
(2015) 11 CAL CK 0020

In the Calcutta High Court

Case No : W.P. Nos. 2382 of 2003 and 16 of 2004

Tepcon International (I) Ltd. and Others

APPELLANT

Vs

Regional Provident Fund Commissioner and Others

RESPONDENT

Date of Decision : 30-11-2015

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2016) 148 FLR 388 : (2016) 1 LLN 342 : (2016) LLR 332

Hon'ble Judges : I.P. Mukerji, J.

Bench : Single Bench

Advocate : Shyamal Sarkar, Sr. Advocate, Kumar Gupta and B.K. Jain, Advocates, for the Appellant; Aparna Banerjee, Advocate, for the Respondent

Final Decision : Allowed

Judgement

I.P. Mukerji, J.—In two writ applications on the Appellate Side W.P. No. 15910 (W) of 2015 Central Board, Employees" Provident Fund Organisation Vs. Employees" P.F. Appellate Tribunal & Anr. & W.P. No. 9354 (W) of 2015 Central Board of Trustees, Employees" Provident Fund Organisation Vs. Union of India & Ors. I delivered the following judgement today.

"In these two writ applications common questions of law are involved. The principal questions of law which arise for consideration are these: whether in the exercise of powers under section 14B of the Employees" Provident Fund and Miscellaneous Provisions Act, 1952 and para 32A of the Employees" Provident Fund Scheme, 1952, the court or the Central Provident Fund Commissioner or any other officer authorised by the Central Government by notification in the official gazette can reduce the damages specified in paragraph 32A recoverable for a particular period for delay? If the answer to the question is yes, what are the factors to be considered by the court or the authorities in reducing the damages?

In these cases the Central Board has approached this court alleging that the

appellate tribunal had no power to reduce the damages.

Section 14B of the said Act provides that where an employer make default inter alia, in the payment of any contribution to the fund or in the transfer of accumulation, the Central Provident Fund Commissioner or such other officers as may be authorised by the Central Government may recover from the employer such damages not exceeding the amount of arrears, as he may think fit to impose.

Section 14B of the Employees' Provident Fund and Miscellaneous Act, 1952 enacts as follows:

" 14B. 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 under section 17 (the Central provident Fund Commissioner or such other officer as may be authorised by the Central Government, 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 under section 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."

Paragraph 32 (A) of the EPF Scheme, 1952 was inserted on 16th August, 1991 with effect from 1st September, 1991. It was again amended in 2008. After amendment, damages have been computed in the form of interest on the annual arrear. It is as follows:

"32A. Recovery of damages for default in payment of any contribution. (1) where an employer makes default in the payment of contribution to the Fund, or in the transfers of accumulations required to be transferred by him under Sub-section (2) of section 15 or sub-section 17 or in the payment of any charges payable under any other provisions of the act or scheme or under any of the conditions specified under section 17 of the Act 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, damages at the given below:

Period of default: Rate of damages (% of arrears per annum)

Now, the question which falls for considerations is whether after introduction of para 32 (A) by amendment made on 16th August, 1991 with effect from 1st September, 1991, the Provident Fund Commissioner or the Tribunal has any power to reduce this rate or amount?

According to the petitioner they have no such power. Damages have been fixed by statute. The figure is certain. The adjudicator, whether it is the Commissioner or the Appellate Authority or the High Court has no power to waive or remit or reduce the amount of damages.

Mr. Prasad, learned advocate for the petitioner tried to expound the above case of the statutory authorities.

On the other hand, Mr. Ghosh learned advocate for the respondent company made three basic submissions.

First, this writ petition is not maintainable by the Central Board. The Board being a creature of the Employees Provident Fund Act, 1952 cannot call in question the power of the tribunal or the Commissioner, another creature of the same statute. In fact, the Board has no locus standi to maintain the writ application. Secondly, the submission was that the person signing and affirming this writ petition did not have the power and authority to do so. Thirdly, he said that when the question of damages or penalty was involved mens rea was a factor. The Commissioner or the Tribunal had the power to reduce the damages.

It is very important to consider the statutory provisions to interpret section 14B and para 32A. In my opinion, the presence of a right of hearing in certain provisions and its absence in others is indicative of the intention of the legislature as to whether the officer or the court has the power to reduce the damages leviable under section 14B.

First section 14 (B). The first proviso of section 14(B) is notable. It gives an opportunity of hearing to the employer.

Compare this provision with sub-section 3 of section 7A. Sections 7A (1) and (3) are inserted below.

7A. Determination of moneys due from employers. (1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner or any Assistant Provident Fund Commissioner may, by order:-

(a) In a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) Determine the amount due from any employer under any provision of this Act, the Scheme or the (pension) Scheme or the Insurance Scheme, as the case may be,

And for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.

(3) No order (***) shall be made under sub-section (1) unless (the employer concerned) is given a reasonable opportunity of representing his case)"

Sub-section 3 provides an opportunity of hearing to the employer. One has to read this provision in conjunction with section 7Q which is set out hereunder.

