
(2007) 09 DEL CK 0052

In the Delhi High Court

Case No : Writ Petition (C) No. 21610 of 2005

Vichitra Construction Pvt. Ltd.

APPELLANT

Vs

Employees Provident Fund Appellate Tribunal and Another

RESPONDENT

Date of Decision : 07-09-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 226

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

Citation : (2007) 09 DEL CK 0052

Hon'ble Judges : Hima Kohli, J

Bench : Single Bench

Advocate : S.K. Gupta, for the Appellant; R.C. Chawla, for the Respondent

Final Decision : Dismissed

Judgement

Hima Kohli, J.—In the present writ petition, the petitioner has assailed the impugned order dated 19th September, 2005 passed by the Regional Provident Fund Commissioner (RPFC), New Delhi levying a penalty of Rs. 2,18,636/- on the petitioner on account of failure to remit the EPF contributions payable for the period from 12/1995 to 4/2004 in time, as also the order dated 24th October, 2005 passed by the Employees Provident Fund Appellate Tribunal (hereinafter referred to as 'the Appellate Tribunal') upholding the order dated 19th September, 2005 passed by the RPFC.

2. In a nutshell, facts of the case are that proceedings were initiated by the RPFC against the petitioner u/s 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short 'the Act') on the grounds of failure on the part of the petitioner to remit the EPF contributions in time. These proceedings were initiated to determine the dues payable by the petitioner vide summons dated 8th April, 2005, for the period from 12/1995 to 4/2004. The petitioner was called upon to represent itself. After taking six dates, on 29th July, 2005, submission was made on behalf of the petitioner that some photocopies of

the bank challans had been obtained, however, further time was sought to consolidate them before making submissions. Subsequently, none appeared on three dates before the RPFC and when the petitioner appeared thereafter, a submission was made that it had not been able to trace out the records for the last 10 years. It was stated on behalf of the petitioner that a show cause notice was not issued to it within three years of default, nor was any warning issued. Therefore, after such a prolonged period of delay, the notice for determining the dues for a period of 10 long years was not permissible in law. After hearing the petitioner, the RPFC passed the impugned order dated 19th September, 2005 observing therein that the petitioner had not categorically pointed out the exact period for which the record was unavailable and could not be granted a blanket relief for the entire period of 10 years. While holding that the petitioner was a habitual a defaulter, the RPFC observed that it did not deserve any leniency and was liable to receive maximum penalty. Thus interest u/s 7Q as well as damages u/s 14B of the Act were imposed upon the petitioner in respect of five accounts amounting to a total of Rs.2,18,636/- for the period from 12/1995 to 4/2004.

3. Aggrieved by the aforementioned impugned order dated 19th September, 2005, the petitioner filed an appeal before the Appellate Tribunal stating inter alias that the petitioner was not given reasonable and sufficient time to represent its case before the RPFC and that imposing damages for a period of 10 years on the basis of non-availability of records was unjustified and a presumption of waiver ought to have been drawn against the RPFC. It was also submitted that despite repeated requests, the petitioner was not provided with copies of challan forms for the alleged period nor were any records shown to the petitioner and as the concerned person looking after the records had left the services of the petitioner, it could not verify/check the allegation of default of belated PF dues for the period in question. It was also argued that interest under the provision of Section 7Q is included in damages chargeable u/s 14B of the Act and Therefore once damages are imposed u/s 14B of the Act, interest cannot be additionally imposed u/s 7Q of the Act as it would amount to double jeopardy. It was also urged that by levying maximum rate of damages upon the petitioner, the RPFC had failed to exercise the discretion vested in him u/s 14B of the Act and paragraph 32A of the Employees' Provident Funds Scheme, 1952 (hereinafter referred to as 'the Scheme') that relates to recovery of damages for default in payment of any contribution.

4. The Appellate Tribunal recorded that the only point taken by the petitioner/appellant was with regard to the delay in initiating proceedings u/s 14B of the Act and that no other argument was advanced nor any other point pressed before it. On the issue of delay, the Appellate Tribunal referred to a judgment of the Supreme Court in the case of Hindustan Times Ltd. v. UOI and Ors. AIR 1998 SC 688 to hold that delay in initiating proceedings u/s 14B of the Act would not be fatal by itself as no period of limitation has been prescribed under the Act for initiating such proceedings. It was further observed that payments were admittedly made by the petitioner through cheques and the same could have

been verified from its bank accounts and as the default committed was for a period from 1995 till 2004, it was hard to believe that the petitioner would not have preserved the records for seven or eight years. Holding so, the Appellate Tribunal passed the impugned order dated 24th October, 2005 rejecting the appeal of the petitioner/appellant. Aggrieved by the aforesaid orders, the petitioner has preferred the present writ petition.

5. Counsel for the petitioner urged that by initiating proceedings u/s 14B of the Act, the RPFC did not exercise the powers vested in him within a reasonable time and having failed to do so, the RPFC could not be permitted to call upon the petitioner to produce the records for a period of 10 long years. The other pleas raised by the petitioner were same as those raised before the RPFC as also before the Appellate Tribunal. That apart, counsel for the petitioner referred to a Circular dated 28th November, 1990 issued by the RPFC referring to the minutes of the meeting held by the Central Board of Trustees, EPF on 20th August, 1990 wherein it was recorded that the Central Board of Trustees had decided that all cases u/s 14B were to be finalized within a period of three years and in case damages were yet to be levied as on 30th June, 1990, the RPFCs should ensure that all such cases are disposed of within three years and in case of fresh defaulters, damages shall be levied within the close of the subsequent three financial years. Reference was also made to another Circular dated 29th May, 1990 issued by the Central Provident Fund Commissioner (CPFC) specifying the rates of damages u/s 14B of the Act to state that the RPFC had levied exorbitant rate of interest on the petitioner. Lastly, it was argued that Section 7Q was inserted after an amendment to the Act, with effect from 1st July, 1997 and the same could not be invoked in respect of dues relating to the period prior thereto, as done in the present case. In support of his arguments, counsel for the petitioner placed reliance on the following judgments:

- (i) Presidency Kid Leathers (P) Ltd. Vs. Regional Provident Fund Commissioner, .
- (ii) M/s Hindustan Times Ltd. v. Union of India and Ors. AIR 1998 SC 688.
- (iii) M/s K. Streetlight Electric Corporation v. Regional Provident Fund Commissioner, Haryana JT 2001 (4) SC 572.

6. On the other hand, counsel for the RPFC submitted that despite repeated adjournments sought for and granted to the petitioner, it intentionally failed to produce the records. The attention of this Court was drawn to the order dated 19th September, 2005 wherein the RPFC noted that in the proceedings held on 29th July, 2005, the petitioner had admitted procurement of photocopies of the bank challans but failed to file the same subsequently, without assigning any reason. It was Therefore contended that the RPFC had no option but to conclude that the aforesaid act on the part of the petitioner was deliberate, more so when all payments stated to be made by the petitioner ought to have been made by mode of cheque. It was further stated that unless the petitioner could prove the fact that the relevant records could not be procured by it or were beyond its

powers, it cannot claim to fall under the exception as carved out by the Supreme Court in the case of Hindustan Times Ltd. (supra).

7. With respect to the Circular dated 29th May, 1990, it was stated by the counsel for the RPFC that the same was issued for the guidance of the officers of the RPFC and such a circular does not overrule the Act and the provisions of law. In this regard, reliance was placed on a judgment of this Court in the case of The Benares State Bank Ltd. v. Union of India and Ors. 2004 (4) SLR 316.

8. In answer to the argument raised on behalf of the petitioner that the provision of Section 7Q was inserted after the amendment in the Act with effect from 1st July, 1997 and thus the same could not be invoked in respect of dues relating to the period prior thereto, it was submitted that Section 7Q was meant to levy interest on any amount due from an employer under the Act, from the date when the said amount became so due until the date of its actual payment and that as the amount was quantified in the order dated 19th September, 2005, the provisions of Section 7Q were attracted in the case. It was further submitted that the said provision could not be made redundant merely by referring to para 32A of the Scheme, which was inserted on 1st September, 1991 for recovery of damages for default in payment of any contribution. It was also submitted that the provision of Section 7Q is not in the alternative to paragraphs 32A and 32B of the Scheme and cannot be read in such a manner.

