

(2011) 06 MAD CK 0378

In the Madras High Court

Case No : Writ Petition No's. 20938 and 31365 of 2004, 4616 of 2005, 24877 and 24878 of 2009, 12155, 15729, 12156, 16838, 16840, 17518 to 17521, 21135 to 21144, 22081 to 22085, 22096 to 22101, 22805 and 22806 of 2010 and 7564 of 2011

The Assistant Provident Fund Commissioner, Employees
Provident Fund Organisation and Others

APPELLANT

Vs

Employees Provident Fund Appellate Tribunal (Ministry of
Labour and Employment, Government of India) and Others
etc. etc.

RESPONDENT

Date of Decision : 21-06-2011

Acts Referred:

Coal Mines Provident Fund and Bonus Schemes Act, 1948 — Section 10F
Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A

Citation : (2011) 06 MAD CK 0378

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : M. Jayaraman, in W.P. Nos. 17518 to 17521, 21135 to 21144, 22081 to 22085, 22096 to 22101, 22805 and 22806/2010, M. Venkatachalapathy, SC for M. Sriram, in W.P. Nos. 31365 of 2004 and 4616 of 2005, Radhagopalan, in W.P. Nos. 24877 and 24878/2009, S. Ravi, for Gupta and Ravi, in W.P. Nos. 16840/2010 and 7564/2011, K. Kalyanasundaram, in W.P. Nos. 12155, 12156 and 15729/2010, S. Ravindran, for T.S. Gopalan and Co. in W.P. No. 16838/2010, M. Suresh Kumar, in W.P. No. 20938/2004, for the Appellant; S. Sivakumar, for R2 in W.P. Nos. 17519 and 17521/2010, Rita Chandrasekar, for R2 in W.P. No. 21135/2010, K. Kalyanasundaram, for R2 in W.P. Nos. 21137 and 21139, 21142, 21143, 22081, 22084, 22806 and 22096 to 22101/2010, S. Ravindran, for T.S. Gopalan and Co. for R2 in W.P. No. 21138/2010, S. Ravi, for Gupta and Ravi for R2 in W.P. No. 21141/2010, V.J. Latha, for R1 and R2 in W.P. No. 31365/2004 and 4616/2005, K. Gunasekaran, ACGSC for R1 in W.P. Nos. 24877 and 24878/2009, 16840/2010 and 7564/2011, M. Jayaraman, for R1 and R2 in W.P. Nos. 12155, 12156, 15729 and 16838/2010, K. Balachandran, ACGSC for R1, Shivakumar, for R4, S. Arun Kumar, for R6, K. Gunasekar, for R9 in W.P. No. 20938/2004, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—Heard both sides in respect of first batch on 15.06.2011 and on 17.06.2011 in respect of the second batch. The issues involved in all the writ petitions arose out of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short PF Act).

2. In majority of the writ petitions, surprisingly, the Petitioner is the Assistant Provident Fund Commissioner, Coimbatore. He has come forward to file the writ petitions aggrieved by the various orders passed by the Employees Provident Fund Appellate Tribunal constituted u/s 7D of the PF Act.

3. The writ petitions came to be filed under the following circumstances; against various orders passed by the authorities under the PF Act, including by the very same Assistant Provident Fund Commissioner (APFC for short), Coimbatore, some of the aggrieved employers preferred appeals before the Tribunal u/s 7I of the PF Act.

4. The Employees' Provident Funds Appellate Tribunal is a judicial Tribunal constituted by the PF Act. It has power to entertain appeals against the order passed by the authority either u/s 7A, or Section 7B, or Section 7C, or Section 14B of the PF Act. The Tribunal entertained the appeal and while upholding the orders of the PF authorities in levying damages and interest, however reduced the quantum of damages paid by the employer. The quantum of damages fixed by the Tribunal varied from case to case and it ranged from 5% to 15% per annum depending upon the circumstances pleaded by the employers and also the case put forth by the PF Department.

5. Aggrieved by the reduction of the damages, the APFC had filed number of writ petitions. Some of the employers aggrieved by the very same order of the Tribunal in fixing damages at a particular rate and in not granting entire relief at the notified rate or damages payable per annum, have filed the writ petitions in some of the cases. In some cases, the employers have also come forward seeking for refund of the amount consequent upon the determination by the Tribunal. In some cases, it was for setting aside the show causes notice issued as to why arrest warrants should not be issued against the employers. In some cases, instead of going before the Tribunal, they have filed writ petitions challenging the notices of attachment of the properties pursuant to the execution proceedings initiated by the PF authorities. In only one writ petition, a Trade Union had filed a writ petition seeking for a direction to the authorities to sell the properties to satisfy the dues of the workmen and also for a consequential direction to the PF and ESI authorities to waive the levy of damages and penal interest on account of the fact that the mill was sick.

6. The following tabular column will show the nature of writ petitions, names of the parties, the orders of the Tribunal under which the writ petitions are filed and the relief if any granted by the Tribunal and also cases where cross writ petitions

were filed by the Employers as well as other miscellaneous reliefs claimed by the Employers:

I. Writ Petitions filed by the Assistant Provident Fund Commissioner, Coimbatore:

Sl. No

W.P. No.

Name of the Employer

Tribunal Order Appeal against and date

Relief granted by Tribunal

1

17518/2010

Bhavani Mills Ltd.

ATA No. 63(13)/2008 Dt : 22.04.09

Damages restricted to 10% p.a. on arrears

2

17519/2010

Narasimha Mills (P) Ltd.

ATA No. 531(13)/2008 Dt : 24.09.09

Damages restricted to 10% p.a. on arrears

3

17520/2010

Bhavani Mills Ltd.

ATA No. 552(13)/2008 Dt : 22.04.09

Damages restricted to 10% p.a. on arrears

4

17521/2010

Indian Express Publication (Madurai) Ltd., Coimbatore

ATA No. 861(13)/2005 Dt : 17.04.2009

Damages restricted to 15% p.a. on arrears

5

21135/2010

Kwality Spinning Mills Ltd.

ATA No. 119(13)/2007 Dt : 21.05.2009

Damages restricted to 10% p.a. on arrears

6

21136/2010

Sri Venkatesa Mills Ltd.,

ATA No. 51(13)/2007 Dt : 03.09.2009

Damages restricted to 5% p.a. on arrears

7

21137/2010

The Coimbatore Pioneer Mills Ltd., Coimbatore

ATA No. 348(13)/2007 Dt : 22.05.2009

Damages restricted to 5% p.a. on arrears

8

21138/2010

Sri Ramalinga Choodambikai Mills Ltd.,

ATA No. 740(13)/2003 Dt : 10.07.2009

Damages restricted to 10% p.a. on arrears

9

21139/2010

Venkata Ganga Textiles

ATA No. 520(13)/2009 Dt : 24.09.2009

Damages restricted to 5% p.a. on arrears

10

21140/2010

Sujay Spinner

ATA No. 21(13)/2007 Dt : 10.07.2009

Damages restricted to 5% p.a. on arrears

11

21141/2010

The Dhanalakshmi Mills Ltd.,

ATA No. 79(13)/2006 Dt : 22.04.2009

Damages restricted to 10% p.a. on arrears

12

21142/2010

The Coimbatore Pioneer Mills Ltd.

ATA No. 26(13)/2008 Dt : 22.05.2009

Damages restricted to 5% p.a. on arrears

13

21143/2010

Sri Balasubramania Mills Ltd.

ATA No. 22(13)/2007 Dt : 10.07.2009

Damages restricted to 5% p.a. on arrears

14

21144/2010

Indian Express Publication (Madurai) Ltd., Coimbatore

ATA No. 489(15)/2006 Dt : 17.04.2009

Damages restricted to 15% p.a. on arrears

15

22081/2010

Bar Wood Estate, Gudalur

ATA No. 734(13)/2004 Dt : 10.07.2009

16

22082/2010

Bar Wood Estate, Gudalur

ATA No. 514(13)/2008 Dt : 10.07.2009

Damages restricted to 5% p.a. on arrears

17

22083/2010

Chikmoyar Coffee Estate

ATA No. 594(13)/2002 Dt : 10.07.2009

18

22084/2010

Chikmoyar Coffee Estate

ATA No. 735(13)/2004 Dt : 10.07.2009

19

22085/2010

Chikmoyar Coffee Estate

ATA No. 517(13)/2008 Dt : 10.07.2009

Damages restricted to 5% p.a. on arrears

20

22096/2010

Silver Cloud Coffee Estate Ltd., Gudalur

ATA No. 518(13)/2008 Dt : 13.07.2009

21

22097/2010

Silver Cloud Coffee Estate Ltd., Gudalur

ATA No. 917(13)/2004 Dt : 13.07.2009

22

22098/2010

Silver Cloud Coffee Estate Ltd., Gudalur

ATA No. 916(13)/2004 13.07.2009

23

22099/2010

Silver Cloud Coffee Estate Ltd., Gudalur

ATA No. 596(13)/2004 13.07.2009

24

22100/2010

Silver Cloud Coffee Estate Ltd., Gudalur

ATA No. 918(13)/2004 13.07.2009

25

22101/2010

Silver Cloud Coffee Estate Ltd., Gudalur

ATA No. 515(13)/2008 13.07.2009

26

22805/2010

Silver Cloud Coffee Estate Ltd., Gudalur

ATA No. 516(13)/2008 13.07.2009

27

22806/2010

Silver Cloud Coffee Estate Ltd., Gudalur

ATA No. 595(13)/2003 13.07.2009

Damages restricted to 5% p.a. on arrears

II. Writ Petitions filed by the various Employers challenging the orders passed by the EPF Tribunal and PF Authorities and cases where different reliefs were claimed

Sl. No

W.P. No.

Employer

Order Challenged/Relief claimed and date

Remarks

28

31365/2004

Sri Venkatesa Mills Ltd

Damages and interest dt : 15.10.2004

10% amount paid towards damages in subsequent proceedings when challenged by the Employer, the Tribunal gave 5% (subject matter of challenge in W.P.No.21136/2010 filed by APFC)

29

4616/2005

Sri Venkatesa Mills Ltd.

Recovery certificate and attachment notice dt: 27.01.2005

30

24877/2009

The Narasimha Mills Ltd.

Appeal No.531(13)/2009 dt. 24.09.2009

To set aside the interest claimed

31

24878/2009

The Narasimha Mills Ltd.

Appeal No.531(13)/2009 dt : 24.09.2009

To set aside the damages @ 5% p.a. As against the same order, APFC has filed W.P. No. 17519/2010

32

16840/2010

Bhavani Mills Ltd.

