

(1994) 09 MAD CK 0072

In the Madras High Court

Case No : Writ Petition No. 4358 of 1985

Vinson Engineering Company

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 02-09-1994

Acts Referred:

Constitution of India, 1950 — Article 226

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

Citation : (1995) 2 LLJ 1224 : (1995) WritLR 63

Hon'ble Judges : Mishra, J

Bench : Single Bench

Advocate : Meenakshi Sundaram, for the Appellant; P. Narasimha, S.C.G.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Mishra, J.—The petitioner herein is an establishment which is subjected to the Employees' Provident Funds and Miscellaneous Provisions Act 1952 (hereinafter referred to as "the Act"). The establishment, it is said, was originally known as M/s. N. Balasubramaniam, which was allegedly closed on January 4, 1981 and restarted on April 13, 1981, under anew management According to the petitioner at the alleged closure, M/s. N. Balasubramaniam paid off and settled all their employees and some of the employees who sought settlement of their provident fund accounts with the respondent. Ex. employees of M/s. N. Balasubramaniam, however, were appointed by the petitioner from April 13, 1981 under new account numbers for the provident fund contributions. The respondent, however, maintained that the transfer of the establishment to the petitioner did not make it a new establishment altogether for the purposes of recovery; of the contributions as per law and the petitioner, in view of the same, made remittances for the period April, 1981 to September, 1981 in November 1981 and February, 1982 to the old account number of the previous owners M/s. N. Balasubramaniam, By a communication, however, dated September 20, 1984, the respondent intimated the petitioner that it had delayed the payment of

contributions and other dues for the periods mentioned therein and called upon the petitioner to show cause why damage should not be levied u/s 14(B) of the Act. The petitioner, by letter dated October 15, 1984, replied

(1) On account of frequent labour unrest the unit situate then at K.R.S. I. Estate, Thiruvottur till September, 1970 was shifted to Thiruvannamiyur in 1971;

(2) There were huge arrears of outstanding from customers like Enfields India Ltd.;

(3) The unit under the old management was closed on January 4, 1981 and the claims of the workmen were settled.

(4) the Unit was restarted only on April 13, 1981;

(5) the petitioner regarded the re-start of the unit under its management only as a fresh start of the contributions and remittances, hence, accordingly, the new accounts.

When however, the petitioner was informed that remittances were required to be made in continuity of the previous contributions and the shifting of the undertaking was not a ground for any new account for remittances, it made contributions as above.

The petitioner, however, contended that it was not possible to trace out the old records from April 1969 onwards to prove all its contentions and sought for time to trace out the records. When, however, the petitioner was called on November 15, 1984 to represent its case with documentary evidence, it replied on the said date that it was unable to trace the records and files from the year 1969 to 1975 and prayed for further time. Further time was allowed to the petitioner.

The petitioner, however, failed to trace the old records, and at the hearing on December 21, 1984, the Manager of the petitioner appeared and submitted that the notice for damages was issued in October, 1984 in respect of a period fifteen years ago and the petitioner, in view of the lapse of time, could neither confirm nor deny the allegations and that in any event the petitioner establishment was closed down from December, 1983. The respondent, however, under the impugned order dated February 20, 1985, has held that the financial difficulties cannot be accepted as a valid excuse sufficient to condone the delay in making contributions and in view of the fact that the unit was closed permanently and taking a lenient view, levied damages as per the statement enclosed with the order.

2. There has been, according to the petitioner itself, delay in the remittances of the provident fund contributions caused for the reasons stated by it. Learned counsel for the petitioner has contended:

(1) that the respondent has not applied its mind is disclosed by the fact that the notice proposed imposition of damages for several periods of delay in making remittances of the contributions by the petitioner, but did not include the period

March, 1973 to February 1974, yet the respondent has imposed the penalty of damages for the said period and has noted only the ground of non-availability of the invoice for the delay in making the contributions, but not other causes;

(2) that the respondent has committed error of law in not taking into account as mitigating circumstances the causes for the delay in the remittances.

3. Learned counsel for the respondent however, has relied on the express language of Section 14(B) of the Act and contended that the competent authority, as authorised by the appropriate Government, has committed no error of jurisdiction or law in proceeding against the petitioner to recover damages, which affected not only the contributions as such, but the claims of the provident fund by the employees.

4. Section 14(B) of the Act reads as follows :-

"Power to recover damages :- Where an employer makes default in the payment of any contribution to the Fund, the Family Pension Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under Sub-section (2) of Section 15 or Sub-section (5) of Section 17 or in the payment of any charges payable under any other provision of this Act or of any scheme or insurance scheme or under any of the conditions specified u/s 17, the Central Provident Fund Commissioner or such other officers as may be authorised by the Central Government, by notification in the official Gazette, in this behalf may recover from the employer such damages, not exceeding the amount of arrears, as it may think fit to impose.

Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard."

The Supreme Court has in *Organic Chemical Industries and Anr. v. Union of India* 55 FJR 283 held that "damages" as imposed by Section 14(B) includes a punitive sum quantified according to the circumstances of the case. There is no prescription fixing any time limit for the recovery of damages. In the absence of any bar of limitation, there is no principle of law which debars the authority from exercising the statutory powers. The question whether damages should be claimed at all and, if so what should be the quantum of damages is one which can be decided only after notice to the employer and after taking into consideration what should be granted to the employees to compensate them for the loss that they sustained on account of the delayed payment and the aggravating elements showing callous disregard to the requirement of the law by the employer for further amount of damages. The Supreme Court has in the above case pointed out that the competent authority, who is charged with administering the Act, is bound to take into account the loss to the beneficiaries as well as the default committed by the employer in making the contributions in such a way that the employees would get damages commensurate with their loss, that is the amount of interest on the delayed payments and if there are aggravating elements, after compensating the loss of the employees such

amount to augment the fund constituted u/s 5 of the Act.

5. Speaking on the question of limitation and delay for action u/s 14(B) of the Act, a Division Bench of the Allahabad High Court in the case of the Regional Provident Fund Commissioner, UP v. Allahabad Canning Co. 1978 Lab I.C.998 has said that, In the absence of any bar of limitation, in our opinion, there is no principle of law which debarred the Provident Fund Commissioner from exercising the statutory powers available to him u/s 14(B) of the Act" and expressed disagreement, with the contrary view expressed by the Punjab High Court in the case of Amin Chand and Sons v. State of Punjab AIR 1965 P.&H 441.

6. In Shyam Glass Works Vs. State of U.P. and Others, another Bench of Allahabad High Court has reiterated the said view and said as follows:

"Section 14(B) of the Act confers power on the, appropriate Government to levy and recover damages for committing default in making the deposit of Provident Fund dues. The Act has not prescribed any period of limitation for the levy or recovery of damages from the defaulter. The petitioner placed reliance on Amin Chand & Sons v. State of Punjab (supra) where a learned single Judge of the Punjab High Court held that the damages should be levied immediately after the default and if the levy is delayed the employer may legitimately come to the conclusion that the Government had decided not to exercise its discretion to levy damages. To choose a date for levy of damages was held arbitrary. This view was however not accepted by our court in the Regional Provident Fund Commr, v. Allahabad Canning Co. (supra). A Division Bench of this court disapproved the view of the Punjab High Court as taken in Amin Chand & Sons case. The Division Bench held that Section 14(B) of the Act does not provide any limitation for taking action against the erring employers for not depositing the provident fund dues. In the absence of bar of limitation there was no principle of law which debarred the Provident Fund Commissioner or the State Government from exercising their statutory powers u/s 14(B) of the Act. We find no reason to take a different view."

7. In Karnataka Agro Industries Corporation Ltd. v. The Regional Provident Fund Commissioner, Karnataka 1979 Lab I.C.72, however, a learned single judge of the Karnataka High Court has pointed out that Section 14(B) does not compel recovery of damages in each case in which there is a default nor does it specify the amount of damages which should be recovered; it confers on the appropriate Government the power not only to decide whether in the circumstances of the case any damages should be recovered from the employer and to further decide if it comes to the conclusion that such recovery should be made, how much should be recovered from him. And when it reaches the conclusion that the case is one in which damages should be recovered, the quantification of the damages should be made on the materials before it and having regard to all relevant circumstances and facts of that case.

8. In S.H. Salve Kadam and Co. v. The Regional Provident Fund Commissioner,

Bangalore, and Anr. 1981 Lab I.C. 568 a learned single judge of the Karnataka High Court has reiterated that Section 14(B) of the Act prescribes no period of limitation for the authority to initiate action for damages against erring employers and pointed out that delay in issuing notice for levying damages, would not confer any right on the defaulting employer to claim that it should not be proceeded against for recovery of damages u/s 14(B) of the Act. It is pointed out in this Judgment, however, that delay could be a mitigating factor in the recovery and assessment of damages and not to claim immunity from action for damages on the ground of waiver or acquiescence which may be relevant for a cause of action founded on tort or contract.

9. A learned single Judge of the Bombay: High Court in the case of K.T.Rolling Mills Ltd. v. R.M. Gandhi 1993 Lab. I.C. 1466 has, however, stated that nothing more is needed than looking at the records and verifying payments and delays of payments for initiation of a proceeding u/s 14(B) of the Act, but observed, the fact that the legislation in question is a social welfare legislation cannot be stretched too far to give a licence to the authorities thereunder to sit over matters for years and years and to spring in action and initiate proceedings as and when they like."

"Where no period of limitation is prescribed by the law for the exercise of any power, it must be exercised within a reasonable time. Any unreasonable delay in exercise of the power may affect its validity. What is reasonable time, however, will depend upon the facts of each case."

10. The authorities aforementioned and the language employed in Section 14(B) of the Act by the Legislature leave no manner of doubt that action is taken u/s 14(B) of the Act on the one hand to impose a penalty upon the erring employer and on the other hand, to compensate the employees who, for the reasons of the delay in making the contributions by the employers have suffered loss. There is no period of limitation prescribed for initiating action as above. Delay may be however, taken as a mitigating factor in determining whether any penalty/damages be imposed upon the erring employer or not and if any penalty/damages is imposed, what should be the quantum of the imposition. Where delay in initiating proceeding u/s 14(B) of the Act has caused any undue harassment to the employer (sic) will mitigate the quantum of damages than ignoring altogether the imposition because the damages u/s 14(B) of the Act are realized for the twin purposes of compensating the employees who have suffered loss on account of delay in the remittances of the contributions of the provident fund as well as to impose a penalty upon the erring employers. The above, however, cannot give (sic) to the competent authority to forget its duty altogether for many years and not act immediately when the delay is detected. Lapse of a long period of time from the delayed remittance would give to the employer opportunity to raise excuses that it would have immediately compensated the loss of the employees had it been called upon to show cause for the delay in remittances within a required time.

11. Opportunity to show cause and of being heard is inherent in the scheme of the law for the imposition of damages u/s 14(B) of the Act. That delay was caused for the reasons beyond the control of the employer, that loss to the employees is minimal, that delay was unintentional, that employer has not neglected his duty to make the contributions are some such pleas that may mitigate against the imposition of damages and in course of the hearing, the Competent Authority before imposing the damages will be required to give a careful consideration to all these aspects. In such considerations, the Competent Authority shall also take the delay at his end as a ground mitigating against the damages. In no case, however, the interest of the employees can be ignored and that would be for the obvious reason that for any recalcitrance of the Competent Authority and/or the employers the employees should not be made to suffer. When, however, we apply the above test to the facts of the instant, case, it is obvious that the petitioner had made certain pleas that it was not liable to continue the contribution dues of the previous employer and that liability would arise from the day it took over the management and it was only after the said issue was resolved that the petitioner made the contributions. It took some time in coming to know that by the delay aforementioned employees suffered loss and on detection of such delay, the competent authority could not ignore the fact that the employer was duty bound to compensate the employees. There is undoubtedly delay in the remittances of the Provident Fund Contributions. But it has not mitigated so much against the imposition of the damages that an erring employer like the petitioner which pretended that it had no responsibility to continue the contributions should have been allowed to go with the advantage. There is some clerical error in the demand notice in the sense that for certain period default is not mentioned in the notice. It is, however, undisputed that in course of the hearing the petitioner was made aware of the delayed payment over the entire period and asked to produce relevant documents/records. Petitioner, however, failed to produce any document, but only harped upon the plea that by lapse of time records were lost, I have perused the impugned order. It does not contain as many details as it should have been to answer all the contentions which the petitioner raised before the competent authority. But it cannot be said to be a non-speaking order. The employer could plead why it was prevented from remitting the contributions within the statutory limitation of time and not that it had its doubts about the remittances and/or that its records were not available, etc. The only plea of substance before the Competent Authority on behalf of the petitioner was that it had suffered financial difficulties. The Competent Authority has not erred in saying that financial difficulty is not a ground to escape from the statutory liability of remitting the contributions within the statutory limitation of time. The Competent Authority has clearly said that he has taken a lenient view. He has, it appears, imposed damages only to complete the deposits so that employees do not suffer on account of the failure of the petitioner in remitting the contributions within the statutory limitation of time.

12. It has been brought to my notice by learned counsel for the petitioner that

for different periods of default without showing any reason behind it, the respondent has imposed different amount of damages. It is not explained before me why such a course has been adopted by the respondent. Any order which is not supported by reason is not a valid order and, accordingly, one may find the quantification of the damages for different periods unjustifiable. I do not, however, propose to interfere with the above in such a manner that employees who were the beneficiaries and who, on account of delay by the employer at the first instance in making the timely remittances, by the respondent at the second instance in initiating the proceedings u/s 14(B) of the Act and lastly on account of inordinate delay in the disposal of the instant writ petition, suffered, I am, for the said reason, inclined to order that the damages for each period shall be quantified at the lowest rate indicated by the respondent in his order, that is at the rate of 10 percent for each period.

13. Subject to the modification, as above, in the quantum of damages, the instant writ petition is dismissed. No costs.