"7(Q) Interest payable by the employer:- The employer shall be liable to pay simple interest at the rate of twelve per cent, per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount was become so due till the date of its actual payment.

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank."

One will notice that in section 7Q there is no provision for personal hearing.

On an examination of section 7A one finds that it relates to the determination of dues under the said Act. Now, these dues are determined after adjudication upon hearing the employer. Section 7Q is a section the operation of which is mechanical, as it relates to interest at particular rates once the section 7A liability is determined. Given the determined section 7A liability and the rate of interest in section 7Q, the interest amount is pre-determined. That is why, in my opinion, no hearing provision is provided in section 7Q.

Since the first proviso to section 14B granting a right of hearing has been retained even after amendment of para 32A, I form the opinion that the officer and the court retain the power to reduce the amount of damages. If the petitioner's argument is to be accepted then no such provision was required because calculation of damages would have been arithmetic like in Section 7Q. The authorities cited below support me.

In Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others, Mr. Justice Satyabrata Sinha held that the Regional Provident Fund Commissioner was given discretion to reduce the percentage of damages but he had no power to waive it altogether.

In M/s. Hindustan Times Limited Vs. Union of India and Others, Justice Rao emphasised the need to pass a reasoned order under section 14B after hearing the parties. The factors which ought to be taken into account by the Regional Provident Fund Commissioner are the number of defaults, the period of delay, the frequency of defaults, the amounts involved, the delay in realisation of debts of the employer and the irretrievable prejudice to the employer caused by delayed recovery by the provident fund authority. Power cuts causing reduction of production and income were also a factor to be taken into account. Mens rea

or absence of wilfulness as a factor for determination of damages under section 14B was emphasised.

In a case under the Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, opined:

"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 85B 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."

In an unreported decision, Mr. Justice Jayanta Kumar Biswas of our court in W.P. No. 19719 (W) of 2004, DBLAB Limited vs. Employees' Provident Fund Organisation & Anr decided on 5th July 2012 refused to apply the principles in the above Employees' State Insurance case to "dilute the principles" In Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others, .

Mr. Justice Girish Chandra Gupta of our court in Hooghly Mills Co. Ltd. & Anr. V. Regional Provident Fund Commissioner reported in (2009) 4 CHN 774 interpreted the word "may" in section 14B as directory which permitted the exercise of discretion. So was the view of Arambagh Hatcheries Ltd. and Another Vs. Employees' Provident Fund Organisation Si Ors., .

Once again the Supreme Court in Mcloed Russel India Limited v. Reg. Provident Fund Commissioner reported in 2014 SC online SC 527, underlined the existence of wilful default as a precondition to assessing damages under section 14B. From an analysis of the above authorities the principles are these:-

- a. Section 14B vests in the Central Provident Fund Commissioner or any other officer authorised by the Central Government the power of recovering penalty.
- b. Under the said section the penalty could be specified in the scheme but could not exceed the amount of arrears.
- c. The word "may" in the section is to be construed as directory and confers a discretion on the above authorities.
- d. In the exercise of this discretion to award penalty or damages or reduce it, factors such as delay, frequency of delay, the number of days" delay and other factors like power cut, nonrealisation of debts by the employer, the delay on the part of the authority to claim the damages, thereby causing irretrievable injury to the employer could be considered.
- e. Although the provident fund authority could reduce the amount of penalty or damages, this discretion could not be used to waive it altogether.

f. The introduction of 32A in the Employees' Provident Fund Scheme 1952 did not alter this discretion.

The other points raised by Mr. Ghosh in these two writ applications do not have much substance. He argued that this writ was not maintainable by the petitioner. I find that this writ has been instituted by the Central Board. This Board is created by section 5A of the said Act. Under section 5C it is a body corporate. In my opinion under section 5A read with the Scheme, the trust has enough power to maintain this application. Section 5E empowers the Central Board to delegate to any of its officers its powers and functions. Hence, the signing and affirming of this writ petition by Sundeep Ceasor Toppo the Assistant Provident Fund Commissioner is perfectly legal provided there is proper delegation of authority to him. In the absence of proof to the contrary a government officer is presumed to have acted regularly. (See Section 114 example (e) of the Indian Evidence Act, 1872)

Finally, on an examination of the impugned order of the appellate authority, I find that it has rightly exercised its discretion in reducing the damages.

For those reasons, there is no ground to interfere with the impugned order.

These writ applications are accordingly dismissed."

2. The legal issues in these two writ applications are substantially similar to those in the said two writ applications on the Appellate Side. The facts are a little different.

WP No. 2382 of 2003

3. On 27th September, 1992 Shree Hanuman Jute Mills Ltd. agreed to grant on hire all the plant and machinery required for the purpose of running its jute mills to the petitioners. Therefore, since 1992, the petitioners acquired control of the jute mills unit of Shree Hanuman Jute Mills. The establishment of these jute mills was at premises 76 & 62A J.N. Mukherjee Road, Ghusuri, Howrah, premises No. 110,111 and 112, G.T. Road, Howrah and premises No. 103 & 104, Naskarpara Road, Howrah. According to the petitioners they discharged all the statutory liabilities of the employees numbering 3500 workmen, till 2nd May, 1997. They say that on 2nd May, 1997 a lock out was declared in the jute mills. This was lifted on 21st August, 1997. Normal operation of the mills resumed by October, 1997. Between 2nd May, 1997 till 20th October, 1997 the petitioners were unable to pay the provident fund dues by the stipulated time.

