

(2012) 12 MP CK 0118
In the Madhya Pradesh High Court
Case No : Writ Petition No. 5543 of 2010

Vrijlal Manilal and Company

APPELLANT

Vs

Regional Provident Fund Commissioner

RESPONDENT

Date of Decision : 18-12-2012

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 15, 17, 5A, 7I
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2013) 137 FLR 354 : (2013) 2 LLJ 293

Hon'ble Judges : Sanjay Yadav, J;Ajit Singh, J

Bench : Division Bench

Advocate : Anoop Nair, for the Appellant; J.K. Pillai, for the Respondent

Judgement

Sanjay Yadav, J.—Order passed in this writ petition shall govern the (sic) Writ Petition Nos. 11347/2009-Regional Provident Fund Commissioner v. M/s. J.P. Tobacco Product Pvt. Ltd., 11348/2009-Regional Provident Fund Commissioner v. M/s. Vrijlal Manilal & Co., 11349/2009-Regional Provident Fund Commissioner v. D.C. Rathore and sons, 11350/2009-Regional Provident Fund Commissioner v. M/s. Prabhudas Kishoredas Tobacco Co., 11368/2009-Regional Provident Fund Commissioner v. M/s. J.P. Tobacco Product Pvt. Ltd., and 11369/2009-Regional Provident Fund Commissioner v. M/s. Chhotabhai Jethabhai Patel & Co.; as all these writ petitions are directed against common order dated 3.7.2009 passed by the Employees' Provident Fund Appellate Tribunal in Appeals u/s 7-I, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Appeals in turn were directed against the orders passed by Regional Provident Fund Commissioner u/s 14-B of 1952 Act inflicting damages by way of penalty for alleged default in payment of non-contribution towards the Fund. That, efforts were made to resolve the dispute by conciliation as the damages by way of penalty was in respect of period from November, 1990 to January, 1997. However, since the parties did not settle the dispute amicably, the matter is heard and decided on merits.

Basic facts relevant for adjudication are carved out from the order by Tribunal. They are that, Employees' Provident Fund Organization issued a notification G.S.R. 689 dated 19.10.1990 effective from 1.11.1990; whereby, Paragraph 26 of the Employees' Provident Fund Scheme, 1952 was amended making it applicable to persons employed in work in any establishment even for a day. The Notification came to be challenged vide Writ Petition No. MP 486/1991 and other connected petitions before the High Court, wherein by order dated 16.2.1991 the operation of Notification dated 19.10.1990 was stayed. The writ petition was later on dismissed on 31.8.1994. That, a SLP preferred there-against was also dismissed on 17.4.1995 With the dismissal of Special Leave Petition; the organization issued clarification on 16.5.1997 to implement the amended Paragraph 26 of the EPF Scheme w.e.f. 1.11.1990 and if there is any problem about recovery of the employers' and the employees' share of provident fund of the past period the same may be resolved as per directives issued by Ministry of Labour in 1989 and modified on 18.2.1997 vide letters R-11025/25/87-SS.II dated 6.10.1989 and R-11025/3/97-SS II dated 18.2.1997. In furtherance whereof the employers were called upon to remit Provident Fund Contribution/ the Family Pension Contributions/the administrative charges/the Employees' Deposit Linked Insurance Administrative Charges for the period from November, 1990 to January, 1997. The amounts as sought for were remitted. Thereafter the employers were subjected to proceedings u/s 14-B of 1952 Act by issuing show-cause notices. The proceedings u/s 14-B culminated into orders of damages by way of penalty for delayed remittance of contribution towards fund. The plea that because of the stay of operation of notification dated 19.10.1990, the contribution could not be remitted was discarded and though the interest was not charged but the damages were imposed by way of penalty, holding that it was beyond the discretion of the Regional Provident Fund Commissioner/Assistant Provident Fund Commissioner to reduce or waive the damages with the introduction of Para 32(A) in EPF Scheme w.e.f. 1.9.1991 which provided for a structured rates for levy of damages. In Appeal the Tribunal however reversed the reasonings regarding exercise of discretion regarding infliction of penalty. The Tribunal held:

6.....

