

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: September 15, 2015*
Judgment Pronounced on: September 21, 2015

+ **LPA 629/2011**

ASSISTANT PROVIDENT FUND
COMMISSIONER

.....Appellant

Represented by: Ms.Aparna Bhat, Advocate with
Ms.Shivani Singh, Advocate

versus

HI-TECH VOCATIONAL TRAINING
CENTRE

.....Respondent

Represented by: None

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. We are called upon to decide two issues in the instant appeal. The first is whether the Employees Provident Fund Commissioner is obliged to levy damages under Section 14B of the Employees Provident Fund Miscellaneous Provisions Act, 1952, and while doing so is the authority bound to levy the damages prescribed in the table in Para 32A of the Employees Provident Fund Scheme, 1952. The second is whether the penalty can be levied under Section 14B if by the date proceedings are initiated under Section 14B the assessee has paid the necessary dues under the Employees Provident Fund and Miscellaneous Provisions Act, 1952.

2. The two issues arise because vide impugned decision dated January 28, 2011 allowing W.P.(C) No.10387/2006 filed by the respondent, the view taken by the learned Single Judge is that the Act and the Scheme

contemplate all relevant factors to be considered if there is a delay in making deposit of the provident fund dues as per the Act while deciding whether at all and thereafter, what quantum of penalty needs to be levied. Striking down the order passed by the appellant on January 16, 2006, which proceeded on the assumption that the Commissioner had no discretion in the matter of levying penalty and levied penalty as per the table prescribed in Para 32A of the Scheme, the learned Single Judge has further held that albeit belatedly, but if the necessary sum has been deposited, the proceedings under Section 14B of the Act cannot be commenced.

3. The journey towards our destination must therefore commence by noting Section 14B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and Paragraph 32A and 32B of the Employees Provident Fund Scheme, 1952. They read as under:-

Section 14B. 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 under section 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 under section 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.

Para 32A. Recovery of damages for default in payment of any contribution-

(1) Where an employer makes default in the payment of any contribution to the 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 of the Act or in the payment of any charges payable under any other provisions of the Act or Scheme or under any of the conditions specified under section 17 of the Act, the Central Provident Fund Commissioner or such 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, damages at the rates given below:—

<i>Sl.No.</i>	<i>Period of default</i>	<i>Rates of damages (percentage of arrears per annum)</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
<i>(a)</i>	<i>Less than 2 months</i>	<i>Five</i>
<i>(b)</i>	<i>Two months and above but less than four months</i>	<i>Ten</i>
<i>(c)</i>	<i>Four months and above but less than six months</i>	<i>Fifteen</i>
<i>(d)</i>	<i>Six months and above</i>	<i>Twenty five</i>

(2) The damages shall be calculated to the nearest rupee, 50 paise or more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored.

Para 32B. Terms and conditions for reduction or waiver of damages-

The Central Board may reduce or waive the damages levied under section 14B of the Act in relation to an establishment specified in the second proviso to section 14B, subject to the following terms and conditions, namely:—

(a) in case of a change of management including transfer of the undertaking to workers' co-operative and in case of merger or amalgamation of the sick industrial company with any other industrial company, complete waiver of damages may be allowed;

(b) in cases where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its schemes, in this behalf recommends, waiver of damages up to 100 per cent may be allowed;

(c) in other cases, depending on merits, reduction of damages up to 50 per cent may be allowed.

4. A perusal of the Section 14B shows that to trigger initiation of proceedings thereunder there must be an employer who has made a default in the payment of any contribution to the fund, and for which we simply highlight the first 13 words of the Section : *'Where an employer makes default in the payment of any contribution to the Fund....'*. Once triggered, the Central Provident Fund Commissioner or such other officer as may be authorized by the Central Government, and we note the language of the Section : *'may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the scheme'*.

5. The legislature has used the word *'may'* twice. Firstly with reference to the very recovery itself, apparent from the use of the expression *'may recover'*; and secondly with reference to the quantum, apparent from the use

of the expression ‘*not exceeding the amount of arrears as may be specified in the scheme*’.

6. In the decision reported as AIR 1979 SC 1803 Organo Chemical Industries Vs. Union of India it was emphasized that imposition of damages under Section 14B is not only meant to penalize the defaulting employer but is also to provide reparation for the amount of loss suffered by the employees. The Madras High Court, the Andhra Pradesh High Court, the Bombay High Court and the Punjab & Haryana High Court, in the decisions reported as 90 Factories Journal Reports 220 Snap Tap Machine Accessories (India) Pvt. Ltd. Vs. Regional Provident Fund Commissioner, 34 Factories Journal Report 140 Pioneer Sports Works Pvt. Ltd. Vs. State of Punjab, (1998) III LLJ (Supp.) Dhandava Co-operative Sugar Ltd. Vs. Regional Provident Fund Commissioner, 1986 Lab.IC 650 Regional Provident Fund Commissioner Vs. The South India Flour Mills Pvt. Ltd. and (1995) I LLJ 1145 Vegetable Vitamins Food Co. Ltd. Vs. Regional Provident Fund Commissioner have consistently taken a view that the Commissioner is bound to take into account aggravating and mitigating circumstances while determining damages and cannot levy damages mechanically. While considering a pari-materia provision under the Employees State Insurance Act, 1948, in the decision reported as (2008) 3 SCC 35 ESI Corporation Vs. HMT Ltd., the Supreme Court held that the statute does not mandate that in every case a penalty has to be levied and has left it to the discretion of the authority to decide whether penalty has to be levied, as also quantum thereof. The said decision brings out that if the provision concerning imposition of penalty contemplates adjudicatory proceedings, imposition of penalty would ordinarily not be mandatory and existence of mens rea i.e. what triggered the late deposit would be relevant.

