending rate plus 5% in case of employers who are habitual defaulters. The circular took into account that there was frequent fluctuations in the lending rates of the bank and consequential difficulties in calculating damages. It, therefore, proposed that the damages should be charged at a rate of 25% annum on all belated remittances subject to the condition that the total damages levied do not exceed actual amount in arrears. The said directions were to be brought into force with immediate effect. The circular further provided that all pending cases and those cases where hearing u/s 14-B have already been held but final orders have not been issued should also be regulated as per the circular. Cases where speaking orders have already been issued were, however, not to be reopened. Thus, the rate of damages were made uniform and were directly linked to the duration of delay in payment of the dues.

5. It appears that certain difficulties were experienced in the implementation of the circular, Exhibit-D, dated 3rd November, 1982 and hence the Central

Provident Fund Commissioner issued a clarification, Ex-hibit-E, dated 13th May, 1983. The clarification inter, alia stated that under the guidelines dated 3rd November, 1982 the levy of damages had been advised to be regulated at the rate of 25% per annum instead of graded rates of damages as provided in the earlier guidelines, in all cases of default with immediate effect. Certain regions, however, sought clarification regarding the true scope of the applicability of the said guidelines in view of certain reference having been made therein to certain cases pending u/s 14-B on the date of the issue of the said guidelines. On the careful examination of the difficulties experienced and the doubt expressed in the matter, it is clarified that the defaults committed after the issue of the said guidelines are advised to be regulated in accordance with the revised guidelines issued as aforesaid. Therefore all defaults for the period upto September, 1982 (September 1982 dues payable on or before 15th October, 1982) are advised to be processed and decided as per the then existing guidelines. Defaults arising for the month of October, 1982 for provident fund dues which are payable on or before 15th November, 1982 and defaults onwards are advised to be regulated under the revised guidelines. Accordingly reference in para 3 of the Revised Guidelines to all pending cases and those cases where hearings u/s 14-B having already been field but final orders have not been issued should also be regulated as per this letter. Cases where speaking orders have already been issued may not however be reopened.

6. It is the contention of Shri Cama for and on behalf of the petitioners that the maximum rate of damages which are leviable under the aforesaid circular is to the extent of 25%. The impugned order insofar as it imposes damages at a rate higher than 25% is illegal and is liable to be set aside.

7. Shri Rele, the learned Counsel appearing on behalf of the respondents on the other hand contends that the aforesaid circulars have no application to the instant case, since the period of default is for the period of August 1978 to March, 1982. The said circulars can apply only prospectively for defaults committed after October, 1982 and onwards. Shri Rele placed reliance on the following portion of paragraph 3 of the circular dated 3rd November, 1982:

"You are accordingly advised to regulate the levy of damages at the rate of 25% per annum subject to the condition specified in the preceding paragraph in all cases of defaults with immediate effect".

According to Shri Rele, the phrase "in all cases of default with immediate effect" was meant to qualify default which would be committed after issuance of the circular.

8. Shri Cama, however, placed reliance on the further portion of paragraph 3, which is as under: -

"All pending cases and those cases where hearing u/s 14-B have already been held but final orders have not been issued should also be regulated as per this letter. Cases where speaking order have already been issued may not however

be reopened except as otherwise instructed in this office circular letter No. E.11/Dam. (Genl.) 80 dated the 31st December, 1990".

According to Shri Cama, the petitioner's case was pending hearing before the Regional Provident Fund Commissioner when the above circular was issued. Since no final orders had been passed the case of the petitioner was liable to be considered under the circular and the maximum penalty that could be levied was to the extent of 25%.

9. In my view, the circular dated 3rd November, 1982 does not give clear cut and unambiguous instructions in regard to the cases which are sought to be covered by the circular. In my view, on a proper construction of the circular, the circular is to be applied to all cases, which are pending hearing and where no final orders u/s 14-B are passed. Hence the phrase "in all cases of defaults with immediate effect" indicates that the circular is to be applied with immediate effect to all cases of default which are pending decision on the date of the issue of the circular. This in my view, is the only way the said circular can be harmoniously construed. However, certain complications appear to have been created by the issue of clarifications dated 13th May, 1983. The clarification provides that the revised guidelines would apply to defaults committed after the issue of the guidelines and the defaults for the period : prior thereto would be governed as per the old guidelines. In my view, the Central Provident Fund Commissioner by the clarifications has specifically directed that the revised guidelines would apply to defaults committed after the issue of guidelines and defaults committed prior thereto are directed to be governed by the old guidelines. It is no doubt true that the clarification further provides that all pending cases should also be regulated as per the clarifications. In my judgment on a proper construction of the circular dated 3rd November, 1982 read with the clarification dated 13th May, 1983 the revised guidelines would apply to defaults committed after the issue of the revised guidelines. This is so because the clarification clearly so provides. It offers that the latter clause of the clarification that the pending cases should also be regulated as per the letter of clarification creates some conflict. The pending cases on the date of the issue of the circular will necessarily to be in respect of the period prior to October, 1982. If under the earlier clause, such cases are directed to be processed and decided as per the old guidelines, it is difficult to see how such cases, under the latter part of the clarifications, can be directed to be regulated as per the revised guidelines. In my judgment, the said latter clause will have to be read down in order to make a harmonious reading of the circular and the clarification. If it is possible to save the circular by reading it down to read in its words, expression or provision, the same need not be struck down. Hence the revised guidelines will apply to defaults committed after October 1982 and the cases of default which are pending hearing on the date of the issue of the circular are liable to be regulated as per the old guidelines. The present case pertains to the default committed prior to October 1982. The petitioners' case was, therefore, properly considered under the old guidelines. The impugned order is, therefore, not liable to be quashed on the ground that

the petitioners" case is liable to be governed not by the old guidelines but by the revised guidelines. The contention of Shri Cama in this behalf is, therefore, liable to be rejected.

10. The next contention advanced by Shri Cama is that the impugned order is passed ex parte without affording the petitioner a reasonable opportunity of being heard. Though he conceded that the show cause notice was duly served, he contended that the partners of the petitioners were unable to attend. The impugned ex parte order thus came to be passed without proper opportunity being given to the petitioners to show cause and hence the said order is liable to be set aside. In my judgment, there is no merit in the above contention. It has been pointed out on behalf of the respondent and this has not been rebutted on behalf of the petitioners that as many as ten adjournments were given to the petitioners, out the petitioners chose not to appear before respondent No. 2. It is difficult, in these circumstances, to subscribe to the contention of Shri Cama that the impugned award was passed without affording a reasonable opportunity to the petitioners to show cause. The instant proceedings show that more than adequate opportunity was given to the petitioners, but they failed to avail of the same. The second respondent was, therefore, justified in passing the instant ex parte order. The second contention of Shri Cama, is, therefore, rejected.

11. Shri Cama next submitted that the impugned order is not a speaking order. It merely applies the standard table for levy of damages and it does not give reasons for imposition of damages in accordance with the table. According to Shri Cama the second respondent ought to have, given reasons for imposing damages in respect of each default committed by the petitioners. Shri Cama relied upon an unreported decision of this Court in the case of Sushama Fabrics Ltd. v. Union of India in Writ Petition No. 1499 of 1984 and Writ Petition No. 1300 of 1988 decided by my learned brother S.M. Daud, J. on 15th January, 1991. According to Shri Cama, the second respondent ought to have passed a reasoned order specifying the amount on damages levied under the head of (i) actual loss, and (ii) punitive damages. He relied in the case of Josts Engineering Ltd., Bombay v. Union of India and Anr. decided by this Court and reported in 1983 M.L.J. P.454. It has been observed in the above case as under:

