
(1992) 02 AP CK 0022

In the Andhra Pradesh High Court

Case No : Writ Petition No. 1209 of 1987

Thandava Co-operative Sugars Ltd.

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 20-02-1992

Acts Referred:

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

Citation : (1998) 3 LLJ 1200

Hon'ble Judges : S. Parvatha Rao, J

Bench : Single Bench

Advocate : K. Srinivasa Murthy, for the Appellant; R.N. Reddy, for the Respondent

Judgement

S. Parvatha Rao, J.—The petitioner herein i.e., the Thandava Cooperative Sugars Ltd., Payakaraopeta, Tuni R.S. questions in this Writ Petition the order of the Regional Provident Fund Commissioner, Andhra Pradesh (the respondent herein) in his proceedings No. AP/1773/PD/EG/87/3914 dated July 31, 1987 levying a total sum of Rs. 72,439-25 Ps. as damages for belated remittances under Para 30 read with Para 38 of the Employees' Provident Funds Scheme, 1952 and with Section 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act") on the ground that the said damages were fixed in an arbitrary manner without any rationale or reasonableness.

2. In the affidavit in support of the Writ Petition, on behalf of the petitioner it is stated that during the period when default was committed in making the various remittances as required by the Act and the Employees' Provident Funds Scheme, 1952 (hereinafter referred to as "the Scheme") i.e., March, 1979 to December, 1979, January 1980 to August 1980 and January 1981 to May 1981 the petitioner "had to struggle very hard for arranging finances at various stages" and "the factory had to pass through a very critical financial position for meeting its normal commitments in its functioning with the then existing capacity unit besides meeting from time to time the project cost for the new higher capacity

unit taken up for erection" and therefore was not even in a position to pay the salaries of its employees and was forced to pay some advances only to the extent its meagre resources permitted, as an alternative to avoid layoff. On this basis, it is firstly contended on behalf of the petitioner that there was no default committed because the question of payment of contribution would arise only when salaries were paid to the employees and deductions were made towards their provident fund contribution from the salaries actually paid to them. The second contention advanced is that even assuming that contributions were to be remitted whether salaries were paid to the employees or not, the respondent ought to have taken into consideration the difficult financial position of the petitioner and ought not to have imposed any damages on the petitioner in view of the peculiar circumstances disabling the petitioner from even paying the salaries to its employees. The third contention advanced on behalf of the petitioner is that fixation of damages was done arbitrarily without any rational basis and therefore are liable to be set aside.

3. In support of his first contention, the learned counsel for the petitioner relied on para 38 of the Scheme. Sub-para (1) of the said para 38 provides that "the employer shall, before paying the member 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..... he shall within fifteen days of the close of every month pay the same to the Fund by separate bank drafts or cheques". From this, the learned counsel for the petitioner contends that only when wages are paid to the employees, contributions from the wages are to be deducted and the said deductions together with the employer's contribution and other sums specified in the said sub-para (1) are to be remitted. Sub-para (1) of para 30 of the Scheme dealing with payment of contribution provides as follows :

"(1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in the Scheme referred to as the member's contribution.)"

Sub-para (1) of para 32 dealing with recovery of a member's share or contribution provides, inter alia, as follows :

"(1) The amount of a member's contribution paid by the employer or a contractor shall, notwithstanding the provisions in this Scheme or any law for the time being in force or any contract to the contrary, be recoverable by means of deduction from the wages of the member and otherwise :

Provided that no such deduction may be made from any wage other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable".

When confronted with the above provisions in paras 30 and 32 of the Scheme,

the learned counsel for the petitioner did not press his first contention further and in my view rightly so, in view of the categorical obligation imposed on the employer under the said provisions that irrespective of whether wages are paid or not, the employer will have to pay both his as well as the employees' contribution and if such payment in respect of the employees' contribution is made before the wages are paid to the employee, he is entitled to recover the same from the said respective wages, A Division Bench of the Kerala High Court in *Calicut Modern Spinning & Weaving Mills Ltd. v. Regional Provident Fund Commissioner* 1982 LabIC 1422 considered the said paras 30 and 38 of the Scheme and held as follows :

"We read para 30 as casting an obligation on the part of the employer to make the contributions payable by himself and on behalf of the member to the Fund in the first instance on every due date as contemplated in para 38. We do not subscribe to the view that in the first instance would mean only for the first time. According to us, "in the first instance" means payment of contribution voluntarily by the employer for every month irrespective of the fact whether wages have been paid or not" and also observed that the decision of the Supreme Court in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, made clear that the initial responsibility for making payment of the contribution of the employer as well as of the employee, lay on the employer."