7. In light of the case law and the language of Section 14B it is apparent that the legislature has vested a discretion in the Commissioner to levy damages with further discretion to determine such damages as he may determine.

8. The argument of learned counsel for the appellant based on the second proviso to Section 14B was that the legislature had vested the power in the Central Board to reduce or waive the damages and thus it would be mandatory upon the Commissioner to not only levy damages but even the quantum as specified in the scheme.

9. Merely because a power has been vested in a superior authority to reduce or waive the damages would not mean that the adjudicatory authority is left with no discretion.

10. A perusal of Para 32A of the Employees Provident Fund Scheme, 1952 would show that the legislature has once again used the word '*may*' in the phrase '*may recover from the employer by way of penalty*'. Para 32A of the scheme is in conformity with the main section. The discretion in the Section is retained in the scheme. The table referred to in Para 32A is indicative of, and to put it differently by way of guidance to the Commissioner as to the rate of damages which could be levied as the maximum levy. Thus, Para 32A of the scheme would mean that the damages indicated in the table of said paragraph fix the upper limit and leave it to the discretion of the authority to determine in each case as to whether or not damages have to be levied, and if yes the extent thereof. Para 32B mirrors the power conferred on the Central Board under the second proviso to Section 14B and thus the argument that since power to waive or lower the penalty is conferred on the Central Board as per Para 32B of the Scheme, the Commissioner would have no power to waive or lower the penalty as per

Para 32A of the Scheme, has to be rejected on the reasoning given by us in para 8 and 9 above.

11. The view taken by the learned Single Judge on the first issue is correct, however we would be failing if we do not note that moneys payable into the fund are for the ultimate benefit of the employees and there being no provision by which the employees can directly recover these amounts, the Commissioner would be obliged to ensure that at least such amount which is necessary to recompense the employees should be levied by way of damages notwithstanding that in the statute book we find Section 7Q being inserted and there being 12% statutory simple interest per annum payable on the defaulting amount. There is an element of a stick in the Section, but the same must be yielded with care and caution. The stick would be to penalize the employer so that he learns by example and does not willfully default in future or adopt a casual attitude. Persistent and repeat defaulters should be dealt with sternly and visited with the maximum penalty. First time defaulters deserve sympathy. These are some of the indicative factors, not exhaustive, which must be kept in mind while exercising the discretion.

12. Cross fertilization of ideas can prove to be dangerous if the textual and the contextual context of an idea is not properly understood. On the second view taken by the learned Single Judge, the reason given is that power to recover damages under Section 14B is by way of penalty and the expression '*not exceeding the amount of arrears*' in the Section has been read by the learned Single Judge as envisaging that when proceedings are initiated under Section 14B there is an arrear of contribution to the fund. The learned Single Judge has cross fertilized the idea by transporting the law declared in the decision reported as AIR 1968 SC 461 Vithal Vasudeo Kulkarni & Ors. Vs. Maruti Rama Nagane & Ors. The Supreme Court was dealing with Section 25 of the Bombay Tenancy and Agricultural Land Act,

1948. Sub-Section 1 of Section 25 of the Act enable a landlord to initiate proceedings to eject the tenant if tenancy was terminated for non-payment of rent. The Supreme Court held that if there was a default in payment of rent but before the landlord initiated ejectment proceedings the rent was tendered and accepted, the act of tendering an acceptance would result in waiver by the landlord of the right to terminate the tenancy. The learned Single Judge has reasoned by analogy that if before proceedings under Section 14B were initiated the defaulting employer had made the payment to the fund, the very initiation of the proceedings would be bad in law.

13. It is trite that where a default by a party confers a right upon another, it would be open to the said other party to waive the breach. This would be when the relationship is interpersonal and stems from either a contract or a law. But where the power to levy damages are on account of a default in making the contribution to a fund which is for the benefit of the employees, the Commissioner would be nobody to waive the default. Further, as we have noted hereinabove what triggers Section 14B is the default in the payment of the contribution to the fund, and the default would be not making the contribution to the fund by the 15th day of the ensuing wage month. The statute nowhere contemplates that the default must be in existence on the day when proceedings under Section 14B are initiated. Thus, if there is a default in making contribution to the fund, notwithstanding belated contribution being made to the fund, since the default has already taken place the Commissioner would be within his power to initiate proceedings under Section 14B. The learned Single Judge has overlooked that the Section triggers '*Where an employer makes default in the payment of any contribution to the fund*'. The Section is not worded '*Where an employer continues to be in default in the payment of any contribution to the fund*'.

14. The second view taken by the learned Single Judge in the impugned decision being contrary to law, we dispose of the appeal affirming the first view taken by the learned Single Judge and overruling the second. In that view of the matter, the order dated January 16, 2006 which was impugned before the learned Single Judge would require the same to be treated as contrary to law because the authority concerned proceeded on the assumption that it had no discretion in law to determine the quantum of damages and proceeded as if it was bound by the table in Para 32A of the scheme. However, the proceedings need to be revived for the Commissioner to determine what quantum of damages need to be levied, and thus while maintaining the impugned decision which has set aside the order dated January 16, 2006, we leave it open to the Commissioner to exercise his discretion and pass a fresh order concerning proceedings initiated under Section 14B of the Employees Provident Funds and Miscellaneous Provisions Act, 1952.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 21, 2015
mamta