

(2012) 01 MAD CK 0143

In the Madras High Court

Case No : Writ Petition No. 633 2012

The Assistant Provident Fund Commissioner, Employees'
Provident Fund Organization, Bhavishya Nidhi Bhawan Dr.
Balasundaram Road, Coimbatore-641018

APPELLANT

Vs

M/s.Tulya Alloy Castings Ltd., Ganapathy Post,
Coimbatore-641 006 and The Presiding Officer, Employees
Provident Funds Appellate Tribunal, 7th Floor, 60, Skylark
Buildings, Nehru Palace, New Delhi-110019

RESPONDENT

Date of Decision : 11-01-2012

Acts Referred:

Coal Mines Provident Fund and Bonus Schemes Act, 1948 — Section 10F, 14B, 20
Constitution of India, 1950 — Article 226
Provident Funds Act, 1925 — Section 7(2), 7A, 7K(2), 7L, 7L(1)

Citation : (2012) 01 MAD CK 0143

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : K. Ramu, for the Appellant;

Final Decision : Dismissed

Judgement

K. Chandru

1. In these five writ petitions, the petitioner is the Assistant Provident Fund Commissioner, Employees' Provident Fund Organization at

Coimbatore. The challenge in these writ petitions is to the order passed by the Employees Provident Fund Appellate Tribunal in ATA No.

154(13)2011, dated 21.9.2011, ATA No. 475(13)/2010, dated 24.08.2011, ATA No. 305(13)2009, dated 22.09.2011, ATA No.

250(13)2011, dated 21.09.2011 and ATA No. 808(13)2009, dated 21.09.2011 respectively in respect of each of the contesting first

respondent.

2. The Tribunal on entertaining the appeals filed by the contesting first respondent had reduced the damages by holding as follows:

11. The point which remains to be seen is whether the delay in depositing the dues is a chronic and intentional one or not. The document filed show

that the appellant was facing financial problem due to which the contribution could not be made and the appellant was paying the dues till it faced

the financial problem, so the delay in depositing the contribution does not appear to be an intentional one. In the case of M/s. Shanti Garments Vs.

Regional PF Commissioner reported in 2003 1 CLR 228 the Hon"ble High Court of Madras held that, ""where default is found but no apparent

fault the quantum of damage should be compensatory rather than penal in nature."" Since, the default does not appear to be intentional one the

assessment on the higher side does not appear to be proper one.

12. Thus in view of the discussion held above, the order of the EPF Authority cannot be sustained. Hence ordered, the matter is remanded back to

the Authority with direction to assess the liability @ 22% (inclusive of interest). The appellant is also directed to appear before the Authority within

receipt of one month of this order and to cooperate with the inquiry, failing which, the Authority may decide the matter as per law. Copy of order

be sent to the parties. File be consigned to record room.

3. It is the reduction of damages to 22% inclusive of interest, the writ petitions came to be filed. 4. It must be noted that when the petitioner

organization imposed damages, they did not make any discretion and levied damages heavily against the contesting first respondent. Therefore, the

Tribunal was forced to intervene and to reduce the quantum of damages. It must be noted that 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 and Sons, interpreting Section 10-F 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 14-B, 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.

4. 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 14-B 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 14-B 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 14-B, 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 14-B 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 and Sons v. State of Punjab

have held like the Single Judge of the Bombay High Court in K.T. Rolling Mills case¹¹, that if there was undue delay in initiating action u/s 14-B

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 case¹² 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. 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 case¹⁷; 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 14-B, 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.*¹⁷ (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*.

5. 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 14-B, 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.

6. 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 14-B 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 14-B 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.

7. 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 14-B 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.

8. In an earlier batch of writ petitions filed by the petitioner Assistant Provident Fund Commissioner, an objection was raised by the contesting respondents about maintainability of the writ petition at the instance of the organization against the order of the Tribunal. However, this court in W.P.Nos. 17518 to 17521 of 2010, etc batch cases, dated 21.6.2011 in Assistant Provident Fund Commissioner Vs. Employees Provident Fund Appellate Tribunal and others had upheld the right of the EPF Organization to challenge the award in the following lines:

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 Holiday's 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's 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 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.

9. But at the same time, this court held that it is only in rare occasions, the department should become a litigant before this court and they should not fritter away public funds with such unnecessary litigations. The present cases are one such instance. This court in the very same judgment held that the Tribunal has got power to modify the damages in paragraphs 26 to 28, which reads as follows:

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 leaving 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.

10. In view of the above, there is no case made out to entertain the writ petitions. Accordingly, all writ petitions will stand dismissed. No costs.