
(2009) 02 MAD CK 0102

In the Madras High Court

Case No : Writ Appeal No. 228 of 2008 and M.P. No. 1 of 2008

The Regional Provident Fund Commissioner - II Employees' Provident Fund Organisation and The Recovery Officer and Assistant Provident Fund Commissioner Employees' Provident Fund Organisation APPELLANT

Vs

Shirine Velankanni Senior Secondary School RESPONDENT

Date of Decision : 11-02-2009

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 14B, 5, 6, 7A

Citation : (2009) WritLR 326

Hon'ble Judges : Prabha Sridevan, J; K.K. Sasidharan, J

Bench : Division Bench

Advocate : K. Gunasekaran, for the Appellant; No Appearance, for the Respondent

Judgement

K.K. Sasidharan, J.—This writ appeal is directed against the order passed by the learned Single Judge dated 9.2.2007 in W.P. No. 9637 of 2004 whereby the proceedings issued by the first appellant dated 10.4.2002 directing payment of damages u/s 14-B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 was set aside with a direction to refix the amount after granting reduction, but without interest u/s 7-Q of the Act.

Factual Background:

2. The respondent is an educational institution and their institution is covered under the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "E.P.F Act.") The respondent appears to have collected the employees share but failed to pay the contribution to the fund as well as the scheme within the time permitted, which made the first appellant (hereafter referred as "the Authorised Officer") to pass an order u/s 14-B of the E.P.F. Act calling upon the respondent to pay damages as well as to pay

interest on such damages. The said order dated 10.4.2002 was the subject matter of challenge in the writ petition. It was the contention of the respondent before the learned Single Judge that there was no basis for levy of damages to the maximum extent as indicated in the statute and recovery at the appropriate rates as indicated in Para 32 of the Scheme would meet the ends of justice and as such the Authorised Officer was not justified in assessing penal damages at the rate at which it was assessed. The respondent also disputed the levy of interest on the amount assessed u/s 14-B, as according to them the amount referred to u/s 7-Q refers only to the amount payable by way of contribution and does not refer to damages and as such there was no justification in claiming interest on damages. Accordingly they have prayed for quashing the order dated 10.4.2002 as well as the consequential recovery notice dated 9.6.2003.

3. In the counter affidavit filed on behalf of the Authorised Officer it was contended that sufficient opportunity was given to the respondent to represent their case before assessing damages and their plea to exempt them from payment was negated as there was no provision in the E.P.F. Act to reduce/waive the damages assessed. They have also justified the claim for interest, as according to them the damages were also a component of the amount due u/s 7Q of the Act and as such the same also attracts payment of interest.

4. The learned Single Judge considered the payment of damages u/s 14-B as well as the claim of interest u/s 7-Q of E.P.F. Act separately. According to the learned Judge, when a discretion was given to the Authorised Officer to reduce the damages by 50%, it should have considered the case of the employer as per the mandate of the statute. The learned Single Judge was of the considered view that Section 32(b) of the E.P.F. Act permits the Board to reduce or waive the damages u/s 14-B of the Act in relation to an establishment specified in the Second Proviso u/s 14-B and in other cases depending on merits, reduction on damages up to 50% could be allowed. Since the Authorised Officer has not exercised the discretion in the manner expected of them as provided under the Act, the learned Judge set aside the order u/s 14-B and directed the Authorised Officer to grant reduction at 50% and to re-determine the amount of damages and to deduct the same from the amount already deposited and to refund the balance to the employer. The learned Judge also considered the scope and ambit of Section 7-Q of the E.P.F. Act and on a comparison of the provisions determining the contribution as well as payment of damages was of the opinion that the term "amount due" as found in Section 7Q does not cover payment of damages quantified u/s 14-B of the Act. Accordingly the direction to pay interest on the amount of damage quantified u/s 14-B was set aside. Aggrieved by the said order, the writ appeal has been filed.

5. The learned Standing Counsel appearing on behalf of the appellants contended that though the Authorised Officer was empowered to levy damages at 100%, it had levied only at 37% and as such the learned Single Judge was not correct in interfering with the order passed by the Authorised Officer. The learned Counsel

also contended that the wording of Section 7-Q is so wide, but clear that it would include damages also for the purpose of computing the amount in respect of which, interest is chargeable and as such the learned Single Judge was not justified in setting aside the order directing payment of interest u/s 7-Q of the E.P.F. Act.

6. Though notice was served on the respondent and their name was printed in the cause list, there was no appearance on their behalf and as such we have directed the Registry to print the name of the counsel, who appeared before the learned Single Judge in the cause list. Even after printing the name of the respondent as well as their counsel, there was no representation on behalf of the respondent.