4. By their letter dated 1st January, 1998 the Provident Fund Authority demanded of the petitioners interest for the period from March, 1997 till November, 1997 of a sum of Rs. 3,54,148/-, under section 7Q of the Employees Provident Fund and Miscellaneous Provisions Act, 1952.

5. The petition states that this sum of Rs. 3,54,148/- was deposited by the petitioners in February and March 1999.

6. On 22nd July, 1999 the provident fund authorities claimed damages under section 14B of the said act for the same period.

7. Aggrieved by this demand the petitioners preferred a writ application in this court. The learned single judge trying the writ application dismissed it on 25th August, 2000. The petitioners preferred an appeal from the said order. By its judgement and order dated 4th December, 2000, the Appellate court set aside the order of the Commissioner dated 22nd July, 1999 and directed the Commissioner to consider and decide the matter afresh. By a decision dated 21st November, 2003 the Regional Provident Fund Commissioner-II assessed the section 14B damages to be Rs. 35,59,160/- and directed its payment within 15 days.

8. Hence, this writ.

9. The Regional Provident Fund Commissioner has not applied the correct legal principles for determination of damages under section 14B. She failed to appreciate that she had a discretion in awarding damages. The effect of the closure of the factory, the regularity with which the petitioners made payment of the provident fund dues in the past, the delay in making the subject payments, the frequency of delay, the reasons for the delay and whether the petitioners had the mens rea or the mental state to defraud the Provident Fund Authority or the workers have not been discussed by the Commissioner. She has acted mechanically without application of mind. The Commissioner has not acted in terms of the Division Bench judgement of this court which remanded the matter on 4th December, 2000. The Commissioner was enjoined with a duty to adhere to the principles laid down in the said division bench judgement.

10. For all the reasons, given by me in the judgement in the two writs on the Appellate Side quoted above, the impugned order dated 21st November, 2003 is set aside with a direction upon the Regional Provident Fund Commissioner to determine the question afresh in accordance with law and the observations made above, upon hearing the petitioners by a reasoned order within six months from date. This application is accordingly allowed.

WP NO. 16 of 2004

11. The petitioners are running the jute mill and factory of Victoria Jute Company Ltd. at Telinipara, District Hooghly as a licensee in accordance with an order dated 16th July, 1998 passed by a Division bench of this court. These orders were confirmed by the Supreme Court on 4th September, 1998.

12. The mill could not be run profitably. It suffered huge losses. Its affairs were referred to the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. The Board on 9th October, 2000 declared the petitioner no. 2 company as sick.

13. By a demand dated 25th June, 2003 the provident fund authorities sought to levy damages on the petitioners under section 14B of the said Act, for the period

July 1989 to October 1997 and June 2000 to October 2002.

14. According to the writ petitioners, on an interpretation of the order of the Division bench of this Court dated 28th March, 2000 they were required to discharge only the current liabilities of the mill and not its past liability. For the payment of its past liability a scheme was framed by the petitioners for stage by stage payment which was approved by the Court on 28th March, 2000.

15. Although elaborate submissions were made on behalf of the petitioners before the Regional Provident Fund commissioner-II, by her determination dated 12th December, 2003, she determined Rs. 14,33,175/- as damages payable by the petitioners for the period 2nd October, 1995 onwards.

16. In this case also in my opinion the Regional Provident fund Commissioner failed to take into account the circumstances and legal principles which ought to have been taken into account by her to assess the damages. The Commissioner ought to have taken into account that the jute mill unit of Victoria Jute Company Ltd. was being run by the petitioners under orders of this court. This court had directed payment of the current statutory liabilities. Accordingly, the provident fund dues had been paid by the petitioners but there was some delay in the payment of these dues. This delay was attributable to the company accumulating losses as would be reflected in its balance sheet dated 31st March, 2000. It was declared as a sick company by the Board for Industrial and Financial Reconstruction. In spite of all these hurdles the section 7A dues since 1995 have been paid.

17. In my opinion it was not proper on the part of the Regional Provident Fund Commissioner to impose the full measure of damages as provided in Section 14B of the Act read with para 32A of the scheme. The Regional Provident Fund Commissioner failed to use her discretion to reduce the measure of damages. Substantial reduction in the measure of damages was necessary in the facts and circumstances of this case.

18. For the reasons, given by me in the said two judgements on the Appellate Side this writ application has to succeed.

19. The order dated 12th December, 2003 of the Regional Provident Fund Commissioner-II, West Bengal, Sikkim the Andaman and Nicobar Island is set aside. The Commissioner is directed to rehear and redetermine the matter by a reasoned order in accordance with law in the light of the above observations within six months of communication of this order.

20. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.