Show cause as to why warrant of arrest should not be issued dt: 02.07.2010

33

7564/2011

Bhavani Mills Ltd

ATA 63(13)/2008 dt : 22.04.2009 confirmed by ATA 552(13)/2008 dt : 11.08.2010

As against the said order, APFC has filed W.P.No.17518/2010

34

12155/2010

Silver Cloud Tea Factory

Notice before attachment dated 25.05.2010

35

15729/2010

Silver Cloud Tea Factory

Seeking for refund of Rs.14,94,676/- on account of the comon order passed by the Tribunal in ATA 596(13)/2003 and batch dt: 13.07.2009

Common order is under challenge in W.P.Nos.22096 to 22101/2010 & 22805 and

22806/2010 by APFC

36

12156/2010

Chikmoyar Coffee Estate

Notice before attachment. Common order in ATA 594(13)/2002 and two others dated 10.07.2009

Tribunal granted damages to be paid @ 5% p.a. (Subject matter of challenge in W.P. Nos. 22083 to 22085/2010)

37

16838/2010

Sri Ramalinga Choodambikai Mills Ltd.

ATA 740(13)/2003 dt: 10.07.2009 and the consequential recovery order dated 07.04.2010

The order of the Tribunal is under challenge in W.P.No.21138/2010 filed by APFC

III Writ petition filed by the Trade Union:

Sl. No

W.P. No.

Employer

Order Challenged/Relief claimed

1

20938/2004

Coimbatore District Mill Workers Union (AITUC)

Seeks for a direction to the Industrial Investment Bank of India and M/s. Dhanalakshmi Mills Ltd to complete the process of sale under supervision of the operating agency for the sale of the assets of the "B" Mill and the surplus land in "A" mill and for a consequential direction to the operating agency to distribute the sale proceeds to the employees against their dues and other statutory dues and to direct the Central provident Fund Commissioner - R) and the ESI Corporation R10 to consider waiver of penal interest and damages payable by M/s. Dhanalakshmi Mills.

7. On behalf of the PF Department, Mr. M. Jayaraman, learned Standing Counsel contended that the Tribunal had erred in partly allowing the claims of the employers and reducing the quantum of damages drastically. The Tribunal also erred in holding that the authority had not discharged its functions properly and

there was a lack of application of mind and discretion. If the Tribunal is of the opinion that the authority had not discharged his quasi judicial function, then it should have remanded the matters for fresh disposal by the authority himself. The learned Counsel for the APFC also submitted that the power to levy damages flowed from Section 14B of the PF Act r/w Para 32A of the Employers PF Scheme 1952. The scheme itself provides for levy of damages on the basis of the period and the rate of damages and therefore fixing an adhoc amounts on uniform rates is contrary to the Act and the Scheme.

8. Per contra, various learned Counsels appearing for the employers contended that the APFC had no locus standi to file writ petitions challenging the orders passed by the PF Tribunal. The authorities are quasi judicial authorities. Therefore, having determined the liability of the employers and when their orders are challenged before the judicial Tribunal, viz., EPF Tribunal, then any determination by the Tribunal is binding on the parties. Hence, the authority cannot file such writ petitions challenging the orders of the Tribunal.

9. In this context, reference was made to an unreported judgment of this Court in Regional Provident Fund Commissioner, Tirunelveli v. Prabha Beverages Private Ltd., Marthandam in W.P. No. 3462 of 1999 dated 22.10.2008. Reliance was placed upon paragraphs 7 to 9, which reads as follows:

7. In more or less similar circumstances, under the Cinematograph Act, the Supreme Court vide its decision in Union of India v. K.M. Sankarappa reported in (2001) 1 SCC 582 held in para 7, which is as follows:

7. ...The executive cannot sit in an appeal or review or revise a judicial order. The Appellate Tribunal consisting of experts decides matters quasi-judicially. A Secretary and/or Minister cannot sit in appeal or revision over those decisions. At the highest, the Government may apply to the Tribunal itself for a review, if circumstances so warrant. But the Government would be bound by the ultimate decision of the Tribunal.

(emphasis added)

8. When the Central Board of Film Certification came up before this Court challenging the order of the Tribunal, a Division Bench of this Court, to which I am (K. Chandru, J.) a party, had an occasion to consider the locus standi of the Central Board of Film Certification in Central Board of Film Certification v. Yadavalaya Films (2007) 2 MLJ 604. In para 22, it was observed as follows:

22. In our opinion, it is doubtful whether these appeals are maintainable, in view of the decision of the Supreme Court in Union of India v. K.M. Shankarappa AIR 2000 SC 3678 : (2001) 1 SCC 582 : (2001) 1 MLJ 146 (SC).

9. In the present case, except that the Petitioner was very sensitive about his own order being reversed by the Tribunal, there is no case for them to come to this Court challenging the order of the Tribunal, which had given sound reasoning for reversing the order passed by the first Respondent.

10. Reference was also made to a recent judgment of the Bombay High Court in *Asstt. Provident Fund Commissioner Vs. Nirmitee Holidays (P) Ltd.*, Reliance was placed upon the following passage found in paragraph 4, which is as follows:

4. ...It is well-settled that an authority while discharging quasi-judicial functions cannot challenge the order passed by the Appellate Authority, reversing his/her order. In my considered opinion, the ratio laid down in the case of *Village Panchayat of Velim v. Shri Valentine S.K.F. Rebello and Anr.* (supra) and in the case of *Village Panchayat of Sancoale and Anr. v. M-Tech Developers Ltd.* (supra), relied upon by the learned Counsel for the Respondent would be squarely applicable. I do not find any merit in the submission of Mr. Singh, learned Counsel appearing for the Petitioner that the petition is maintainable since the Petitioner himself is not benefited by challenging the order passed by the Appellate Authority and he has filed the present petition only to protect the interest of the employees of the Respondent. In my opinion, this issue does not arise in the present petition. An authority exercising judicial or quasi-judicial functions; is not even supposed to defend its own order when challenged before higher forum. In this connection, it would be appropriate to refer to the judgment of the Apex Court in the case of *Syed Yakoob Vs. K.S. Radhakrishnan and Others*, in which the Apex Court has held that the Tribunals are not suppose to defend his own orders unless allegations are made against them. It is therefore well-settled that the Tribunal discharging quasi-judicial functions its not supposed to defend its action even when its order are challenged before the higher forum, as has been held in the case of *Syed Yakoob v. K.S. Radhakrishnan and Ors.* (supra).

11. Without prejudice to the said submission, it was contended that the Tribunal ought not to have upheld the claim for damages in the absence of any compelling reasons to levy damages. In any event, the authority should have found out that whether there was any due on the date on which the damages were levied. In this context Mr. S. Ravindran, learned Counsel appearing for the Petitioner in W.P. No. 16838 of 2010 relied upon the judgment of the Delhi High Court in *Hi-Tech Vocational Training Centre Vs. Assistant Provident Fund Commissioner*, . He relied upon the following passages found in paragraphs 18 and 20, which is as follows:

18. There is another interesting aspect of the matter which does not appear to have been considered in any of the judgments aforesaid. Section 14B empowers imposition of "penalty" by recovery of "such damages, not exceeding the amount of arrears", when an employer makes "default in the payment of any contribution to the Fund..." The language suggests that for power u/s 14B to be exercised, if not on the date of levy of damages, at least on the date of invocation of Section 14B, there must be a "default" coupled with "arrears". There can be no "arrears" if the contribution to the Fund has already been paid, even if belatedly. Black's Law Dictionary, 6th Edition defines "arrears" as money which is overdue and "unpaid". What has already been paid, cannot be "arrears". If there are no "arrears" there can be no computation of damages not exceeding the arrears.

Though Section 14B itself refers to the scheme qua computation of rate of damages but para 32A of the Scheme also uses the word arrears in conjunction with period of default. It thus cannot be said that under the Scheme recovery of damages without the contribution being in arrears is possible.

20. In my opinion, the aforesaid dicta squarely applies to Section 14B also. The proceedings for imposition of penalty thereunder can be initiated only if there are arrears and then, maximum damages of equal to arrears can be recovered. However, the proceedings cannot be commenced if there are no arrears on that date, even if there has been delay in payments.

12. It is submitted that the percentage of damages fixed by the Tribunal should be a one time payment and not based upon annual basis. Lastly, it was also submitted that the Tribunal itself in some cases had reduced the quantum of damages to 5% and similar relief should have been granted to the Petitioners. At least in a case where in W.P. No. 16838 of 2010, the Tribunal gave relief to the very same employer in an earlier occasion and that order should have been obeyed in case of that employer. Apart from the cases where the Tribunal's order is under challenge, the parties submitted that once the Tribunal has determined the percentage of the damages, then the Department should have refunded the amount paid in excess by the employer and it cannot further institute execution machinery. Only on that basis, the Tribunal's orders are under challenge before this Court.

13. Before proceeding to deal with the rival contentions, the case pleaded before the Tribunal will have to be looked into:

The Employers pleaded before the Tribunal that due to recession in the industry, there was a delay; but the delay was not willful or wanton. Therefore, the imposition of uniform rate was unwarranted. They had also placed reliance upon the judgment of the Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*, . Reliance was placed upon the following passage:

.... An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute....

14. It was submitted by them that the power u/s 14B of the PF Act is a quasi-judicial power and the discretion exercised must be for sound and objective

considerations. Para 32A of the Scheme is only a guideline and not intended for a mechanical application. Reliance was placed upon judgment of the Kerala High Court in *Indian Telephone Industries Ltd. v. APFC and Ors.* reported in 2006 (3) KLJ 698 and of the Bombay High Court in *Cable Corporation of India Ltd. v. Union of India* reported in 2006(3) CLR 349 (Bom). In both the judgments, it was held by the High Court that belated remittance of PF dues liability to pay damages does not arise automatically, but the same will have to be decided by the PF Authorities by applying mind to the merits of the case and no arithmetic calculation can be made. The Supreme Court in *Organo Chemical Industries and Anr. v. Union of India and Ors.* reported in AIR 1979 SC 1803 had observed that while fixing the amount of damages, the PF authorities generally takes into consideration the various factors vis-à-vis the number of defaults, the period of delay, the frequency of defaults and the amount involved. Subsequently similar view was taken by the Orissa High Court in *Bhubaneswar City Distribution Division Vs. Union of India (UOI) and Another*, wherein, it was observed that delayed payment of contribution does not ipso facto invite levy of damages. If the employer furnishes sufficient cause for the delay, the authority may not levy damages in a given case.

15. Opposing the appeals, on behalf of the department, it was argued that financial crisis cannot be a ground for delayed remittance of PF dues. On that ground, no waiver of damages can be made. They placed reliance upon the judgment of the Kerala High Court in *RPFC v. Bharat Plywood and Timber Products Ltd.* reported in 1980 LIC 446 (Ker) and the judgment of the Orissa High Court in *Esskey Machinery (P) Ltd. Vs. Regional Provident Fund Commissioner*,). The authority after analyzing the rival contentions came to the conclusion that while damages can certainly be levied for delayed remittance of PF, the authority had not followed the various guidelines and dictum of the Supreme Court and the High Court. There was no enquiry or finding of fact that the employers had deliberately withheld the PF Contribution and also the Enquiry Officer had not exercised his discretion vis-à-vis the actual reasons for the delay in remittance of the PF dues. Therefore, since the orders under appeal were suffered from legal infirmities, the Tribunal found that the employer should not be unjustly punished. But at the same time, it found that the financial difficulties expressed by the employer cannot be a ground for delayed remittance. Therefore, keeping in view the reasons and circumstances in which the default in remittance of PF dues occurred, ends of justice is to be met by restricting the levy of damages to a particular percentage. It is this order which is under challenge mostly by the Department and in some cases by the employers.

16. Taking note of the first objection by the employer regarding the maintainability of the writ petitions, this Court is of the view that the writ petitions cannot be rejected on the ground of locus standi of the APFC. Taking note of the peculiar position that the PF authorities are to play under the PF Act, the challenge by the authorities of the order of the Tribunal cannot be rejected on the ground of want of jurisdiction. It must be noted that the authorities are

playing multifarious role under the provisions of the PF Act including investigation, enforcement, quasi judicial determination of the rights of the parties, prosecution of the erring employers as well as securing the rights of workmen, who also contribute PF subscriptions.

17. The Bombay High Court in the judgment in Nirmitee Holidays case (cited supra) proceeded on the basis that the quasi judicial authorities are not expected to defend their proceedings before appellate forum and hence they cannot challenge the orders of the Tribunal cannot be accepted. u/s 7K(2) of the PF Act, the Act provides for the authority to authorize one or more legal practitioners to present its case with reference to any appeal before the Tribunal. Further u/s 7L of the PF Act, the Tribunal is expected to give opportunities to the parties to the appeal and to pass such orders as it may think fit. u/s 7L(3) of the Act, the Tribunal is mandated to give copies of its orders to both parties to the appeal. Though u/s 7L(4) of the PF Act, it is stated that any order made by the Tribunal finally disposing of an appeal shall not be questioned in any Court of law, the same has no relevance to a writ petition filed under Article 226 of the constitution. In the unreported decision in M/s. Prabha Beverages Case (cited supra), this Court had merely expressed doubts about the maintainability of the writ petition and it did not give any categorical finding on the said issue. It was only observed that without even a prima facie case in their favour, the APFC ought not have filed that writ petition. Hence, that judgment is not an authority to decide the issue involved.

18. Since the authorities were allowed to be represented before the Tribunal even by engaging a legal practitioner and they were also heard during the proceedings by the Tribunal and that order was directed to be issued to them, certainly they have locus standi to challenge the proceedings of the Tribunal before the High Court. The finality that is attached to the Tribunal's order u/s 7L(4) of the PF Act will not apply to the proceedings initiated under Article 226. It must also be noted that the PF authorities are holding the amount collecting from the employee and employer in Trust and therefore, as Trustees, they are bound to maintain the funds of the Trust with greater vigil and for any loss caused to the funds of the Trust as Trustees, they may be held responsible. Therefore, if any order of the Tribunal is manifestly erroneous or passed without jurisdiction, the authority can challenge the same in a writ petition under Article 226 of the Constitution.

19. In this context, it is necessary to refer to certain decisions of the Supreme Court which will have a bearing on the said matter:

i) In State of Orissa Vs. Union of India (UOI) and Another, the State Government exercising power under the Mines Act was held to have locus standi to sue the Central Government. Paragraph 12 of the judgment may be usefully referred to:

12. In this connection, it is necessary to note that in the first place, the State Government is not merely an authority subordinate to the Central Government

which would, undoubtedly, be bound by the revisional orders of the superior authority. It is also the owner of the mines and minerals in question. If it is directed to issue a mining lease in favour of any party, it has locus standi to challenge that order under Article 226 of the Constitution of India.

ii) In *Ghulam Qadir Vs. Special Tribunal and Others*, the Supreme Court has held that a petition under Article 226 can be filed by any aggrieved person. In Paragraph 38, the Supreme Court held as follows:

38. There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed for is for habeas corpus or quo warranto. Another exception in the general rule is the filing of a writ petition in public interest. The existence of the legal right of the Petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid article. The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea change with the development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dislodging the claim of a litigant merely on hypertechnical grounds. If a person approaching the court can satisfy that the impugned action is likely to adversely affect his right which is shown to be having source in some statutory provision, the petition filed by such a person cannot be rejected on the ground of his not having the locus standi. In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi.

iii) In AIR 1977 1718 (SC) the Supreme Court held that if a Court acts illegally, then a Writ of Certiorari lie against its order. Paragraph 5 may be usefully extracted:

5. One of the principles on which certiorari is issued is where the court acts illegally and there is error on the face of record. If the court usurps the jurisdiction, the record is corrected by certiorari. This case is a glaring instance of such violation of law. The High Court was in error in not issuing writ of certiorari.

iv) In *M.S. Jayaraj Vs. Commissioner of Excise, Kerala and Others*, the Supreme Court set out the guiding principles behind the concept of locus stand and Paragraphs 12 and 14 reads as follows:

12. In this context we noticed that this Court has changed from the earlier strict interpretation regarding locus standi as adopted in *Nagar Rice & Flour Mills v. N. Teekappa Gowda & Bros.* and *Jasbhai Motibhai Desai v. Roshan Kumar* and a much wider canvass has been adopted in later years regarding a person's entitlement to move the High Court involving writ jurisdiction. A four-Judge Bench in *Jasbhai Motibhai Desai*² pointed out three categories of persons vis-à-vis the locus standi: (1) a person aggrieved; (2) a stranger; and (3) a busybody or a meddlesome interloper. Learned Judges in that decision pointed out that

anyone belonging to the third category is easily distinguishable and such person interferes in things which do not concern him as he masquerades to be a crusader of justice. The judgment has cautioned that the High Court should do well to reject the petitions of such busybody at the threshold itself. Then their Lordships observed the following: (SCC p.683, para 38)

38. The distinction between the first and second categories of applicants, though real, is not always well demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of "persons aggrieved". In the grey outer circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be "persons aggrieved".

14. In the light of the expanded concept of the locus standi and also in view of the finding of the Division Bench of the High Court that the order of the Excise Commissioner was passed in violation of law, we do not wish to nip the motion out solely on the ground of locus standi. If the Excise Commissioner has no authority to permit a liquor shop owner to move out of the range (for which auction was held) and have his business in another range it would be improper to allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition has strictly no locus standi. So we proceed to consider the contentions on merits.

20. Therefore, this Court is unable to agree with the reasoning of by the Bombay High Court in *Nirmitee Holidays 's case* (cited supra). The unreported judgment of this Court in *Prabha Beverages 's case* (cited supra) cannot be said to have decided the issue finally. Further, in that case, this Court went into the merits of the matter and only passed a passing reference. Hence, the objections stands overruled. At the same time, it must be cautioned that the PF authorities should not come on appeal without a strong legal case and for the mere sake of filing writ petitions. This word of caution is only rendered so that this Court is not clogged with unnecessary writ petitions thereby, leading to docket explosions. Hence the objection raised in this regard is overruled.

21. With reference to nature of power vested u/s 14B of the Act for levy of damages and the scope for levying such damages came to be considered elaborately in the judgment of the Supreme Court in *M/s. Hindustan Times Limited Vs. Union of India and Others*, . In paragraphs 15 and 17, the Supreme Court observed as follows:

15. In *Commr. of Coal Mines Provident Fund v. J.P. Lalla & Sons*³, interpreting Section 10F of the Coal Mines Provident Fund and Bonus Scheme Act, 1948, it was stated by this Court that by the use of the words "may levy damages", in

case of default in payment of contribution, and the words "as it may think fit to impose", it was clear that the determination was not based on the inflexible application of a rigid formula and that by these words, the authorities were to apply their mind to the facts and circumstances of the case. As a duty was judicially imposed on the authority, principles of natural justice were implied. In *Organo Chemical Industries v. Union of India* where the vires of the Act were upheld, this Court laid down that while passing orders u/s 14B, the authority was acting in a "quasi-judicial" capacity and was bound to give reasons for its orders. The levy was not necessarily proportionate to the loss incurred by the employee inasmuch as it was partly compensatory and partly penal.

17. As to the manner in which the authority concerned could arrive at the "damages", A.P. Sen, J. stated that the authority usually takes into consideration, as was done in that case the number of defaults, the period of delay, the frequency of defaults and the amounts involved. The damages were to be compensatory and penal as well and hence principles of estimation of damages under the law of contract or torts, were not applicable.

22. At the same time, equitable considerations are out of place in the levy of damages and that the question of prejudice being caused to an erring employer cannot be accepted. The Supreme Court also ruled out that if there is any long delay in making their claim by the Department also cannot come to the rescue of the employer and there cannot be any limitation in such circumstances. In the very same judgment, in paragraphs 22, 24 and 25 these issues have also been dealt with:

22. The reason is that while in the above cases decided by this Court the exercise of powers by the authority at a very belated stage was likely to result in the deprivation of property which rightly and lawfully belonged to the person concerned, the position u/s 14B of the Act of an employer is totally different. The employer who has defaulted in making over the contributions to the Trust Fund had, on the other hand, the use of monies which did not belong to him at all. Such a situation cannot be compared to the above line of cases which involve prolonged suspense in regard to deprivation of property. In fact, in cases u/s 14B if the Regional Provident Fund Commissioner had made computations earlier and sent a demand immediately after the amounts fell due, the defaulter would not have been able to use these monies for his own purposes or for his business. In our opinion, it does not lie in the mouth of such a person to say that by reason of delay in the exercise of powers u/s 14B, he has suffered loss. On the other hand, the defaulter has obviously had the benefit of the "boon of delay" which "is so dear to debtors", as pointed out by the Privy Council in *Nagendranath De v. Sureshchandra De*. In that case, it was observed that equitable considerations were out of place in matters of limitation and the strict grammatical construction alone was the guide. Sir Dinshaw Mulla stated:

Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously

inclined there is nothing to prevent his paying what he owes into court.

(emphasis supplied)

The position of the employer in case of default u/s 14B is no different.

24. We shall now refer to the judgments of some of the High Courts to cull out some broad guidelines. The Orissa High Court in *Orissa Forest Development Corpn. Ltd. v. R.P.F. Commr.* and a Single Judge of the Punjab & Haryana High Court in *Amin Chand & Sons v. State of Punjab* have held like the Single Judge of the Bombay High Court in *K.T. Rolling Mills case*, that if there was undue delay in initiating action u/s 14B which the Court thought was unreasonable, on that sole ground the demand could be struck down. With great respect, this view is, as already stated, clearly wrong. The judgment of this Court in *K.T. Rolling Mills case* having been reversed by this Court, the above view is no longer good law. In fact, the Punjab judgment was rightly reversed in appeal in *State of Punjab v. Amin Chand & Sons*¹⁵. The view taken by the learned Single Judge of the Punjab & Haryana High Court in 1965 has also been rightly dissented by the Delhi High Court in *Birla Cotton Spg. & Wvg. Mills Ltd. v. Union of India*; by the Gujarat High Court in *Gandhidham case*¹⁷; the Patna High Court in *Inter State Transport Agency v. R.P.F. Commr.* and the Allahabad High Court in *Northern India Press Works v. R.P.F. Commr.*

25. The Gujarat High Court in *Gandhidham Spg. & Mfg. Co. Ltd. v. R.P.F. Commr.* (to which one of us Majmudar, J. was a party), laid down a principle that "prejudice" on account of delay could arise if it was proved that it was "irretrievable". There it was observed that for purposes of Section 14B, there is no period of limitation prescribed and that for any negligence on the part of the Department in taking proceedings the employees, who are third parties, cannot suffer. It was further observed:

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 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 whether the employer in the meantime has changed his position to his detriment and is likely to be irretrievably prejudiced by the belated issuance of such a show-cause notice.

(emphasis supplied)

It was also stated that such a defence of irretrievable prejudice on account of delay, was to be pleaded and proved in the reply to the show-cause notice. We may add that if such a plea is rejected by the Department, it cannot be raised in the High Court unless specifically pleaded. The above principle of prejudice laid down by the Gujarat High Court in *Gandhidham Spg. & Mfg. Co. Ltd. (Guj)* has been followed by the Bombay High Court in *Saoner Taluka Ginning, Pressing and Dal Mill Prakriya v. R.P.F. Commr.*; *Super Processors v. Union of India*.

23. The Supreme Court also held that if an employer wants relief, necessary

pleadings must be raised before the Department and must be strictly proved as found in paragraph 26 of the same judgment, which is as follows:

26. A different aspect of prejudice was referred to in *Sushma Fabrics (P) Ltd. v. Union of India* by a learned Single Judge of the Bombay High Court. It was stated that in some cases there could be serious prejudice on account of abnormal delay in taking proceedings u/s 14B, either because the records or accounts of the defaulter are lost or on account of the personnel concerned acquainted with the facts of a bygone period no longer being available for unearthing the facts. But such pleas must be raised before the Department and strictly proved. In case such facts are proved it is possible in some cases that there is irretrievable prejudice.

24. The judgment in *Hindustan Time's* case (cited supra) came to be quoted with approval in the subsequent judgment in *M/s. K. Streetlite Electric Corporation Vs. Regional Provident Fund Commissioner, Haryana*, . In paragraph 4, the Supreme Court observed as follows:

4. ...The High Court adverted to the decision of this Court in *Hindustan Times Ltd. v. Union of India* to reach this conclusion. In that case, this Court examined the scheme of the provisions of the Act in relation to delay in passing of the order. It was stated that the mere fact that the proceedings are initiated or demand for damages is made after several years cannot, by itself, be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings u/s 14B would be taken and mere delay in initiating such action cannot amount to prejudice inasmuch as such delay would result in allowing the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest on such amount. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action u/s 14B he has altered his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an irretrievable nature, and such prejudice can also be established by stating reason of non-availability of records of the personnel by which evidence it could be established that there was some basis for delay in making the payments. Therefore, this Court was of the opinion that such delay, by itself, would not result in any prejudice. In the present case, the High Court found that no such prejudice was either pleaded or proved. Hence the first contention stands rejected.

25. At the same time, in the *Streetlite Electric Case* (cited supra), the Supreme Court also interfered with an order passed by the PF Authorities mechanically by levying damages u/s 14B of the Act based upon a Central Government's circular. While setting aside the order passed by the authorities, the Supreme Court did not remit the matter for fresh consideration. On the other hand, on an overall consideration, the Court itself reduced the damages to 25% of the amounts claimed. In paragraph 5, the Supreme Court held as follows:

5. The second contention need not be examined in the view we propose to take in the matter. Even if we hold that the Central Government instructions issued u/s 20 of the Act are not binding on the Respondent, still in assessing the damages it will be necessary for us to take note of the manner in which the amounts of damages have been levied and appropriately consider as to what would be the correct rate of damages to be imposed u/s 14B of the Act. The statement of calculation prepared by the Respondent regarding delay in payments discloses that the Respondent has imposed damages at different rates, for example, for the month of July 1976 the rate of damages is 50% whereas the period of default is over a month, while in case of December 1976 the damages imposed upon the Appellant are at the rate of 20% though the period of delay is over two months, in the case of delay for April 1988 damages imposed are at the rate of 30% though the period of delay is only one month. In certain cases, even for a delay of below 15 days, like October 1977, damages at the rate of 85% have been imposed, while for another period though the delay is for six months 65% damages have been levied. Therefore, it is not possible to discern the rationale adopted by the Respondent in the matter of imposition of penalty. In the circumstances, therefore, it would have been appropriate for us to set aside the order and remit the matter to the Respondent, but we do not think that such an exercise is necessary after such a long period. In this case, the amount due towards provident fund has already been deposited and this Court, by order dated 18-12-1998, granted an interim relief to the extent of 75% of the amount of damages sought to be recovered, while out of the disputed amount of damages (that is, Rs. 88,731.25) 25% had already been directed to be deposited. In that view of the matter, we think, it is appropriate to confine the damages leviable in this case on an overall consideration to the extent of 25% of the total damages imposed.

26. In this context, it is necessary to refer to the second proviso to Section 14B of the PF Act wherein, the Central Board was given power to reduce or waive the damages levied u/s 14B of the PF Act if it is a sick industrial company and in respect of which a scheme for rehabilitation was sanctioned by the BIFR. The parliament did not stop with giving power only to Central PF Board alone in dealing with the question of damages. By the amendment introduced by the Central Act 33/1988 also clothed the power on the EPF Tribunal to entertain appeals against the order levying damages u/s 14B of the Act. The Tribunal was not only given an appellate power but also u/s 7(2), it was also entrusted with the same power which are vested with the officers u/s 7A of the PF Act. Further, u/s 7L(1) of the PF Act, the Tribunal has also been given power either to determine, modify or annul the order appealed against. It can also refer the case back to the authority which passed the order for fresh adjudication.

27. If it is seen in this context, then the argument made by the learned Standing Counsel for the PF Authorities that the Tribunal has no power to modify the order must necessarily fail. Therefore, it must be held that the Tribunal has the power to go into all aspects of an appeal including the power to modify the orders

passed by the authorities in levying damages.

28. The other submission made by the learned Standing Counsel that the Tribunal should not have fixed a flat rate and must have gone by Section 14B read with Para 32A of the Scheme also does not stand to reason. As held by the Supreme Court in *Streetlite Electric* case (cited supra), it cannot make arithmetical formula of levying damages and it should depend upon several factors. In the present case, the Tribunal had kept in mind the parameters of exercising such jurisdiction and had fixed damages for different appeals at different rates ranging from 5% to 15% per annum as can be seen from the tabular column set out above. Therefore, the contentions raised by the learned Counsel for the PF Department must necessarily fail. The impugned orders need not be remanded for fresh disposal. In the *Streetlite Electric* case, the Supreme Court had reduced the damages to 25% of the amounts levied by exercising its own power in the interest of justice.

29. The submission made by the learned Counsels for the employers that the damages cannot be based upon an annual basis but should be adhoc amount also cannot be accepted. If any statutory guidelines is required, a perusal of Para 32A of the PF Scheme will clearly show that the rate of damages are based upon percentage of arrears per annum only. Therefore, the Tribunal is well within its right to indicate the damages on annual basis.

30. It must be noted that the Employers had the benefit of the appellate authority viz., (the Tribunal) exercising his power u/s 7I r/w Section 7L of the PF Act by reducing the damages and quantifying it. The Petitioners did not plead before the PF authorities with any concrete materials for either total waiver or for any reduction.

31. Even the contention raised by Mr. Ravindran of M/s. T.S. Gopalan and Co., learned Counsel for the Petitioner in W.P. No. 16838 of 2010 based upon the Delhi High Court judgment in *Hi-Tech Vocational Training Centre's* case that no damages can be levied if there were no arrears on the date of the deduction cannot be a correct position of law in the light of the judgment of the Supreme Court in *Hindustan Times Limited's* case. The other argument that in some writ petitions that they had filed for a review before the Tribunal to follow its own earlier order to reduce the damages to 5% as was done in another case also cannot stand to reason. The Tribunal has got discretion to award damages in respect of each case and there cannot be any fixed percentage for all such matters. One employer cannot take advantage or seek parity with an order passed in another case by another employer and it had to depend upon facts of each case.

32. Under the circumstances, the following writ petitions will stand dismissed:

W.P. Nos. 17518 to 17521 of 2010, W.P. Nos. 21135 to 21144 of 2010, W.P. Nos. 22081 to 22085 of 2010, W.P. Nos. 22096 to 22101 of 2010, W.P. Nos. 22805 and 22806 of 2010, W.P. Nos. 24877 and 24878 of 2009, W.P. No. 16840 of

2010, W.P. No. 7564 of 2011 and W.P. No. 16838 of 2010

33. With reference to W.P. Nos. 31365 of 2004 and 4616 of 2005 filed by Sree Venkatesa Mills Ltd., the same also must necessarily fail in the light of the above orders. But at the same time, in W.P. No. 21136 of 2010, the Tribunal's order in ATA No. 51(13)/2007 dated 03.09.2009 was dismissed, the mills are entitled to have benefit of the order only in respect of that notification. In other respects, for the other claims, there is no impediment for the PF Department in claiming the amounts passed by the authorities as there was no challenge to the orders for the period not covered by the order passed by the Tribunal. Hence, W.P. No. 31365 of 2004 and W.P. No. 4616 of 2005 will be disposed of with a direction to the PF Department to take note of the fact the amounts were claimed to have been paid already by the mills and hence it should rework their calculation. If any amounts are still due, they are at liberty to claim the same.

34. W.P. Nos. 12155, 15729 of 2010 and W.P. No. 12156 of 2010 are concerned, if any attachment was made for amounts which are disallowed by the Tribunal, then no attachment proceedings can be initiated by the Department. If the Petitioner estate is entitled for refund of the amount consequent upon Tribunal's order being confirmed, then the PF authorities are directed to refund the amount by calculating the excess amount paid by the estate. Hence, W.P. Nos. 12155 and 15729 of 2010 and W.P. No. 12156 of 2010 are disposed of accordingly.

35. W.P. No. 20938 of 2004 is filed by a Trade Union, seeking for a waiver of damages and interest against the PF Department. No orders are produced and if at all, it is the employer who alone can be said to be aggrieved by the levy of interest and damages and the employer has not come before this Court challenging the same. Therefore, the second portion of the prayer made in the writ petition cannot be granted. With reference to the first portion of bringing the property to sale is concerned, it is for the PF and ESI Departments to exercise their power vested on them and it is not for this Court to suggest the method by which property can be sold. In so far as the claim of the workmen are concerned, though they may have a preferential claim over the other claims, but with reference to the first charge over the property and also the primacy given over the said charge is concerned, the subject matter of the said issue is squarely covered by the judgment of the Supreme Court in Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner, Therefore, no contrary directions can be issued in that writ petition. Hence, WP. No. 20938 of 2004 stands dismissed.

36. In view of the above, all the miscellaneous petitions will stand dismissed. However, parties are allowed to bear their own costs in all the writ petitions.