7. The Employees' Provident Fund Act was enacted with a laudable object of making suitable provision for the retirement life of the employees. The Act requires compulsory payment of contribution by the employer as well as employee. This social security legislation was amended time and again after taking into account the working and practical difficulties. The provisions regarding recovery of damages for delayed payment was brought on the statute book as per Act 37 of 1953 on account of the absence of penal provisions to ensure timely payment of contribution.

8. The Honourable Supreme Court in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, referred to the reasons which made the parliament to insert Section 14-B on the statute book thus:

10. In its working, the authorities were faced with certain administrative difficulties. An employer could delay payment of Provident Fund dues without any additional financial liability. Parliament, accordingly, inserted Section 14-B for recovery of damages on the amount of arrears. The reason for enacting Section 14-B is that employers may be deterred and thwarted from making defaults in carrying out statutory obligations to make payments to the Provident Fund. The object and purpose of the section is to authorise the Regional Provident Fund Commissioner to impose exemplary or punitive damages and thereby to prevent employers from making defaults. Section 14-B, as originally enacted, provided for imposition of such damages, not exceeding 25% of the amount of arrears. This, however, did not prove to be sufficiently deterrent. The employers were still making defaults in making contributions to the Provident Fund, and in the meanwhile utilising both their own contribution as well as the employees' contribution, in their business. The provision contained in Section 14-B for recovery of damages, therefore, proved to be illusory. Accordingly, by Act 40 of 1973, the words "twenty-five per cent of" were omitted from Section 14-B and the words "not exceeding the amount of arrear" were substituted. The intention is to invest the Regional Provident Fund Commissioner with power to impose such damages that the employer would not find it profitable to make defaults in making payments.

9. The scope of adjudication of penalty proceedings was also indicated in Organo Chemical Industries case cited supra by the Honourable Supreme Court thus:

13. ...The power of the Regional Provident Fund Commissioner to impose damages u/s 14-B is a quasi-judicial function. It must be exercised after notice to the defaulter and after giving him a reasonable opportunity of being heard. The discretion to award damages could be exercised within the limits fixed by the statute. Having regard to the punitive nature of the power exercisable u/s 14-B and the consequences that ensue therefrom, an order u/s 14-B must be a "speaking order" containing the reasons in support of it. The guidelines are provided in the Act and its various provisions, particularly in the word "damages" the liability for which in Section 14-B arises, on the "making of default". While fixing the amount of damages, the Regional Provident Fund Commissioner usually takes into consideration, as he has done here, various factors viz. the number of defaults, the period of delay, the frequency of defaults and the amounts involved. The word "damages" in Section 14B lays down sufficient guidelines for him to levy damages.

10. Even though Section 14-B of the E.P.F. Act permits the authorised officers to levy damages not exceeding the amount of arrears, the respondent was called upon to pay only at the rate of 37% as indicated in Section 32A of the E.P.F. Act. There was no discretion vested in the Authorised Officer to reduce or waive the damage levied u/s 14-B. The Central body is found to be the authority to reduce/waive the penalty. The learned Single Judge directed the appellants to reduce the levy by 50% by invoking the discretionary power conferred upon the Board u/s 32-A of the Act. However the fact remains that the Authorised Officer has no right to reduce or waive the damage levied u/s 14-B and as such we are of the opinion that the learned Single Judge was not justified in reducing the damages by 50%. Therefore the said direction to re-calculate the amount after reducing the penalty by 50% is set aside. However we grant liberty to the respondent to make a request to the Central Board as provided under para 32-B of the Employees' Provident Fund Scheme to reduce the penalty and we hope that in the event of making such application by the respondent, the same would be considered by the Central Board on merits.

11. The next question is regarding payment of interest on the amount of damages as provided u/s 7-Q of the E.P.F. Act. It is found from the impugned order that the Authorised Officer has also levied interest u/s 7-Q of the Act on the amount quantified as damages. The learned Single Judge was of the view that the characteristics of the "amount due" u/s 7-A cannot be equated with the characteristic of the damages recoverable u/s 14-B of the Act and accordingly the direction to levy of interest was set aside.

12. The learned Counsel for the appellants by placing reliance on the judgment of a learned Single Judge of the Karnataka High Court in *Tataguppa Plywood Products (P) Ltd. v. W.P.F.A.T.* 2006 (2) LLN 253 would contend that the expression "amount due" would necessarily include dues determined as damages

u/s 14-B read with para 32-A of the Scheme.

