

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

Reserved on: 20th January, 2015
Date of Decision: 6th February, 2015

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+ W.P.(C) 5937/2013

ASSISTANT PROVIDENT FUND

COMMISSIONER, (SOUTH)

..... Petitioner

Through: Mr. Ram Narayan Singh, Advocate.

versus

M/S. SHALOM RESTAURANT

.....Respondent

Through: Mr. Abhay Pratap Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By the present petition filed under Articles 226 and 227 of the Constitution of India, the petitioner assails order dated 18.05.2012 passed by learned Presiding Officer, Employees' Provident Fund Appellate Tribunal in ATA No.50(4)2010 whereby the order dated 26.11.2009 passed by the Assistant Provident Fund Commissioner, Employees' Provident Fund Organization directing the respondent to deposit the damages (account wise) for the period 02/2005 to 10/2006 was held as an unreasonable order passed in a mechanical manner and was, therefore, quashed.

2. The concise facts of the case are that the respondent was a unit of M/s. Mahima Caps (P) Ltd. In the year 2005 M/s. Mahima Caps (P) Ltd. started its amalgamation process with M/s. Mahima Hospitality

(P) Ltd., which was finally concluded on 01.09.2006. The respondent is covered under the purview of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short, 'EPF Act') and was allotted code No.DL/30308 for remitting its provident fund contributions. The respondent was required to remit the amount of provident contribution and allied dues from 02/2005 to 10/2006 within a stipulated time frame, i.e., within a period of 15 days from closure of every month. However, the respondent failed to deposit the said dues. Hence, a notice under Section 14-B of the EPF Act was issued to it on 07.02.2008. The respondent was also asked to appear for a personal hearing on 28.02.2008 before the Assistant Provident Fund Commissioner. It was only on 17.07.2008 that the respondent appeared through a counsel before the concerned authority and subsequently filed its reply dated 04.09.2008 to the show-cause notice dated 07.02.2008.

3. Vide order No. E/DL/30308/damages/C-II dated 26.11.2009, the Assistant Provident Fund Commissioner directed the respondent to deposit the damages within 15 days failing which, the proceedings under Section 8-B to 8-G of the EPF Act were to be invoked against it. The respondent preferred an appeal against the said order which was allowed by learned Presiding Officer, Provident Fund Appellant Tribunal, New Delhi vide order dated 26.11.2009. Feeling aggrieved by the said order, the petitioner has filed the present petition.

4. Learned counsel for the petitioner contended that the tribunal should not have set-aside the entire order once it came to the

conclusion that the respondent was guilty of inordinate delay and in default of payment of the provident fund dues. The objections of the respondent were duly considered and it was only then that the order of levy of fine was imposed on it. Before passing the order under Section 14-B of EPF Act, due opportunity was granted to the respondent and the reply filed by it was duly considered.

5. It was further contended by learned counsel for the petitioner that the amalgamation proceedings carried out by the respondent is not a sufficient reason to justify delay from 02/2005 till the issuance of show-cause notice dated 07.02.2008. The EPF Act is a beneficial piece of legislation and if it is allowed to be construed to condone the defaults on the part of the defaulter, then in all cases, a defaulter would have one or the other excuse to not make its payments on time. The amalgamation was purely an internal matter of the respondent and was not a sufficient reason to condone the delayed payment of its dues.

6. It was lastly contended by learned counsel for the petitioner that the respondent could not specify any of the conditions as prescribed under Section 32-B of the Employees' Provident Fund Scheme, 1952 for the waiver or deduction of the damages. The reasons for waiver as stated by the respondent do not go in tandem with the scheme and purpose of the Act.

7. *Per contra*, learned counsel for the respondent urged that there was no intentional or deliberate delay in remitting the dues. The respondent had already deposited the provident fund dues through challan dated 01.03.2007 amounting to Rs.9,62,335/- (Rupees Nine

lakhs sixty two thousand three hundred thirty five) and the same were cleared on 06.03.2007, much before the commencement of the current enquiry proceedings under the EPF Act. The respondent was under the process of amalgamation which took a lot of time and resulted in delay in the payment of the monthly EPF contribution.