If, while deciding the quantum of damages u/s 14-B the reasons for the delay has to be taken into account then the damages cannot be as per any strait-jacketed formula. At the best, clause 32-A would only serve as a guideline. In fact, the words used in clause 32-A are that "may recover from the employer by way of penalty damages at the rates given below", which would also suggest that the same is intended as a guideline. Here, it may work the other way also. The clause take into account only the period of delay, but not take into account the number of delays, which also may be a factor in favour of imposition of higher damages. Further, when section 14-B envisages a maximum damages equal to the amount of arrears, the maximum envisaged by clause 32-A is only 37%. Therefore, Clause 37-A is purely in the nature of guidelines and not a structured

formula of invariable application in all circumstances without reference to the reasons of delay. In view of the above observations of the Hon'ble High Court of Kerala for 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 not be resorting to arithmetical calculations. Therefore, levy of damages by following the straight jacket formula amount calculation of damages without application of mind and is illegal and liable to be struck down.

2. The Tribunal drew inspiration from the decision in Supreme Court in Hindustan Steel Ltd. Vs. State of Orissa, and decision by Kerala High Court in Indian Telephone Industries Ltd. v. APPC 2005 (3) KLJ 698.

3. The Tribunal on the said reasonings interfered with the inflicting of damages by way of penalty as per structured table under Paragraph 32(A) of the EPF Scheme and reduced the same to 10% on the total sum.

4. The order by the Tribunal is being questioned both by the establishment/ employer as also by the Regional Provident Fund Commissioner.

5. Whereas the employer has challenged it on the ground that there being no mens rea in evading to remit the contribution for the period from November, 1990 to January, 1997 which could not be because of the stay of operation of Notification dated 19.10.1990 by the High Court and Supreme Court; damages cannot be levied by way of penalty.

6. The Regional Provident Fund Commissioner on his turn questions the order on the ground that the Tribunal exceeded its jurisdiction in tinkering with the structured table, as provided vide Paragraph 32(A) of EPF Scheme stipulating the rate of penalty. It is urged that the delayed remittance of contribution to the Fund being attributable to the employer they are liable for the damages by way of penalty. It is urged that the damages by way of penalty is not to be construed in the nature of punishment under the Scheme of Employees' Provident Fund which has been evolved for the benefit of employees/workers who are at the receiving end. It is urged that since the organization has to meet out the statutory claims under the Act and the Scheme, from the Fund, the non-contribution whereto by the employer of employees' share adversely effect the maintenance of the Fund. It is to keep the balance that the damages by way of penalty is provided for in case of defendants. It is urged that since no discretion is left with the employer but to remit the contribution under the Act, the question of mens rea is not attracted. Furthermore, to bring home the submissions that the stay of operation of Notification dated 19.10.1990 will prejudice the right of the organization to recover damages by way of penalty, learned Counsel for the organization has placed reliance on the decision in Rajasthan Housing Board and others v. Krishna Kumari 2005 (13) SCC 151. It is further contended that interest was not charged from the petitioner as section 7-Q which relates to interest payable by employer in case of default was brought into existence w.e.f.

1.7.1997 inserted by Act 33 of 1988. It is accordingly contended that, since there was a default on the part of employer/establishment in remitting the contribution within time, the Regional Provident Fund Commissioner was within its power u/s 14-B of 1952 Act to invoke Paragraph 32-A of Employees' Provident Fund Scheme towards recurring damages by way of penalty.

7. Question which crops up for consideration is as to whether in a case where the employer/establishment is covered by provisions of Act of 1952 and E.P.F Scheme if prevented by a cause from remitting the contribution within the stipulated time would be liable for damages by way of penalty when contribution is remitted at later date.

8. Section 14-B of 1952 Act stipulates:

14-B. Power to recover damages.--Where an employer makes default in the payment of any contribution to the Fund, the 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 officer as may be authorised by the Central Government, by notification in the official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme.

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

Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established u/s 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.

9. Apparent it is from the aforesaid provision that it is within the competence of the organization to recover damages by way of penalty, such penalty, however, should not exceed the amount of arrears as may be specified in the scheme. Thus, discretion is cast with the competent authority to appreciate the reasons which prevented the employer/establishment to contribute towards fund within the stipulated time.

10. Contention put-forth on behalf of organization that with the introduction of structured table vide Paragraph 34-A, the competent authority is left with no choice but to implement the same as it is though prima facie appears convincing; however, when the provisions contained in section 14-B is minutely scrutinized, the expression "may recover from employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the scheme", leaves

no iota of doubt that the competent authority is not divested of the power to exercise discretion. Had there been intention of the Legislature to leave no discretion with the competent authority, the aforesaid expression would not have been enacted. Instead, the structured rate mandatorily would have been made applicable, then there was no need for the first proviso to section 14-B that "before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard", which in absence of exercise of discretion, in our considered opinion, would be reduced to an empty formality. The second proviso which empowers the Board (i.e. Board of Trustees constituted u/s 5-A of 1952 Act) comes into operation when the damages are levied. It in no terms curtails the discretion of the competent authority to determine the damages by way of penalty less than the rate prescribed under Paragraph 32(A) of EPF Scheme. However, under no circumstances it should exceed the amount of arrears, as may be specified in the scheme. Paragraph 32-A of the EPF Scheme no doubt provides for the rates of damages to be recovered qua the period of default. The rates qua the period in our considered opinion are the maximum cap which under no circumstances be exceeded, for example, if the period of default is of less than two months the damages shall not exceed 17% of the arrears per annum and so on so forth. However, it is nowhere mentioned that it cannot be less than the maximum cap.

11. In view whereof we are of the considered opinion that the powers exercised by the competent authority u/s 14-B of 1952 Act are wider and are not limited by the EPF Scheme as would prevent the Authority to exercise the discretion and in a given case wherein the circumstances are beyond the control of the employer to remit the contribution, to reduce the damages by way of penalty.

12. The next question is whether in the facts of present case, the damages by way of penalty could be waived.

13. Admittedly with the issuance of Notification dated 19.10.1990 liability of employer to remit the contribution in respect of classes of employees as per Paragraph 26 of EPF Scheme arose w.e.f. 1.11.1990. The stay of operation of the notification by the High Court and Supreme Court did not absolve the employer from such liability. The liability though differed; however, the failure of challenge reincarnated the liability which leads to revival of the statutory liability such as damages by way of penalty. In AIR 1997 993 (SC) , it has been held by the Supreme Court that--

15.....This Court has also repeatedly emphasised the inadvisability of making interim orders which have the effect of depriving the State [the people of the State] of the revenues legitimately due to it. The Court should not take upon itself the responsibility of staying the recovery of amounts due to State unless a clear case of illegality is made out and the balance of convenience is duly considered. Otherwise, the odium of unlawfully depriving the State/the people of the monies lawfully due to it/them would lie upon the Court.....

19.....It is the duty of the Court to try to repair the damage to the extent possible. No one should be allowed to suffer on account of the act (s) of the Court.

14. In M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another, it has been held:

15.....It is a settled principle of law that as and when a party applies and obtain a stay from the Court of Law, it is always at a risk and responsibility of the party applying. Mere passing of an order of stay cannot be presumed to be conferment of any additional right upon the litigating party.....

(Please also see Rajasthan Housing Board and others v. Krishna Kumari 2005 (13) SCC 151.)

15. In view whereof the employer/establishment cannot be absolved from the damages by way of penalty. But how much damage they would be liable for? Since there was a stay of operation of notification dated 19.10.1990, the employer establishment, therefore, cannot be made to suffer wholly, equity has to be balanced. As per Paragraph 32(A)(d) of EPF Scheme, 1952 in respect of period of default is six months and above, the rate of damages is 37% of arrears per annum. In the given facts of present case 18 % of arrears per annum towards rate of damages would meet the ends of justice.

16. The impugned orders passed by the Tribunal is modified to the extent that the employer/establishment would be liable to pay the penalty by way of damages @ 18 % per annum the arrears of the contribution for the period of delay in payment. In the result, whereas W.P. No. 5543/2010 is dismissed. Writ Petition Nos. 11347/2009, 11348/2009, 11349/2009, 11350/2009, 11368/2009 and 11369/ 2009 are partly allowed to the extent above.

No costs.