13. Section 7-Q provides that an employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the Scheme "on any amount due" from him under the Act. The question as to whether damage is also a component which would be taken into account for determining the "amount due" under the Act, so as to levy interest u/s 7-Q very much depends on the nature of damages levied. A plain reading of Section 14-B along with other sub-provisions of Section 14 would make the position clear that damage is essentially penal in character. This provision as well as other provisions as contained in Section 14 of the E.P.F. Act compels the employer to make payment on time. Since the levy of damage is essentially penal in character there is no express provision in the Act to levy interest on such damages. The amount due as referred to in Section 7-Q deals only with the amount of contribution as indicated in Section 6 and determined u/s 7-A of the Act.

14. The Honourable Supreme Court in *Organo Chemical Industries* case cited *supra* while considering the scope and ambit of Section 14-B of the Act referred to the concept of damages as found in Section 14-B and observed thus:

21. The traditional view of damages as meaning actual loss does not take into account the social content of a provision like Section 14-B 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 14-B be read out of context. The very object of the legislation would be frustrated if the word "damages" appearing in Section 14-B of the Act was not construed to mean penal damages. The imposition of damages u/s 14-B 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.

22. The expression "damages" occurring in Section 14-B is, in substance, a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty u/s 14-B is not merely "to provide compensation for the employees". We are clearly of the opinion that the imposition of damages u/s 14-B serves both the purposes. It is meant to penalise defaulting employer as also to provide reparation for 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 14-B is related to the word "default". The words used in Section 14-B 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 14-B must mean "failure in performance" or "failure to act". At the same time, the imposition of damages u/s 14-B is to provide reparation for the amount of loss suffered by the employees.

23. The construction that we have placed on the word "damages" appearing in Section 14-B of the Act, is in accord with the intent and purpose of the legislation. It was brought on the statute book by Act 37 of 1953. The objects and reasons so far material, read:

There are also certain administrative difficulties to be set right. There is no provision for inspection of exempted factories nor is there any provision for the recovery of dues from such factories. An employer ... can delay payment of Provident Fund dues without any additional financial liability. No punishment has been laid down for contravention of some of the provisions of the Act.

The object and purpose of the section is to authorise the Regional Provident Fund Commissioner to impose exemplary or punitive damages and thereby prevent employers from making defaults. The provision for imposition of damages at twenty-five per cent of the amount of arrear, however, did not prove to be effective. Accordingly, by Act 40 of 1973, the words "not exceeding the amount of arrear" were substituted, for the words "twenty-five per cent". The necessity for making this change is brought out in the objects and reasons, a material portion of which reads:

Statement of Objects and Reasons (Act 40 of 1973)

The working of the Employees' Provident Fund and Family Pension Fund Act, 1952 and the Employees' Provident Fund Scheme has revealed that the present provisions of the Act and the Scheme are not effective in preventing defaults in payment of contributions to the Employees' Provident Fund or in recovery of the dues on that account. The result is that the amount of Provident Fund arrears recoverable from the employers has been steadily increasing. In 1959-60, the arrears which amounted to Rs 3.65 crores, rose to Rs 5.96 crores as on March 31, 1967. The arrears stood at Rs 14.6 crores on March 31, 1970 and they have risen to Rs 20.65 crores as on March 31, 1972.

2. The National Commission on Labour has recommended that in order to check the growth of arrears, penalties for defaults in payment of Provident Fund dues should be made more stringent and that the default should be made cognisable. In its 116th Report presented to Parliament in April 1970, the Estimates Committee has endorsed the recommendations made by the National Commission on Labour and has further suggested that Government should consider the feasibility of providing compulsory imprisonment for certain offences under the Act. Accordingly, it is proposed to amend the Act so as to render the penal provisions more stringent and to make defaults cognisable offences. Provision is also being made for compulsory imprisonment in cases of non-

payment of contributions and administration or inspection charges. As recommended by the Estimates Committee, a further provision is being made to enable levy of damages equal to the amount of arrears from a defaulting employer.

Each word, phrase or sentence is to be considered in the light of general purpose of the Act itself. A bare mechanical interpretation of the words "devoid of-concept or purpose" will reduce must of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole.

15. The contention of the appellants that damages also carry interest u/s 7Q of the E.P.F. Act is devoid of merits. Mr. Justice V.R. Krishna Iyer in His Lordship's inimitable style indicated the legal position with regard to the penal nature of levy of damages, in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, thus:

40. The measure was enacted for the support of a weaker sector viz. the working class during the superannuated winter of their life. The financial reservoir for the distribution of benefits is filled by the employer collecting, by deducting from the workers' wages, completing it with his own equal share and duly making over the gross sums to the Fund. If the employer neglects to remit or diverts the moneys for alien purposes the Fund gets dry and the retirees are denied the meagre support when they most need it. This prospect of destitution demoralises the working class and frustrates the hopes of the community itself. The whole project gets stultified if employers thwart contributory responsibility and this wider fall-out must colour, the concept of "damages" when the court seeks to define its content in the special setting of the Act.

