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(2012) 01 KL CK 0117

High Court Of Kerala

Case No: Writ Petition (C) No. 1399 of 2006

Harrisons Malayalam Ltd.		APPELLANT
	Vs	
The Regional Provident Commissioner and Others		RESPONDENT

Date of Decision: Jan. 4, 2012

Acts Referred:

- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 14B, 15, 17, 2
- Employees State Insurance (Amendment) Act, 1989 - Section 14B, 29, 32A, 75, 76
- Employees State Insurance (General) Regulations, 1950 - Regulation 31, 31C
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 1, 4

Citation: (2012) 1 KLJ 398

Hon'ble Judges: S. Siri Jagan, J

Bench: Single Bench

Advocate: E.K. Nandakumar and A.K. Jayasankar Nambiar, for the Appellant; S. Gopakumar Nair (SC), T.N. Girija (SC) and P. Parameswaran Nair (ASG), for the Respondent

Judgement

S. Siri Jagan, J.

These writ petitions arise under the Employees Provident Funds and Miscellaneous Provisions Act (hereinafter referred to as the Act) and the Employees Provident Funds Scheme (hereinafter referred to as the Scheme), where, in a series of cases on the question of imposition of damages u/s 14B of the Act, after remand by the Employees Provident Fund Appellate Tribunal (hereinafter referred to as the Tribunal), the original authorities have passed orders directly contradictory to the specific findings of the Tribunal on questions of law, which amounts to negation of the rule of law by the original adjudicating authorities. Facts are simple. The petitioner, a company registered under the Companies Act, who is engaged in the business of planting tea and rubber, delayed payment of contributions under the Act because of the financial difficulties, which plagued the plantation industry in

India, particularly in Kerala, a decade or so ago. Each Regional Provident Fund Commissioner (hereinafter referred to as the Commissioner), having jurisdiction over the particular plantation belonging to the petitioner-company, passed orders u/s 14B of the Act, imposing damages calculated as per the sliding table clause 32A of the Scheme, holding that financial difficulty is not a factor which can be taken into account for deciding the liability for and quantum of damages u/s 14B, since damages are liable to be imposed strictly in accordance with clause 32A of the Scheme. The petitioner filed appeals against the orders of the Commissioners before the Tribunal. In a common order in 28 appeals relating to different plantations of the petitioner, the Tribunal, following judgments of the Rajasthan and Kerala High Courts on the subject, after holding that financial difficulties are relevant considerations for determining the quantum of damages u/s 14B and that in case of mitigating circumstances the original authority can apply lesser rates than those prescribed under clause 32A of the Scheme, remanded the cases for fresh consideration by the original authorities, keeping in mind the principles laid down in the said judgments and- the observations made by the Tribunal. After remand, the original authorities again considered the matter and imposed the same damages earlier imposed as per the orders, which were set aside by the Tribunal, holding that the authority has no power to reduce or waive damages on the ground of financial difficulties of the employer and that damages are leviable as per the sliding table provided under paragraph 32A of the Scheme. That common order is under challenge in these five writ petitions.

2. At the outset, I am constrained to state that the attitude of the Commissioners are against the well-established canons of judicial principles and propriety on the question of precedents. A lower authority in the legal hierarchy is bound to comply with the decisions of the higher authority, that too, a judicial authority. The Tribunal is the appellate authority competent to set aside orders of the Commissioner and to direct the adjudicating authority as to how the orders are to be passed. The adjudicating authority is statutorily bound by the decision and direction of the Tribunal and the adjudicating authority has no manner of authority to pass orders contrary to the decision of the Tribunal, which exactly has been done in these cases, that too by two different Commissioners. If this is permitted, the result would be sheer anarchy. Although the impugned orders are liable to be set aside on that ground alone, I am inclined to take this opportunity to restate the law on the subject as to whether financial difficulty can be considered as a mitigating factor in the matter of imposition of damages u/s 14B of the Act and whether clause 32A of the Scheme is a structured formula of invariable application irrespective of all other considerations in all circumstances without reference to the reasons for the delay, for future guidance.

3. The standing counsel for the Provident Fund Organisation would seek to sustain the orders on the ground that as per the several Supreme Court decisions on the subject, financial difficulties are not a ground for mitigation of damages u/s 14B and

once delay is admitted, imposition of damages calculated as per the sliding table provided under paragraph 32A of the Scheme is automatic and the authority competent to impose damages has no discretion in the matter. Therefore, there cannot be any reduction in the damages taking into account factors like financial stringency is the contention raised.

4. I had earlier answered the first question in the affirmative and the second question in the negative, in my decision in Indian Telephone Industries Ltd. v. Asst. P.F. Commissioner and others, 2006(3) KLJ 698. Although that decision has been affirmed by a division bench of this Court in E.S.I. Corporation v. Premanand, 2007(2) KLT 666. while construing provisions of the Employees State Insurance Act, and the Employees State Insurance (General) Registrations, which are in pari materia with Section 14B of the Act and clause 32A of the Scheme, which division bench decision was followed by another division bench in Regional Director, E.S.I. Corporation and Another Vs. Managing Director, Qetcos Ltd., , some doubt still remains as to the continued applicability of the said decision as a precedent, in view of the fact that in W.A. No. 2182 of 2006, without either considering the sustainability of the law laid down therein or holding that the findings on law in Indian Telephone Industries Ltd.''s case (supra) are incorrect, on a purely technical ground, on the facts of that case, the appeal was allowed and the Central Board of Trustees of the Provident Fund Organisation was directed to reconsider the application for waiver of damages untrammelled by my observations in that decision, holding that having found that the application under the proviso to the section was rejected by an authority, which did not have jurisdiction, the writ court should have set aside the impugned order and directed the competent authority to decide the application in accordance with law. Since the Division Bench has not expressed any opinion as to the correctness or otherwise of the law laid down in my decision, I shall restate the law applicable on the subject in the light of the provisions of the Act and the Scheme as also the decisions on the subject.

5. The history of Section 14B of the Act has two stages. One, before its amendment by Amendment Act No. 33 of 1988 and the other, after the amendment. Originally, before amendment in 1988, Section 14-B of the Employees Provident Funds and Miscellaneous Provisions Act read thus in the statute book:

Power to recover damages:- Where an employer makes defaults in the payment of any contribution to the Fund (the Family Fund or the Insurance Fund) or in the transfer of accumulations required to be transferred by him under subsection (2) of Section 15 (for 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 such damages, not exceeding the amount of arrear, 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.

(emphasis supplied)

At the relevant time, the power u/s 14-B was a power to recover damages not exceeding an amount of arrears as the competent authority under the Act may think fit to impose. The scope of this provision was examined in detail by the Supreme Court of India in the decision of Organo Chemical Industries and Another Vs. Union of India (UOI) and Others, . In that decision, the Supreme Court held that the damages imposed under the said Section are both punitive and compensatory in nature. Subsequently, Section 14-B of the Act was amended by Act 33 of 1988. After amendment, the Section reads as follows:

14-B. Power to recover damages:- Where an employer makes default in the payment of any contribution to the Fund (the Family Pension Fund of 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.

(emphasis supplied)

The amended provision was brought into force with effect from 1-9-1991 by Notification No. SO 2259 dated 7-8-1991, published in the Gazette of India dated 24-8-1991. On a comparison of the pre-amended Section and the amended Section, it is to be noted that for the words "from the employer such damages not exceeding the amount of arrears as it may think fit to impose", the words "from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the scheme" were substituted. Along with this amendment, the legislature brought in an additional Section also in the Act, namely, Section 7Q,

providing for imposition of interest for delay in payment of amounts due under the Act. The said Section 7Q reads as follows:

7Q. Interest payable by the employer:- The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the Scheme on any amount due from turn under this Act from the date on which the amount has become so due till the date of its actual payment:

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.

I am of the opinion that by these amendments, the legislature consciously wanted to segregate the compensatory portion of the damages u/s 14-B, making Section 14-B purely punitive in nature leaving the compensatory part of the damages under the erstwhile Section 14B to be taken care of by the newly introduced Section 7Q. A careful reading of Organo Chemical''s case (supra) and the amendment together would certainly lead one to this interpretation only.

6. In Qrgano Chemical''s case (supra), after finding that Section 14-B as it existed then was both punitive and compensatory in nature, the Supreme Court held as follows in paragraph 24:

.....In assessing the damages, the Regional Provident Fund Commissioner is not only bound to take into account the loss to the beneficiaries but also the default by the employer in making his contributions, which occasions the infliction of damages. The learned Additional Solicitor General was fair enough to concede that the entire amount of damages awarded u/s 14-B, except for the amount relatable to administrative charges, must necessarily be transferred to the Employees'' Provident Fund and the Family Pension Fund. We hope that those charged with administering the Act will keep this in view while allocating the damages u/s 14-B of the Act to different heads. The employees would, of course, get damages commensurate with their loss i.e., the amount of interest on delayed payments: but the remaining amount should go to augment the ''Fund'' constituted u/s 5, for implementing the Schemes under the Act."

(emphasis supplied)

This would evidently mean that the compensatory part of the damages under the unamended Section 14-B damages was the amount of interest on delayed payments, which have to be credited to the individual account of the members of the Fund. Since the same has now been incorporated in Section 7Q of the Act, I am of opinion that the legislature has consciously bifurcated the punitive and compensatory parts of damages under the unamended Section 14-B confining Section 14-B to the punitive part alone, by making it clear in the amended Section that the damages u/s 14-B is by way of penalty and transferring the provision for interest on delayed payments to the newly added Section 7Q.

7. Therefore, the irresistible conclusion after the amendment of the provisions is that Section 14-B, as it now stands, is purely punitive in nature. When Section 14-B is by way of penalty alone, then the 1 "respondent has to impose damages u/s 14-B strictly in accordance with the principles for imposing penalty for non-compliance with a statutory prescription, which is quasi-criminal in nature. The Supreme Court had, as early as in 1970, laid down guidelines in the matter of imposing penalty for failure to carry out a statutory obligation, in the decision of Hindustan Steel Ltd. Vs. State of Orissa, . In the same, the Supreme Court held as follows:

.....An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

Under Section 14-B also, which when considered purely as a penalty provision for failure to carry out the statutory obligations under the Act, the 1st respondent ought to have imposed damages u/s 14-B, as if in a quasi-criminal proceedings, bearing in mind the principles laid down in the above decision of the Supreme Court, i.e., by ascertaining whether the petitioner either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or in disregard of its obligation in the matter of payment of contributions under the Act and Scheme in time. If damages could have been imposed only on satisfying the above conditions, then certainly the 1st respondent ought to have looked into the question as to whether there was any conscious failure on the part of the petitioner-Company in delaying payment of contributions under the Act in time. In considering that question, the 1st respondent has to certainly appreciate the background in which the delay in payment of contributions occurred. If that be so, the facts that the Company was in dire financial straits and the wages of the employees, from which the employees'' contribution had to be deducted and paid, had not been paid to the workmen, for whose benefit the Act itself was enacted, were relevant considerations which had to be taken into account by the 1st respondent while quantifying the damages u/s 14-B. Of course, the Learned Counsel for the 1st respondent would point out that the Supreme Court has not chosen to note any such departure in the position of the law relating to the subject from the language of the amended Section, in decisions rendered subsequent to the amendment, on the question of damages u/s 14-B. The decisions referred to by the 1st respondent are the decisions in Regional Provident

Fund Commissioner Vs. S.D. College, Hoshiarpur and others, and M/s. Hindustan Times Ltd., v. Union of India & Ors, AIR 1998 SC 688. A perusal of both those decisions would reveal that both related to imposition of damages under the unamended Section 14-B, the period of contributions in those decisions being March, 1982 to February, 1988 in S.D. College''s case (supra) and for the periods July 1965, October 1965, December 1965, January 1966, March 1966, August 1966, July 1967, August 1967, May 1968 and July 1967 to November 1968 in Hindustan Times'' case(supra). Therefore, those decisions cannot be taken to have considered the effect of the amendment to Section 14-B, on the principles regarding imposition of damages for delay in payment of contributions under the Act and Scheme. Hence, I do not find any merit in the contentions of the counsel for the 1st respondent based on those decisions on the scope of the amended Section 14-B and the new Section 7Q.

8. While considering the question as to whether there was a conscious failure on the part of the petitioner in payment of contributions, the applicable provisions of the Scheme would be relevant. The relevant portion of Clause 30 of the Employees Provident Fund Scheme reads thus:

30. Payment of contributions: (1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer''s contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member''s contribution).

(2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member''s contribution) and shall pay to the principal employer the amount of member''s contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer''s contribution) and also administrative charges.

(3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges."

(emphasis supplied)

Clause 31 of the Scheme stipulates that notwithstanding any contract to the contrary, the employer shall not be entitled to deduct the employer''s contribution from the wages of a member or otherwise, to recover it from him. Clause 32 of the Scheme stipulates the mode of recovery of the employees'' share of the contribution. It would be advantageous to extract the said clause here:

32. Recovery of a member''s share of contribution:-

The amount of a member''s contribution paid by the employer or a contractor shall not with standing the provisions in this Scheme or any law for the time being in force or any contract to the contrary, be recoverable by means of deduction from the wages of the member and not otherwise:

Provided that no such deduction may be made from any wage other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable:

Provided further that the employer or a contractor shall be entitled to recover the employee''s share from a wage other than that which is paid in respect of the period for which the contribution has been paid or is payable where the employee has in writing given a false declaration at the time of joining service with the said employer or a contractor that he was not already a member of the Fund:

Provided further that where no such deduction has been made on account of an accidental mistake or a clerical error, such deduction may, with the consent in writing of the Inspector be made from the subsequent wages.

(2) Deduction made from the wages of a member paid on daily, weekly or fortnightly basis should be totalled up to indicate the monthly deductions.

(3) Any sum deducted by an employer or the contractor from the wages of an employee under this Scheme shall be deemed to have been entrusted to him for the purpose of paving the contribution in respect of which it was deducted.

(emphasis supplied)

Clause 38 of the Scheme again gives the mode of payment of contributions, which reads thus:

38. Mode of payment of contributions:- (1) The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employees'' contribution from his wages which together with his own contribution as well as an administrative charge of such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, as the Central Government may fix. He shall within fifteen days of the close of every month pay the same to the Fund by separate bank drafts or cheques on account of contributions and administrative charge:

Provided that if the payment is made by a cheque, it should be drawn only on the local bank of the place in which deposits are made.

Provided further that where there is no branch of the Reserve Bank or the State Bank of India at the station where the factory or other establishment is situated, the employer shall pay to the Fund the amount mentioned above by means of Reserve

Bank of India [Government Drafts at par] separately on account of contributions and administrative charge

(2) The employer shall forward to the Commissioner within twenty-five days of close of the month, a monthly abstract in such form as the Commissioner may specify showing the aggregate amount of recoveries made from the wages of all the members and the aggregate amount contributed by the employer in respect of all such members for the month.

Provided that an employer shall send a Nil return, if no such recoveries have been made from the employees:

Provided further that in the case of any such employee who has become a member of the Pension Funds under the employees'' Pension Scheme 1995, the aforesaid Form shall also contain such particulars as are necessary to comply with the requirements of that Scheme.

(3) The employer shall send to the Commissioner within one month of the close of the period of currency, a consolidated Annual Contribution Statement in Form 6-A showing the total amount of recoveries made during the period of currency from the wages of each member and the total amount contributed by the employer in respect of each such member for the said period. The employer shall maintain on his record duplicate copies of the aforesaid monthly abstract and consolidated annual contribution statement for production at the time of inspection by the Inspector.

(emphasis supplied)

From these provisions, an interpretation that the liability to pay contributions, at least the employees'' share, is by deduction from the wages of the employees and arises only at the time of payment of wages cannot be said to be far-fetched. However, in this connection, I have to consider a Division Bench decision of this Court in Calicut Modern Spinning & Weaving Mills Ltd, v. Regional Provident Fund Commissioner, 1982 KLT 303, wherein the Division Bench held that the employer is bound to pay contributions under the Act every month voluntarily irrespective of the fact that wages have been paid or not. I have my own doubts about the correctness of that decision. That decision lays stress on the words "in the first instance" occurring in clause 30 to hold that the employer is liable to pay contributions even if no wages are paid. But I feel that those words are used in the context of contractor''s employees to denote that even in the case of contractor''s employees, the principal employer has to pay the contribution in the first instance. But, being a Division Bench decision, I am bound by the same. However, since in that decision, the Division Bench themselves had specifically held that although even in cases of lock-outs, strikes etc., failure to make contribution resulting in default will have to be visited by damages u/s 14-B, the authority can consider the question of mitigation of damages having regard to the attendant circumstances that had resulted in the

delay, I need not delve into that question any further, since the same is in consonance with the view I have taken, in the sense that for deciding the quantum damages u/s 14-B, the reasons for non-remittance have to be considered to decide whether there was any conscious failure on the part of the petitioner-Company in non-payment of contributions under the Act in time. Going by that decision itself, the 1st respondent is bound to look into the circumstances under which the delay in non-payment of contribution occurred and it would go only to the extent that while considering that question, the 1st respondent is bound to consider the above provisions in the Scheme regarding the point of time when contributions are to be made. In this connection, it must be noted that the Division Bench was dealing a case relating to a period prior to the amendment, meaning thereby that the Division Bench held that even under the unamended Section, the reasons for the delay is relevant for deciding the quantum of damages. That being so, the fact that because of the financial difficulties, the petitioner had not even paid wages to the employees, which, had caused the delay in payment of contributions, is certainly a mitigating circumstance which should have been taken into account by the 1st respondent, while quantifying the damages u/s 14-B as a penalty for delay in payment, keeping in mind the principles of imposing penalty as explained above, based on the Supreme Court decision in Hindustan Steel Ltd.''s case (supra).

9. Likewise, in the context of deciding the question whether there is any contumacious conduct on the part of the petitioner in delaying payment of contributions, the past and future conduct of the petitioner in the matter of payment of contributions is certainly a very relevant consideration. The facts that for the past the petitioner was prompt in payment of contributions and for the current periods the petitioner is prompt in payment are certainly factors which should go into the question of quantification of damages u/s 14B. The decision of the Commissioner that ''the track record of the establishment in making payments in time in the previous periods may not absolve the employer from levying damages for the defaulted period'', therefore, is incorrect.

10. In this connection, it would be fruitful to advert to the legal position as laid down by this Court and the Supreme Court, in respect of payment of damages under a similar legislation viz. the Employees State Insurance Act, where exactly identical amendments were made to exactly identical provisions regarding imposition of damages. Section 85B of the E.S.I. