(1999) 3 LLJ 469 : (1993) 2 ShimLC 155

High Court of Himachal Pradesh

Case No: C.W.P. No. 50 of 1980

H.P. Agro Industries Corporation Ltd. — APPELLANT

Vs

Regional Provident Fund Commissioner — RESPONDENT

Date of Decision: April 6, 1993

Acts Referred:
Employees Provident Funds and Miscellaneous Provisions Act, 1952 â€” Section 14B, 16, 17

Citation: (1999) 3 LLJ 469 : (1993) 2 ShimLC 155

Hon'ble Judges: L.S. Panta, J; Devinder Gupta, J

Bench: Division Bench

Advocate: K.D. Sood, for the Appellant; P.A. Sharma, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Devinder Gupta, J.
Order Annexure PE-3 passed by the respondent on September 7/13, 1979, levying damages u/s 14-B of the

Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (Act No. 19 of 1952) (herinafter referred to as ''the Act'') is under

challenge by the petitioner in this Civil Writ Petition filed under Articles 226 read with 227 of the Constitution of India.

2. The petitioner-company is a Government undertaking incorporated under the Companies Act, 1956 with effect from September 24, 1970.

Share capital of the company was received on March 29, 1971 and it actually commenced its business in June-July, 1971. The company initially

carried on the business of procurement and distribution of tractors and its spare parts. The other activities of procurement and distribution of Iron

and Steel, Tree spray oil etc. were added later on. During the year 1970-71, it had only one employee, who was on deputation from the

Government. In 1971-72, there were 16 employees, out of which 6 were on deputation from the Government. The strength of the employees

reached 20 somewhere in June/July, 1972. In all, in 1972-73 there were 74 employees out of which 11 were on deputation. During 1973-74,

there were 132 employees, out of which 13 were on deputation and in 1974-75, the total strength of employees as on March 31, 1975 was 138.

The strength was reduced thereafter since some activities were transferred to its subsidy company.

3. The employees of the petitioner-company agreed to become the members of the Provident Fund Scheme offered by the company, the fund of

which was to be administered by a committee consisting of General Manager and two representatives of the employees. Under the scheme

adopted by the company 8.33 per cent contribution was to be paid by it as the employer''s share to the fund and the employees'' contribution was

to be equal to the contribution payable by the petitioner-company. The accumulated fund was to be kept as deposit in the Bank of India Provident

Fund Investment Scheme, which carried an interest of 10% per annum with monthly interest payments. Annexure PA is"" the Bank of India

Provident Investment Scheme, which was adopted by the petitioner-company and it is the petitioner''s case that the benefits offered by the

company to its employees were not less favourable than the benefits available under the provisions of the Act. The scheme was put into operation

with effect from April 1, 1975.

4. It has further been pleaded by the petitioner that since the benefits offered by it to its employees were not less favourable than the benefits under

the Act. It, on May 16 & 20, 1975 applied for exemption u/s 17 of the Act to the Government of Himachal Pradesh by addressing

communication, Annexure PB, copy of which was also addressed to the respondent. The petitioner was under the impression that since it had

applied well in advance for exemption, the same would be granted in due course of time.

5. On October 1, 1975, a communication Annexure PC-1 was addressed by the respondent to the petitioner informing that its establishment was

coverable under the provisions of the Act and a formal order allotting code number etc. and of giving guidance for depositing provident fund would

be issued separately. The petitioner was further informed that the question of granting exemption would arise only after it has been covered under

the provisions of the Act, for which purpose the petitioner was required to furnish consent of its employees in favour of exemption and also to bring

its rules, atleast at par, with the Employees'' Provident Fund Scheme, 1952. Annexure P-2 are the various consent letters of the employees of the

petitioner.

6. On October 4, 1975, respondent addressed another letter Annexure PC-2 to the petitioner informing that the provisions of the Act are

applicable to the petitioner''s establishment provisionally with effect from January 1, 1975 subject to further verification of the record for the prior

period. Code number was also allotted to the petitioner after complying with the provisions of the Act. Clause 6(iii) of the communication provided

that since the establishment has been discovered for coverage, the petitioner should commence depositing employer''s and employees'' contribution

together with the administrative charges etc. from the first of the following month and for the peirod prior to it, namely, pre-discovery period,

petitioner was required to pay only the employer''s contribution and administrative charges. The employees contribution for the pre-discovery

period was not required to be realised unless the employees themselves wanted to pay the same. The petitioner was further informed that an inspector of the respondent office would visit the establishment for necessary guidance and that in case there was already a provident fund or other

scheme for the employees petitioner should inform the respondent about the details thereof indicating whether the petitioner would like to continue

with the scheme or would like to be governed by the provisions of the Act. The respondent further informed the petitioner that :

..... It may be clarified that you could be allowed to continue with your existing Scheme, subject to certain condition being imposed on you,

provided the benefits accruing to the member-employees therefrom are not less favourable than those provided under the E.P.F. and F.P.F.

Schemes.