43. I am clearly of the view that "damages", as imposed by Section 14-B, includes a punitive sum quantified according to the circumstances of the case. In "exemplary damages" this aggravating element is prominent. Constitutionally speaking, such a penal levy included in damages is perfectly within the area of implied powers and the legislature may, while enforcing collections, legitimately and reasonably provide for recovery of additional sums in the shape of penalty so as to see that avoidance is obviated. Such a penal levy can take the form of damages because the reparation for the injury suffered by the default is more than the narrow computation of interest on the contribution.

48. ...The employees would, of course, get damages commensurate with their loss, that is, the amount of interest on delayed payment but the remaining amount should go to augment the Fund constituted u/s 5 for implementing the schemes under the Act.

16. The Honourable Supreme Court in *VST Industries Ltd. Vs. Collector of Central Excise, Hyderabad*, while considering the principles governing payment of damages u/s 14-B clearly indicated that there is no provision in the E.P.F. Act for charging interest thus:

29. The authority u/s 14-B has to apply his mind to the facts of the case and the reply to the show-cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages u/s 14-B. The fact that 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; mere delay in initiating action u/s 14-B cannot amount to prejudice inasmuch as the delay on the part of the Department, would have only allowed the employer to use the monies for his own purposes or for his business especially when there is no additional provision for charging interest.

17. The judgment in Hindustan Times Ltd. case cited supra was followed in M/s. K. Streetlite Electric Corporation Vs. Regional Provident Fund Commissioner, Haryana, and in the said decision the Supreme Court confirmed the legal position that there is no provision to levy interest on damages.

18. The proceedings contemplated by Section 7A is the primary proceedings and this is for determining the contribution from the employer. The authorities competent to determine the dues are also specified in the said provision. The contribution so determined by the statutory authorities are termed as the amount due from the employer. On the other hand, proceedings u/s 14-B is entirely different. It is only when the employer makes default in the payment of contribution that the Act gives liberty to the authorities mentioned in Section 14-B, to initiate proceedings for recovery of damages. The damages cannot be termed to be the amount due. In fact the damages are in the nature of penalty. This provision in addition to the other penal provisions as contained in Section 14 of the E.P.F Act, is to compel the employer to pay the dues determined by the statutory authorities. Therefore under the threat of imposing damages, the authorities would be in a position to realise the dues from the employer.

19. The authorities empowered to take action to recover damages u/s 14-B are different from the authorities constituted for the purpose of determining the dues u/s 7A of the Act. It is only when the employer fails to pay the amount determined by the authorities, the statutory authorities empowered u/s 14-B takes re-course to the penalty proceedings. The levy of damage serves as a deterrent. As observed by Mr. Justice V.R. Krishna Iyer in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, , E.P.F. Act is a special statute creating a special fund, empowers special officers to recover specially designated contributions and special damages for default.

20. The observation of the Supreme Court in Organo Chemical Industries case that the employees would get damages commensurate with their loss (i.e.) the amount of interest on delayed payment, also throws light on the issue that what was sought to be recovered u/s 14-B was not the amount due within the meaning of Section 7Q of the Act. When the employees are compensated by the award of damages commensurate with their loss, being the amount of interest on such delayed payment, there is no question of payment of interest on interest. In fact, there is no express provision in the E.P.F. Act to charge interest on such damages. Since the recovery of damages is essentially penal in nature, there is no question of levying such interest on assumption.

21. Since the payment of damages u/s 14-B has nothing to do with the contribution due from the employer so to make them liable to pay interest u/s 7-Q of the E.P.F. Act, we are of the considered opinion that the appellants were not justified in charging interest on the amount quantified as damages and as such the order of the learned Single Judge in respect of levy of interest does not call for interference.

22. In the result, the direction of the learned Single Judge for re-computation of the amount after giving 50% reduction is set aside and the finding with regard to payment of interest u/s 7Q is confirmed. Since the respondent has already deposited a sum of Rs. 2,25,000/- out of the total damages quantified at Rs. 2,65,913/-, we direct the respondent to pay the balance amount within a period of twelve weeks from the date of receipt of a copy of this order and on such payment, the respondent is given liberty to approach the Board under Para 32-B of the Employees' Provident Fund Scheme as indicated above.

23. The writ appeal is allowed in part subject to the above observation. Consequently, the connected MP is closed. No costs.