8. It was also contended on behalf of respondent that while levying damages due consideration is required to be given to the reason which resulted in default. The order must be a reasoned order and passed only after considering all relevant facts. The petitioner passed the order levying damages without taking any material facts into consideration. Lastly, it was submitted on behalf of respondent that imposition of penalty is not mandatory rather only discretionary which the authority, on the consideration of relevant facts, may not impose.

9. I have given my thoughtful consideration to the submissions made by learned counsel for both the parties. I have also perused the material on record.

10. Undisputedly EPF Act is a beneficial piece of legislation. It was passed with an object of making some provisions for the future of the industrial worker after his retirement or for his dependents in the case of his early death. The parliamentarian, after considering various financial and administrative difficulties in old and survival pension's schemes and gratuity schemes, agreed to introduce the institution of contributory provident fund schemes in which, both, the worker and the employer would contribute. Provident fund scheme was considered as a means to encourage the stabilization of a steady labour

force in industrial centre. The Parliamentarians were well aware of the fact that with industrial growth, although, the big employers had introduced the scheme of provident fund for the welfare of their workers, but all these schemes until then were private and voluntary and the workers of the small employers remain deprived of the benefits which were provided by big employers. Thus, with an object to provide for compulsory establishment of provident fund by every employer in the industrial concerns for the betterment of his employee, the EPF Act was enacted.

11. The EPF Act, under its various sections, encompasses the provisions for establishment of Employees' Provident Fund Schemes, contribution and matters which may be provided for in scheme, determination of money due from the employer, deposit of amount due, mode of penalties, recovery, etc. Section 14-B of the EPF Act provides for the power to recover damages which is material in the present case. Section 14-B of the EPF Act reads as under: -

“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.”

12. Section 14-B of the EPF Act was inserted with an object to act as a deterrent measure on the employer to prevent them from not carrying out their statutory obligations to make payments to the provident fund. The damages under Section 14-B EPF Act are penal in nature. This section authorizes the Central Provident Fund Commissioner or such other officer as may be authorised to impose exemplary or punitive damages and thereby prevent the employer from making defaults. In the absence of such a provision, the employer could deliberately default in the payment of their provident fund contributions and in the meanwhile utilize both their contributions as well as that of employees’ in their business. In such a case, an employer could delay the payment of provident fund dues without any genuine reasons on his part for doing so and may escape from his liability to make payment without undergoing any additional financial liabilities. To prevent this, the said section was made a part of the EPF Act and also the words “damages not exceeding 25% of amount of

arrears” were amended to “not exceeding the amount of arrears” under the said section.

13. The Hon’ble Supreme Court in ‘**Organo Chemical Industries and Anr. vs. UOI & Ors.**’, (1979) 4 SCC 573, referred to the reasons which made the Parliamentarian to insert Section 14-B on the statute book and observed: -

“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.”

14. The Hon'ble Supreme Court speaking through Sen, J. in **Organo Chemical's** case (supra) discussed the scope of "damages" under Section 14-B of the EPF Act and observed as under: -

"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 under Section 14-B is not merely "to provide compensation for the employees". We are clearly of the opinion that the imposition of damages under Section 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 under Section 14-B is to provide reparation for the amount of loss suffered by the employees."

15. In the same judgement, concurring with Sen J., Krishna Iyer J., with regard to damages observed as under: -

“38. What do we mean by “damages”? The expression “damages” is neither vague nor over-wide. It has more than one signification but the precise import in a given context is not difficult to discern. A plurality of variants stemming out of a core concept is seen in such words as actual damages, civil damages, compensatory damages, consequential damages, contingent damages, continuing damages, double damages, excessive damages, exemplary damages, general damages, irreparable damages, pecuniary damages, prospective damages, special damages, speculative damages, substantial damages, unliquidated damages. But the essentials are (a) detriment to one by the wrongdoing of another, (b) reparation awarded to the injured through legal remedies, and (c) its quantum being determined by the dual components of pecuniary compensation for the loss suffered and often, not always, a punitive addition as a deterrent-cum-denunciation by the law. For instance, “exemplary damages” are damages on an increased scale, awarded to the plaintiff ever and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called “punitive” or “punitory” damages or “vindictive” damages, and (vulgarly) “smart-money”. [See Black's Law Dictionary, 4th Edn., pp. 467-648] It is sufficient for our present purpose to state that the power conferred to award damages is delimited by the content and contour of the concept itself and if the Court finds the Commissioner travelling beyond, the blow will fall. Section 14-B is good for these reasons.”

16. It is settled law that the power of the Regional Provident Fund Commissioner or the competent authority to impose damages under Section 14-B of the EPF Act is quasi-judicial in nature. It is to be exercised after giving a notice to the defaulter and providing him a reasonable opportunity of being heard. Any authority carrying out a judicial/ quasi- judicial function is bound by the principles of natural justice. Thus, the competent authority must give the person charged an opportunity of being heard by an independent person providing him an opportunity to present his case and only then pass a speaking order giving the reasons of his decision.

17. Section 14-B of EPF Act is designed to recover damages and the penalty imposed is deterrent in nature, the Central Provident Fund Commissioner or the authorised officer is bound to give proper reasons in support of his order. The Central Provident Fund Commissioner or the authorised officer must also pass its orders after due consideration of various factors which may include: number of defaults, the period of delay, the frequency of defaults, amounts involved, etc.

18. In '**Hindustan Times Ltd. vs. UOI**', (1998) 2 SCC 242, the Apex Court held: -

“29. From the aforesaid decisions, the following principles can be summarised:

The authority under Section 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 under Section 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 under Section 14-B would be taken; mere delay in initiating action under Section 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. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under Section 14-B, 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 defence in the reply to the show-cause notice and must satisfy the authority concerned 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.”

19. In **Organo Chemical's** case (supra) the Hon'ble Supreme Court observed that power conferred to the Regional Provident Officer is not an unguided or uncontrolled and held: -

“13. The contention that Section 14-B confers unguided and uncontrolled discretion upon the Regional Provident Fund Commissioner to impose such damages “as he may think fit” is, therefore, violative of Article 14 of the Constitution, cannot be accepted. Nor can it be accepted that there are no guidelines provided for fixing the quantum of damages. The power of the Regional Provident Fund Commissioner to impose damages under Section 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 under Section 14-B and the consequences that ensue therefrom, an order under Section 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 14-B lays down sufficient guidelines for him to levy damages.”

20. A penal provision should be construed strictly. However, just because a provision has been made for the levy of fine, it would not lead to the conclusion that a penalty must be levied in all the situations.

The power conferred on the Central Provident Fund Commissioner or authorised officer is discretionary, which can be observed from a careful reading of Section 14-B of EPF Act. The words used under Section 14-B of EPF Act are:

“.....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...” (emphasis supplied).

21. Section 14-B of EPF Act are *pari materia* to Section 85-B of Employees' State Insurance Act, 1948 (for short, 'ESI Act') with the only difference that in the former Act, both, the employer and employee make contribution, while under ESI Act only the employer contributes. Section 85-B of ESI Act is also a penal provision and just as Section 14-B of EPF Act uses the expression “may recover” in respect of the damages for default in making payment of the amount due.

22. The scope of Section 85-B of the ESI Act was discussed by the Hon'ble Supreme Court in '**Employees' State Insurance Corporation vs. HMT Ltd. and Anr.**, (2008) 3 SCC 35. The Hon'ble Supreme Court considered several earlier decisions, including those rendered while considering Section 14-B of the EPF Act and concluded that imposition of penalty under Section 85-B of the ESI Act should not be a mechanical exercise to be undertaken by the authority concerned. The imposition of penalty even at the prescribed

rate is not imperative. Proceedings under Section 85-B of the ESI Act and Section 14-B of EPF Act are quasi-judicial in nature in which the authority has to apply its mind to the facts of the case and reply to the show-cause notice and pass a reasoned decision. It was further held by the Supreme Court that a penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that a penalty must be levied in all situations. The Hon'ble Supreme Court, thus, held: -

“21 [Ed.: Para 21 corrected vide Official Corrigendum No. F.3/Ed.B.J./19/2008 dated 4-3-2008.] . A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85-B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an endeavour should be made to construe such penal provisions as discretionary, unless the statute is held to be mandatory in character.”

23. Thus, what can be summarized from the above discussion is that Section 14-B of the EPF Act is a penal provision directed towards the realization of “damages” in lieu of non-deposit of provident fund dues. The power given to the competent authority under this section is not unguided or unreasonable. The power of the authority under Section 14-B of EPF Act is quasi-judicial in nature and the competent authority has to apply its mind to the facts of the case and reply to the show-

cause notice and pass a reasoned decision after following the principles of natural justice. Although, the power is given to impose penalty on the defaulter, however, it is not mandatory in all cases for the authority to do so. The competent authority, on the other hand, must apply its mind to the facts of the case in the light of several factors such as the period of delay, the frequency of defaults and number of defaults and amount involved, etc. Proper consideration must also be given to the reasons of delay as stated by the defaulter in his reply. It should not be a mechanical exercise and in all the cases a reasoned decision should be passed on a proper application of mind.

24. In the present case, the Assistant Provident Fund Commissioner passed the order of levy of fine vide order dated 26.11.2009. The relevant part of the said order is:

“The representation made by the employer has been considered and it is found that the contention of the employer is incorrect where it says that the delay in the deposit of provident fund dues and other allied charges was not deliberate, there was on malafide intention to delay the same. In this connection several judgments of Hon’ble state High Courts as well as Hon’ble Supreme Court of India have held that the payment of the PF dues by the prescribed date is the un-qualified obligation of the employer. Any delay in deposit of PF dues **shall invite levying of damage u/s 14B** of the Act, 1952. So far as issue relating to non issuance of 7Q notice is concerned, in this regard the employer is advised to appear in person before the authority on 27.01.2010 and make submission against the charges of interest u/s 7Q. This communication treated as notice as notice u/s 7Q as forming part of this order.” (emphasis supplied)

25. In the appeal preferred by the respondent, the order dated 26.11.2009 was set aside by the Employees' Provident Fund Appellate Tribunal vide order dated 18.05.2012 with the observation as under: -

“6. A perusal of the impugned order indicates that the Officer conducting enquiry under Section 14B of the Act has not considered at all the submissions made by the appellant. The submission of the appellant that there was no intentional or deliberate delay in remitting the dues is not appreciated properly by the respondent authority. No reasons in support of impugned order are assigned. **The impugned clearly indicates that it is an unreasoned order passed in mechanical way. Hence, it is legally not sustainable and is quashed.** The appeal is allowed. Copy of the order be sent to both the parties. File be consigned to the record room.” (emphasis supplied)

26. From a perusal of the order dated 26.11.2009 it can be seen that it was passed in a mechanical manner without consideration of the explanation provided on the part of the respondent. The same fact was also observed by the Employees' Provident Fund Appellate Tribunal in its order dated 18.05.2012. Further, in the order dated 26.11.2009, no reason for levy of fine was given. In fact, from the statement, “any delay in deposit of provident fund dues shall notify levying of damages under Section 14-B of the Act, 1952” mentioned in the said order, it is observed that this finding was based on an improper reading of Section 14-B of EPF Act and the decision of Hon'ble Supreme Court in various judgments. As already observed above, the authority is not bound to impose the fine on the defaulter rather must consider relevant facts into consideration to decide whether it wants to and if it does, the quantum of such a penalty to be imposed on the defaulter. Although,

the Employees' Provident Fund Appellate Tribunal quashed the order of levy of fine, however, while passing the said order it did not remand the matter back to the petitioner to reconsider the matter and pass a reasoned decision in the matter which would have been the proper course.

27. In the light of aforesaid discussion, the matter is remanded back to the Assistant Provident Fund Commissioner with the directions to consider all the relevant facts and after affording an opportunity of hearing to the respondent pass a fresh reasoned order in accordance with law as expeditiously as possible and preferably within a period of three months.

28. The petition is disposed of accordingly.

(VED PRAKASH VAISH)
JUDGE

FEBRUARY 6th, 2015
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