"As laid down in : (1979) 2 LLJ 416 Organo Chemical Industries v. Union of India , the damages contemplated u/s 14-B of the Employees' Provident Funds Act cover (a) compensation for actual loss and (b) the punitive element. The authority assessing the damages is obliged to write a speaking order of his assessment setting out the reasons for it so that it was readily exposed to the scrutiny of the Court exercising writ jurisdiction, which is a guarantee against arbitrariness. The assessment of damages is a vital aspect of the function of the quasi-judicial authority u/s 14-B. Merely calculating damages after having a look at the standard table for levy of damages prepared by the Central Board of Trustees of the Employees Provident Fund is not legal. No executive or administrative authority can in any manner channel the discretion of a judicial or

quasi-judicial authority by directives or guidelines. When the judicial or quasi-judicial authority acts upon the directives or guidelines his decision is impaired. The contention that the table had been formulated so all those assessing the damages u/s 14-B can conform and not pass orders which were characterised as arbitrary or capricious in fact begs the question. A quasi-judicial authority is not expected to conform but use his own judgment and support it by a speaking order".

12. Shri Cama next relied upon another decision of this Court in the case of Mody and Co. and Ors. v. Union of India in Writ Petition No. 1781 of 1984, decided by my learned brother T.D. Sugla, J (as he then was) wherein reliance was placed in the aforesaid case of Josts Engg. Ltd. (supra), the order impugned therein was quashed and the matter was remanded back to the Regional Provident Fund Commissioner with a direction to pass a fresh speaking order taking into account the period of default in each case. Placing reliance on the above observations, Shri Cama submitted that it was obligatory on the part of the second respondent to have given reasons for imposing damages for each default. The impugned order not having given any reasons whatsoever smacks of non-application of mind and is liable to be quashed.

13. In my view, the above case can apply only to cases where the employers in response to the show cause notice file their replies and adduce evidence in support. In such a case there is a lis between the parties. The Regional Provident Fund Commissioner in such a case would be bound to decide the issues arising between the parties by supporting them by reasons. If the reply of the employer gives different reasons for the default in respect of different periods, naturally the Provident Fund Commissioner will be obliged to give reasons for deciding each of the defaults separately. There can, therefore, be no quarrel in respect of the propositions laid down in the above cases. However, in the present case, the employer has failed to file a reply, failed to adduce evidence and has chosen to remain absent. In the present case ten adjournments were granted but no reply was filed. I fail to see what reasons can be expected from the Provident Fund Commissioner. It has been observed by the Punjab and Haryana High Court, T.C.M. Woollen Mills Pvt. Ltd. v. Regional Provident Fund Commissioner, Punjab reported in 1980 (57) F.J.R. 222 as under:

"Where, no reply was filed by the employer against the notice issued to him u/s 14-B of the Act, he cannot complain that the Commissioner did not make a speaking order as required by law. Unless objections and the factual matters are pressed before the Commissioner, he cannot imagine the same and adjudicate thereon. Where the objections raised are vague and devoid of necessary particular, a finding that a plea is untenable would be sufficient compliance with the requirements of a reasoned order".

14. In my judgment, the ratio laid down in the above case aptly applies to the facts of the present case. Since the petitioners have chosen not to file a reply to the show cause notice and not to lead evidence in support thereof, there was

nothing which was required to be adjudicated upon. Hence the impugned order cannot be assailed on the ground that it is not a speaking order. The said contention of Shri Cama is, there fore, rejected.

15. Shri Cama next submitted that there has been undue and un-explained delay in initiating the instant proceedings. The period of default is for the period August 1978 to March 1982. The show cause notice, however, is issued only after March, 1984. On account of the said delay, there is again violation of the principles of natural justice. The petitioners, due to passage of time, could not be expected to maintain the relevant records when the show cause notice was issued. The petitioners, were, therefore adversely affected in giving reasons for the delay in payment of the provident fund dues. The instant proceedings which were taken up after the undue and unexplained delay is liable to be quashed as having been taken in violation of the principles of natural justice.

16. Shri Cama relied upon the decision of this Court in the case of Abdulla A. Latifshah v. The Bombay Port Trust and Ors. reported in 1990 II CLR 390 wherein it was held that the departmental enquiry which was initiated against the delinquent employee after considerable delay was liable to be quashed as the employee on account of the delay was entitled to presume that the department had either abandoned or given up the charges against him. The above case related to a departmental enquiry conducted against a delinquent employee for misconduct. The misconduct alleged was in respect of an offence of theft. The delinquent in that case was acquitted in the criminal trial. After acquittal he was taken back in service and allowed to work. It was after a period of about 5 years that the enquiry in question was initiated. It was, in these circumstances and on other independent grounds, that the enquiry was held to be liable to be quashed.

17. Shri Cama further relied upon the decision of the Punjab High Court in the case Amin Chand & Sons v. State of Punjab and Ors. reported in AIR 1965 Pun 441. The Punjab High Court on the facts and circumstances of the case was pleased to hold that the undue and unexplained delay in initiating proceedings u/ s 14-B was fatal. There was a failure of not following the principles of natural justice and hence the impugned order levying damages was quashed. In my judgment, whether there has been an undue and unexplained delay in initiating proceedings and whether there has been an infraction of the principles of natural justice would depend upon the facts of each individual case. If it is shown that the employer has been prejudiced on account of the delay; that the employer has been prejudiced in setting up a proper defence to the show cause notice and to lead evidence in support thereof on the ground that he has not maintained the relevant record, it is possible to hold that there has been an infringement of the principles of natural justice and therefore, the order levying damages is liable to be quashed. In the present case, however, it will be seen that the petitioner has not filed any reply whatsoever to the show cause notice. Though as many as ten adjournments were granted, the petitioners failed to submit their explanation. They chose to remain absent. This is not a case where the petitioners have filed

a reply and have taken up a contention that they have, on account of passage of time, not maintained the relevant record for the period in question and therefore they are not in a position to take up a proper defence. It will therefore not be open for the petitioners to take up the points for the first time in the writ petition i.e. prejudice being suffered by the petitioners on ground of delay. It is to be noted that so far as Section 14-B is concerned, there is no period of limitation prescribed within which action for the recovery of damages can be instituted against the defaulter. It is to be realised that amount of provident fund dues consist of deductions made from wages of the workers as well. If an employer deducts these contributions from wages and sits tight over them, he as a trustee is liable to account for the same at any time. It is no defence for him to say that he will cease to be accountable after a given fixed period. Legislature has advisedly not prescribed any period of limitation for issuing show cause notice against such defaulting trustees-employers. It is also to be noted that the Act is a beneficial piece of legislation meant for the welfare of weaker section of society namely the employees. Such employees have no control over the acts and omissions of authorities exercising their powers under the Act. If such authority out of negligence or otherwise fails to issue show cause notice against defaulting employer promptly, there is no rhyme or reason why innocent beneficiary employer who are third parties should suffer thereby. The only question that would really survive is the one whether on the facts and circumstances of a given case, the show cause notice issued after lapse of reasonable time can be said to be issued beyond reasonable time. The test whether lapse of time is reasonable or not will depend upon the further fact that whether the employer in the mean time has changed his position to his detriment and is likely to be irretrievably prejudiced by the belated issuance of such a show cause notice. If such defence is not pleaded and proved, challenge on the ground of late issuance of notice must stand rejected. (See *Gandhidham Spinning & Mfg. Co. v., Regional Provident Fund Commissioner* 1987 L.I.C 659.

18. In the instant case, the petitioners in response to the show cause notice did not file any reply. The petitioners nowhere pointed out to the second respondent-Commissioner that because of the late issuance of the notice they were prejudiced in any manner and that in the meantime relevant record was not available on the basis of which they could defend its action. In fact, the commission of defaults was an admitted position and is not disputed. It is, therefore, difficult to subscribe to the contention of Shri Cama that the impugned order is liable to be quashed on account of delay.

19. The last contention advanced by Shri Cama relates to the challenge of the circular dated 3rd November, 1982, at Exhibit-D, and the clarification dated 13th May, 1983 at Exhibit-E. The respondents prior to the issuance of the said circulars were governed by the old guidelines recommending damages for different number of defaults and the period of delay in making payment of the contributions to the fund. The damages varied from 2% to 100% of the amount in arrears. By the instant circulars the respondents have sought to amend the

guidelines. By the amendment a higher limit of damages has been prescribed at 25%. The said circular is made applicable to defaults which take place after the month of October, 1982. The pending cases in respect of the period upto September, 1982 are directed to be heard and disposed of under the old guidelines. By the circulars the respondents have sought to be laid down a uniform pattern of damages to be levied for default or delay in making the contribution to the fund. It is sought to reduce the quantum of damages which are liable to be levied. The circulars have thus created two clauses of defaults, one committed prior to September, 1982 and the other for the month of October, 1982 and thereafter. The employers who have committed default for the prior period, are required to be treated differently from the employers who have committed similar or identical defaults for the subsequent period. The circulars have thus treated two classes of employers, who are similarly placed. Whereas one class is liable to be visited with damages which can extend upto 100%, the latter class is liable to be treated lightly and is liable to pay damages not over 25% of the amount in arrears. The classification is not based on any intelligible differentia which distinguishes persons or things which are grouped in one class and others who are grouped in the other. The action on the part of the respondents to treat the petitioners differently from the employers who committed similar defaults for the subsequent period will attract the vice of Article 14 of the Constitution of India. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is attracted where equals are treated differently without any reasonable basis. The principle underlying the guarantee is that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same. Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation. The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question. In other words, there ought to be casual connection between the basis of classification and the object of the statute. The classification has to be based, as is well-settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. A discriminatory action is liable to be struck down unless it can be shown by the Government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational, unreasonable and discriminatory. See *D.S. Nakara and Others Vs. Union of India (UOI)*, . In the present case what has been done by the aforesaid circulars is that the employers who were found guilty of default for a period prior to September, 1982 will be liable to pay damages which can extend upto 100% whereas the employers who committed defaults for the period October 1982 and thereafter will be liable to pay damages only upto 25% of the amount in arrears. Why the two sets of employers are to be

differently treated is not explained. In my view, there is no justification to treat the defaults committed prior to September 1982 and the defaults committed in October, 1982 and thereafter differently. If the defaults which are committed for the period October 1982 and thereafter are liable to be visited with damages only upto the extent of 25% of the amount in arrears. I do not see any valid reason why the same benefit should not be extended to the employers who are found guilty of default for the period prior to September, 1982. If the employers guilty of default for the period prior to September, 1982 are treated differently from the employers who are guilty of default for the period of October, 1982 and thereafter the same would attract the mischief of Article 14 of the Constitution. The employers like the petitioners who are guilty of default for the period prior to September 1982 will therefore be entitled to get equal treatment along with the employers who are guilty of default for the period October 1982 and onwards. Hence the maximum penalty, which can be imposed upon the petitioners, will be to the extent of 25% of the amount in arrears.

20. For the foregoing reasons, the impugned order dated 15th March, 1985 passed by the second respondent, Regional Provident Fund Commissioner, at Exhibit-B, is quashed and the matter is remanded back to the second respondent to calculate the damages by applying the circulars dated 3rd November, 1982 and 13th May, 1983, Ex-habits-D and E. The second respondent will arrive at the figure of damages which would be payable by the petitioners. The petitioners in pursuance of the interim orders passed by the Appellate Court in Appeal No. 136 of 1986 has deposited in Court a sum of Rs. 50,000/-. After the damages are computed the second respondent, will be entitled to recover the said amount from out of the deposit. The balance, if any, will be liable to be paid over to the petitioners.

21. Rule is made absolute in the above terms.

However, in the facts and circumstances of this case, there shall be no order as to costs.

Miss Shah, appearing on behalf of the respondents, has requested for stay of the operative part of my order. What I have passed is an order of remand directing the second respondent to make calculations of the damages liable to be paid by the petitioners. It is only thereafter that the petitioners will be entitled to withdraw the surplus amount, if any, lying in Court. Since no immediate irreparable loss is likely to be sustained by the respondent, the prayer for stay is rejected. I am, however, adjourning several other matters involving similar points and which are on my Board to enable the respondent to prefer on a appeal against my present order and obtain interim relief from the Appellate Court.

Expedite the issue of certified copy.