4. The learned counsel for the respondent contends relying on the decision of the Supreme Court in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, that financial and other difficulties of the petitioner cannot be taken into account in fixing the damages u/s 14B of the Act. He further submits that all aspects were taken into consideration by the respondent in fixing the damages after giving full opportunity to the petitioner and that the order of the respondent dated July 31, 1987 impugned in this Writ Petition is not vitiated in any manner and that the damages fixed by the respondent are reasonable and not arbitrary. He also relied on a decision of the Division Bench of the Gujarat High Court in *Arvind Mills Ltd. v. R.M. Gandhi*. 1982 L.I.C. 344. On the other hand, the learned counsel for the petitioner placed reliance on the decision of a Division Bench of the Madras High Court in the *Regional Provident Fund Commissioner v. The South India Flour Mills* 1 (1985 I LLJ 283) in support of his contention that it is not incumbent on the Provident Fund Commissioner to impose damages in every case where default in making remittances occurs and that in appropriate cases, the Provident Fund-Commissioner may not impose any damages at all and that the actual nature of the financial problems faced by the employer can be taken into consideration in enquiring into whether the damages should be imposed or not and also in: fixing the quantum of damages, if damages are to be imposed.

5. In *Organo Chemical Industries* case (1979 I LLJ 416) the Supreme Court was dealing with a situation where the employer, instead of making its contributions, deliberately made wilful default on one pretext or another and was utilising the

amounts deducted from the wages of its employees, including its own contributions etc., in running its business and in those circumstances, held that the Regional Provident Fund Commissioner rightly observed that the employer, having regard to its past record must be visited with the maximum penalty as the employer was habitual defaulter. Under those circumstances, the Supreme Court rejected the contention advanced on behalf of the employer that as the period of arrears varied from less than one month to more than 12 months, the imposition of damages at the flat rate of hundred percent for all the defaults irrespective of their duration was not only capricious but arbitrary. The Supreme Court also considered at length the meaning of the word "damages" in Section 14B of the Act and resolving the conflict between the various High Courts, held as follows at p. 429 :

"The traditional view of damages as meaning actual loss, does not take into account the social content of a provision like Section 14B contained in a socio-economic measure like the Act in question. The word "damages" has different shades of meaning. It must take its colour and content from its context, and it cannot be read in isolation, nor can Section 14B be read out of context. The very object of the Legislation would be frustrated if the word "damages" appearing in Section 14B of the Act was not construed to mean penal damages. The imposition of damages u/s 14B serves a two-fold purpose. It results in damnification and also serves as a deterrent. The predominant object is to penalise, so that an employer may be thwarted or deterred from making any further defaults.

The expression "damages" occurring in Section 14B is, in substance, a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty u/s 14B is not merely "to provide compensation for the employees." We are clearly of the opinion that the imposition of damages u/s 14B serves both the purposes. It is meant to penalise defaulting employer as also to provide reparation from the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements of Section 6, but at the same time it is meant to provide compensation or redress to the beneficiaries i.e., to recompense the employees for the loss sustained by them. There is nothing in the Section to show that the damages must bear relationship to the loss which is caused to the beneficiaries under the Scheme. The word "damages" in Section 14B is related to the word "default". The words used in Section 14B are "default in the payment of contribution" and, therefore, the word "default" must be construed in the light of Para 38 of the Scheme which provides that the payment of contribution has got to be made by the 15th of the following month and, therefore, the word "default" in Section 14B must mean "failure in performance" or "failure to act." At the same time, the imposition of damages u/s 14B is to provide reparation for the amount of loss suffered by the employees."

6. In *Arvind Mills Ltd. v. R.M. Gandhi* (supra), the Gujarat High Court was also

dealing with a case of deductions made from the wages of the workers not being deposited with the Provident Fund Commissioner and considered the argument based on the financial position of the defaulter in the context and held as follows :

"It is contended that the Laxmi Cotton Mills was in serious financial difficulties at the material time between 1974 and 1977 and that is why it had not been able to make the payments due under the Act and the Scheme. Be it realised that the arrears consisted of the deductions made from the wages of the workers as well. The competent authority has himself taken the view that it is not the financial position of the petitioner company which matters but it is the financial position of the Laxmi Cotton Mills at the material time which matters in case it is a valid argument for mitigating damages. The competent authority has, however, taken the view that no material has been produced to show that at the time when the payments became due, the financial position of the company was such that these payments could not have been made from its resources then. No material has been produced even before us showing its financial position at the point of time of the individual defaults. It could have been shown as to what amount was available with the Laxmi Cotton Mills in its Bank Accounts and what resources it had at the material time when the payment became due. No effort has been made to produce material having an eye on the relevant point of time when the individual default occurred. We do not think that merely because the company was experiencing a financial hardship it was justified in refusing to pay its due under the Act and the scheme including the deductions made from the wages of the workers. The very concept of punitive damages which has been recognised by the Supreme Court in *Organo Chemical Industries*" case (1979 II LLJ 416) (supra) would be defeated if this were considered to be a legitimate ground for shutting one's eyes to the defaults or taking a lenient view of the defaults. The anxiety of the Parliament to deter employers from committing such defaults is unfolded and made manifest in Sections 14, 14A, 14AA, 14AB and 14AC. The offence has been made cognizable. Enhanced punishment is provided for every subsequent offence and a minimum jail sentence is also contemplated. We will be setting at naught the will of the parliament if we were to say that a mere averment to the effect that the payment could not be made on account of financial hardship is sufficient to mitigate the damages. Even if it was established that the financial position of the Company was embarrassing, it would not justify taking such a view. In a way every company needs finances and has even to borrow from financial institutions. Even the fact that the company is running at a loss for some years would not justify committing defaults in respect of the payments due under the Act and the scheme. Under the circumstances, we do not think that the competent authority has committed any error much less an error apparent on the face of the record in holding that there was no justification * for taking a lenient view in respect of the damages. Be it realised that in respect of delayed payments the competent authority has taken a very lenient view and has determined damages at a rate ranging between 1% and 10%. Only

in regard to defaults in the context of total nonpayment for a number of years has a serious view been taken. We do not think that any error has been committed in doing so which requires to be rectified by us in exercise of powers under Article 227 of the Constitution."

7. In the present case, it is not in dispute that the petitioner did not pay the wages to its employees and that it only paid some advances. It is the case of the petitioner that it could not pay the wages in view of its acute financial difficulties and that during the period in question it only paid "some advances" only to the extent its meagre resources permitted, as an alternative to avoid lay-off. This is not a case where the employer deducted the employees' contributions from out of the wages paid to the employees and utilised the said sums without depositing the same with the Provident Fund Commissioner. The Karnataka High Court in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, held that from the wording of Section 14B of the Act, it was clear that what the Section prescribed was the maximum amount that could be recovered from the defaulting employers and therefore it was necessary for the authority to come to a conclusion as to the reasonable amount that should be recovered by : way of damages from the employers having regard to all the facts and circumstances of the case. Referring to an earlier decision of the Karnataka High Court in *R.Fernandes v. State of Mysore 1969 L.I.C. 691* it was observed in Karnataka] *Agro-Industries Corporation Ltd. case (supra)* that the words "may recover" in Section 14B of the Act demonstrate that in a given case, the authority concerned had the power, if the circumstances justify the conclusion, to decide against the recovery of any damages. To the same effect is the decision of the Madras High Court in the *Regional Provident Fund Commissioner, Tamil Nadu v. The South India Flour Mills (Pvt.) Ltd. (supra)*. The Madras High Court relied on the; decision of the Supreme Court in *Coal Mines Provident Fund Commissioner v. J.P. Lalla (1976 II LLJ 91)* wherein the Supreme Court construed the words" as it may think fit" occurring in Section 10F of the Coal Mines Provident Fund and Bonus Scheme Act, 1948. After discussing the decision of the Supreme Court in *Coal Mines Provident Fund Commissioner's case (supra)* and *Organo Chemical Industries case (supra)* the Madras High Court held that the Provident Fund Commissioner has the discretion to levy or not to levy damages and observed that the use of the word "may" is indicative of the discretion which has been vested in the Provident Fund Commissioner and that the said discretion will have to be exercised on well known principles and in this connection further observed :

"This will only mean that if it is possible for the employer to satisfy the Provident Fund Commissioner that for reasons beyond the control of the employer, the employer was not possessed of sufficient means or funds to make the necessary payment then employer should be relieved of the liability to pay the penalty part of damages. The Provident Fund Commissioner can, in the exercise of his discretion u/s 14B of the Act, decline to recover that part of damages. If the defaulting employer wants to be relieved from the liability to pay damages u/ s 14B having regard to the object for which Section 14B was specifically enacted,

in our view, it will be obligatory on the part of the employer to lay before the Provident Fund Commissioner sufficient and reliable materials to establish his inability to send in the contribution payable under the Act. The mere fact that there was a strike or a lock-out or power cut, etc., during the relevant period would not be a sufficient explanation, unless it is also possible for the employer to show that the employees' salaries had not been paid and therefore, deductions were not made ; or that even that much of funds to be remitted were not available on due dates. The relevant factors have to be determined by the Provident Fund Commissioner quasi-judicially and, as already pointed out by us, he has to ascribe reasons for conclusions arrived at."

8. I fully agree with the above observations of the Division Bench of the Madras High Court in the South India Flour Mills" case (supra).

9. B.P.Jeevan Reddy,J., (as he then was) in The Commissioner of Coal Mines Provident Fund, Dhanbad and Others Vs. J.P. Lalla and Sons, also observed as follows :

"Now, Section 14B says that damages can be levied in a sum" not exceeding the amount of arrears" as the authority may think fit to impose. It is only the maximum. It does not mean that in every case, irrespective of the facts and circumstances of that case, the authority should levy damages"in an amount equal to the amount of arrears. The words" as it may think fit to impose" vest a discretion in the authority in the matter of determining the quantum of damages to be levied, which discretion has to be exercised having regard to all the relevant * facts and circumstances of the case. If the authority exercised its discretion having regard to the relevant circumstances, this Court, cannot, certainly, sit in appeal over its judgment, in exercise of its power under Article 226 of the Constitution of India. However, where an authority fails to exercise its discretion or exercises it arbitrarily there can be little doubt that this Court can interdict and call upon the authority to exercise its discretion properly and according to law."

In that case, after consideration of the facts, the learned Judge held that the Commissioner had not applied and followed the criteria evolved by himself while determining the amount of damages and therefore, set aside the order of the Commissioner with a direction to him to redetermine the amount of damages on the basis of the facts of that case.

10. In the present case also, I am of the view that the respondent had not applied his mind to the facts of the case. The respondent referred to the decision of the Gujarat High Court in Arvind Mills" case (supra) but failed to notice the significance of the fact that in that case, the deductions already made from the wages of the workers were utilised by the employer without depositing the same, whereas in the present case even the wages were not paid, according to the petitioner to its employees and that this is not a case where the amounts which were deducted were not deposited. The respondent also failed to see that in

Arvind Mills" case (supra) the delays were of several years and the damages in respect of 33 defaults out of 38 defaults, were levied at a rate ranging from 1% to 10%. The learned counsel for the petitioner has pointed out that the percentages at which the respondent imposed damages in the present case in most of the cases ranged between 25% and 45% and were unrelated to the period of delay and that the quantum imposed was not on any rational basis. This attack of the learned counsel for the petitioner cannot be brushed aside. Moreover, as already observed above, the respondent has not considered the various circumstances relating to the financial difficulties of the petitioner which were mentioned in its letter dated June 9, 1987 filed before the respondent. It is also stated that the petitioner filed various other papers in support of its case of financial difficulties at the relevant time. In the said letter dated June 9, 1987 it is also stated on behalf of the petitioner that it was running the sugar factory on a co-operative basis and that it has become a sick unit in view of the accumulated losses suffered by it and that its capacity was proposed to be expanded and that during the period in question it faced acute financial shortage because of administrative delays in the release of loan assistance from the financial institutions and the non- release of funds by the State Government. It is also stated that the petitioner could not pay the other liabilities like purchase tax, manure loans due to the State Government and also the price for the cane supplied by the members promptly. The respondent did not enquire into the question whether the petitioner's financial difficulties, if true, were really of such a nature as would disable the petitioner from making the remittances under the Scheme and the Act at the relevant times promptly. I am of the view that the respondent erred in brushing aside the said aspect of the matter by merely observing that "these difficulties cannot be considered as valid ground in the eyes of law to delay the statutory payments" and that "even if it was established that the financial position of the company was embarrassing, it would not justify taking such a view".

11. In the circumstances, the order of the respondent dated July 31, 1987 is set aside. It is open to the respondent to enquire into all aspects of the matter and if he finds that the employer is liable for imposition of damages, to determine the quantum of damages afresh, after giving full opportunity to the petitioner in accordance with law. The Writ Petition is accordingly allowed. No costs.