9. Counsel for the RPFC also relied on a judgment of the Supreme Court in the case of Organo Chemical Industries and Anr. v. Union of India and Ors. AIR 1979 SC 1803 wherein the Supreme Court discussed the powers of the Provident Fund Commissioner to impose damages on an employer defaulting in payment of contributions to the provident fund u/s 14B of the Act and held that the same is not violative of Article 14 of the Constitution of India. The attention of this Court was also drawn to a judgment of the Division Bench of this Court in the case of Birla Cotton Spinning and Weaving Mills Ltd. Vs. Union of India and Others, wherein relying on the judgment of the Supreme Court in Organo Chemical Industries (supra), the Division Bench held that limitation cannot be read where it is not so provided.

10. I have heard the rival contentions of the respective counsels of the parties and have also carefully perused the relevant records and the judgments cited by both sides.

11. The plea of the counsel for the petitioner that inordinate and inexplicable delay in initiating the proceedings u/s 14B of the Act against the petitioner, was sufficient in itself to quash the show cause notice dated 8th April, 2005 for the period from 12/1995 to 4/2004, is no longer rest integra as the Supreme Court in the case of Hindustan Times Ltd. (supra), on which the counsel for the petitioner also placed reliance, has clearly stated that no period of limitation has been prescribed by the legislature for initiating action for recovery of damages u/s 14B of the Act. Reference was made by the counsel for the petitioner to para

25 of the said judgment in which the Supreme Court referred to a judgment rendered by a learned single Judge of the Bombay High Court in the case of *Sushma Fabrics Pvt. Ltd. v. Union of India* 1991 Lab IC 1946 where it was observed that in some cases there could be serious prejudice on account of abnormal delay in taking different proceedings u/s 14B either because the records or most of the accounts of the defaulters were lost or on account of the concerned personnel acquainted with the facts of a by-gone period no longer being available. The Supreme Court observed that such pleas ought to be raised before the department and strictly proved and in case such facts are proved, it is possible in some cases that there is irretrievable prejudice. However, while advertent to the previous judgments rendered on the issue, including the judgment in the case of *Organo Chemical Industries (supra)*, the Supreme Court held as below:

Para 28: From the aforesaid decisions, the following principles can be summarised: The authority u/s 14B 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 realisations 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 14B. 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 14B would be taken; mere delay in initiating action u/s 14B 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. 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 changed 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; he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to "irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defense in the reply to the show cause notice and must satisfy the concerned authority with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect.

12. In the present case, the petitioner had, on its own admission, deposited the amounts by way of bank challans. It had also admitted before the RPFC in the proceedings held on 29th July, 2005, that it had procured the photocopies of the bank challans and needed some time to consolidate the same before submission. Thereafter, the dead silence on the part of the petitioner and failure on its part to produce the photocopies of the bank challans after seeking number of adjournments is not only inexplicable but also a pointer to its admission of default as even if it is assumed that its employee concerned who was dealing with the affairs relating to provident fund had left the services of the petitioner, at least bank accounts could have been reconstructed and/or procured by the petitioner. The RPFC rightly observed that the petitioner failed to file even a simple document in the form of a plain bank statement for the relevant period to establish the date of debits into its account and thus adverse inference was rightly drawn against the petitioner to the effect that it was deliberately not producing the details of its bank statements. Therefore, reliance placed by the counsel for the petitioner on the Division Bench judgment of the Madras High Court in the case of Presidency Kid Leathers (P) Ltd. (supra) is of no use as even in the said case, the Court held that the initiation of proceedings against the employer and levy of damages even after a lapse of 4 1/2 to 8 years was not non-est. Nor can the judgment of the Supreme Court in the case of K.Streetlight Electric Corporation (supra) be of any assistance to the petitioner as it was passed in the peculiar facts of the said case.

13. The contention of the counsel for the RPFC that the petitioner cannot be permitted to enlarge the grounds for assailing the impugned order dated 24th October, 2005 passed by the Appellate Tribunal before this Court as it had chosen to confine itself only to the issue with regard to delay on the part of the RPFC in initiation of proceedings u/s 14B of the Act before the Appellate Tribunal, is not without merit since it is also borne out from the observation made by the Appellate Tribunal in the impugned order to the effect that no other arguments were advanced nor any other point pressed by the petitioner, except the one with regard to delay in initiating proceedings u/s 14B of the Act.

14. However, this Court proposes to deal with the other ground taken by the counsel for the petitioner that as interest was already included in the damages livable u/s 14B, interest u/s 7Q as also damages u/s 14B cannot be levied on the petitioner simultaneously which according to it amounts to imposing a double jeopardy on the petitioner, is also devoid of merits. Merely because Section 14B empowers the RPFC to recover damages where an employer defaults in payment of any contribution to the fund, does not mean that the provisions of Section 7Q become redundant. Section 7Q was inserted by the legislature with effect from 1st July, 1997, by way of an amendment. The said provision empowers the RPFC to levy interest on an employer for any amount due from him under the Act, from the date on which the amount became due till the date of its actual payment. To say that the damages to be levied u/s 14B includes the interest component is Therefore misconceived as two different heads have been carved

out by the legislature to penalise the defaulting employer. As observed by the Supreme Court in the case of *Organo Chemical Industries (supra)*, imposition of damages u/s 14B of the Act serves both purposes, i.e., it is meant to penalise a defaulting employer as also to provide reparation for the amount of loss suffered by the employee. Thus 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 for the loss sustained by them. While Section 14B comes into play by imposition of damages for "default in payment of contribution", Section 7Q comes into play when an employer does not deposit any amount due from him under the Act from the date when the said amount became due and payable till the date of its actual payment. Thus both the Sections operate in different fields and the areas of their operation do not overlap. Hence, the petitioner cannot be heard to state that the provisions of Section 7Q of the Act are rendered redundant merely in view of the provisions of Section 14B or for that matter, provisions contained in paragraphs 32A & 32B of the Scheme.

15. The other plea raised on behalf of the petitioner that since provisions of Section 7Q were inserted in the Statute only with effect from 1st July, 1997, the RPFC was not empowered to impose any interest on the petitioner prior to the year 1995, is also unacceptable for the reason that the relevant date for the consideration of imposition of interest u/s 7Q is not the date when the amount was due and payable but the date on which the amount was assessed as livable on an employer. In the present case, the amount was assessed on 19th September, 2005 and thus the RPFC was well empowered to impose interest on the petitioner u/s 7Q with effect from the actual date from which the amount was due. The last contention raised on behalf of the petitioner that till an assessment takes place, interest cannot be charged and only after the time granted to the petitioner is over, can interest be charged, is also devoid of merits as interest under the provisions of Section 7Q of the Act is livable on an amount due and relates back from the date when it became so due and payable.

16. The contention of the counsel for the petitioner that the Circular dated 28th November, 1990 was issued for the guidance of the officers of the RPFC and on account of the same the RPFC cannot open the cases more than three financial years old, can also be of no avail for the said reason that the said circular is only a guideline given to the officers of the RPFC and the cannot override the mandate of the statute. Reliance has rightly been placed by the counsel for the RPFC in the case of *The Benares State Bank (supra)* wherein the court held that letters issued by the Government of India and the Central Provident Fund Commissioner do not have statutory or legal basis and are merely administrative decisions and if they run contrary to the statutory intendment of the Act, reliance on such communications cannot be permitted. In so far as the rate of interest levied by the RPFC on the petitioner is concerned, the same is a matter of discretion vested in the RPFC. The said discretion cannot be stated to have been exercised arbitrarily or de hors the merits of the case.

17. For all the aforesaid reasons, this Court does not find any illegality, infirmity or perversity in the impugned order dated 19th September, 2005 passed by the RPFC as also the impugned order dated 24th October, 2005 passed by the Appellate Tribunal which warrants interference under Article 226 of the Constitution of India. The writ petition Therefore fails and is dismissed. No orders as to costs.