Through Order Annexure PD-1, dated December 31, 1975, various formats were also sent by the respondent to the petitioner. On receipt of

these formats, the petitioner through letter dated January 21, 1976 asked the respondent to depute some Provident Fund Inspector for further

guidance and also enquired about the manner in which forms were to be utilised, since the petitioner had already applied for exemption due to the

reason of maintaining its own Provident Fund.

7. It is not disputed that in March, 1976, an officer of the respondent (Enforcement Officer) visited petitioner''s company and was handed over a

cheque for a sum of Rs. 28, 123/-. Petitioner''s case is that it was advised by the said officer that the petitioner should withdraw the deposited

Provident Fund from the Bank of India and should remit the same to the respondent. This advice was rendered pending the action on the

petitioner''s application for exemption. Acting on the said, advice, cheque for the provident fund from the period April 1, 1975 to February 29,

1976 was drawn and handed over to the said officer.

8. It has been further alleged that for the first time on August 7, 1976, through letter Annexure PD-3, respondent asked the petitioner to deposit

the provident fund dues for the period from January 1, 1975 to March 31, 1975 within a period of 15 days; failing which the petitioner was informed that it would be liable to legal action. On the receipt of the same, the petitioner on August 17, 1978 represented through letter Annexure

PD-4, explaining its stand and further asserting that the amount shall be deposited by August 20, 1976. Consequently, the amount was deposited.

The petitioner kept on complying with every requirement of the respondent and the requisite amount was also deposited. Abruptly, on March 6,

1979, notice Annexure PE-1 was sent by respondent to the petitioner to show cause as to why damages u/s 14-B of the Act be not imposed for

belated payment of various amounts. To this, the petitioner sent reply Annexure PE-2 on March 9, 1979 and ultimately the impugned order

Annexure PF-3 was passed on September 13, 1979, proposing damages to the tune of Rupees 10,085.10 for the delayed payment of provident

fund contribution and Family Pension Fund contribution for the period from March 1, 1975 to March 31, 1975 and April 1, 1975 to February 29,

1976. It is this order, which is under challenge in this writ petition.

9. The main ground for challenge is that since the petitioner started functioning from the month of June/July, 1971, period of five years was not over

and before expiry of five years period, it voluntarily submitted to the scheme and to the provisions of the Act and since the petitioner voluntarily

submitted to the scheme, provisions of the Act were not applicable for the relevant period and it consequently acted on the assurances held out by

the respondent and bona fide complied with the same. The company was not liable to deposit the amounts earlier. The amounts were deposited

promptly thereafter. The respondent had no jurisdiction to impose penalty in these circumstances and the action taken after a period of almost

three years from the date of deposit is highly belated. The respondent will be deemed to have exempted the imposition of penalities, even if the

petitioner is held liable to the same.

10. The respondent contested the petition by filing its reply. It is averred that the writ petition involves disputed questions of fact, which cannot be

decided in writ jurisdiction. It is not disputed by the respondent that the application seeking exemption was no doubt received but no decision

thereon was reached by the appropriate authorities nor the same had been conveyed to the petitioner. It is pleaded that the impugned order has

been passed after due application of mind and considering the facts and circumstances of the case and after affording due opportunity to the

petitioner. It is stated that since there was delay in making the deposit on due date, the competent authority rightly passed the orders imposing

damages. The petitioner ought to have deposited the dues payable by it within the statutory period and by not doing so, provisions of Section 14-B

of the Act were attracted and were rightly made applicable.

11. We have gone through the record of the case and heard the learned counsel for the parties. The impugned order imposing damages has been

passed by the respondent u/s 14-B of the Act after recording a finding that the petitioner made default in the payment of the fund and other charges

payable under the provisions of the Act. Neither in the Act nor in the Employees'' Provident Fund Scheme, 1952, any limitation is provided for

levying damages. Section 14-B also does not require that action imposing damages should be taken immediately or soon after the employer makes

any default in payment of the Contribution amount within the period prescribed in law. But an order levying damages being an action which is

punitive in nature, it is always necessary that such an action, if it is required to be taken, be initiated as quickly as possible and within a reasonable

time. However, delay to levy damages on account of default in payment of contribution to the fund would not amount to waiver of the rights, if

liability to pay damages has otherwise been incurred by the employer.

12. Submission on behalf of the petitioner is that it had applied u/s 17 of the Act for exemption from the operation of the Act since it had its own

beneficial scheme for its employees and for this reason the payment of the amounts due under the Act could not be made in time also had no force since admittedly no order of exemption u/s 17 in respect of the petitioner had been passed. Till such an order was passed by the competent

authority under the Act, the petitioner, if it was covered under the provisions of the Act would be under a legal liability for the payment of its

contribution w.e.f. the date when the provisions of the Act became applicable to it. The employer, which is covered by the provisions of the Act, in

case makes an application for exemption, till any decision is taken, on the application, the employer is bound to comply with the provisions of the

Act and cannot take shelter behind the fact that it has made an application seeking exemption from the operation of the Act.

13. The third submission on behalf of the petitioner that during the period for which damages have been imposed, provisions of the Act were not

applicable, deserves to the considered in the 1ight of Section 16 of the Act as it stood at the relevant time, which provided for certain exemption.

14. Sub-clause (b) of Sub-section (1) of Section 16, as it stood prior to the amendment of the Act w.e.f. August, 1, 1988 by Act No. 33 of 1988

was in the followingterms:

16. Act not to apply to establishments belonging to Government or local authority and also to infant establishment--

(1) this Act shall not apply--

(a) .....

(b) to any other establishment employing fifty or more persons or twently or more, but less than 50 persons until the expiry of three years in the

case of the former or five years in the case of the latter, from the date on which the establishment is, or has been, set up.

15. The bare reading of Sub-clause (b) of subsection (1) of Section 16 shows that when once the number of employees reaches the figure of 20,

the provisions of the Act are attracted to the establishment. The starting point for the period of three or five years in case the employees are 50 in

the case of former and 20 in the case of latter is the date on which the establishment was set up with 20 or less persons.

16. In State of Punjab Vs. Satpal and Another, it has been held that period of infancy must be calculated from the first establishment of factory and

not from the moment of time when figure of 20 or more is first reached.

17. It has been in the case of the petitioner, which has not been controverted, that the Company was incorporated on September 24, 1970.

Capital was received by it on March 29, 1971 and it came in production only in June/July, 1971. The date of establishment of factory, obviously is

the date when the establishment started manufacturing process for which it is established and not the date of its incorporation. For the purpose of

Section 16 of the Act, the petitioner establishment will be deemed to have come into existence only in the month of June/July, 1971, when it came

in production. The number of employees in June/July, 1971 were less than 20, namely, 10 employees of its own and six on deputation. Number of

20 was reached in 1972-73. By virtue of Cl.(b)of Sub-section (1)of Section 16, the period of infancy of five years thus has to be calculated from

the month of June/July, 1971 and not from any prior date thereto or any subsequent date when the figure of 20 was reached. Since the figure of 20

was reached in the year 1972-73, the provisions of the Act would apply on the expiry of the period of five years taking the starting point as

June/July, 1971.

18. Thus, in the month of June, 1976 for the first time, the provisions of the Act would become applicable to the petitioner and not from any other

earlier or subsequent date. On and from the month of June, 1976, the petitioner became liable under the provisions of the Act to comply with

every requirement of the Act of making deposit or in making contributions with respect to its employees under the provisions of the Act. In case,

prior to this date, the petitioner had voluntarily submitted itself to the jurisdiction of Respondent No. 2 under the provisions of the Act, it cannot be

said that it was under any legal obligations to comply with the provisions of the Act of making deposits. It had its own scheme for the benefit of its employees and had made its contribution in the bank, which at the behest of the Inspector, Provident Fund was transferred as contribution under

the Act when cheque was handed over.

19. Damages in the impugned order were imposed for not making the requisite deposit of the dues within time for the period from January 1, 1975

to March 31, 1975 and for the period from April 1975 to Fabruary 1976, which period is the period for which, in view of what we have stated

above, provisions of the Act did not apply to the petitioner. The respondent in the impugned order nowhere recorded a finding about the date

since when the provisions of the Act would apply. In various communications, the respondent took a vague stand that the provisions of the Act had

provisionally been made applicable to the petitioner w.e.f. January 1, 1975 subject to the verification as to the number of its employees etc. This

would be clear, in case a reference is made to Annexure PC-2 dated October 4, 1975 sent by the respondent to the petitioner. In the first

paragraph of this communication, it has been observed by the respondent that :

..... Accordingly the said Act is applicable to your factory /establishment including all departmental / branches whether situated in the same place

or in different places w.e.f. January 1, 1975 provisionally subject to further verification of your records for the prior period.

20. In case the petitioner admittedly commenced production in the month of June/July, 1971, which fact is not disputed by the respondent, there is

no reason why the provisions of the Act would apply to it prior to the month of June/July, 1976. Applicability of the provisions of the Act to any

establishment is a sine-qua-non for taking a decision of imposing penalty by way of damages u/s 14-B of the Act in the absence of which the

impugned order stands vitiated. It was incumbent for the respondent before levying penalty to have first taken a decision as to from which date the

provisions of the Act would apply to the petitioner. In case, the petitioner was not bound to make any deposit or make any contribution towards the fund up to June, 1976, there is no reason why the petitioner would be liable to pay damages. In this view of the matter, we are satisfied that the

impugned order is liable to be quashed and set aside. No other point was urged or agitated.

21. Consequently, we allow the writ petition, quash and set aside the order Annexure PE-3 dated September 13, 1979 passed by the respondent

and direct that in case any payment in pursuance to the impugned order has been made in respect of the damages, the same shall be refunded by

the respondent to the petitioner within a period of four months along with interest at the rate of 9% per annum from the date of deposit till the date

of payment.

Costs made easy.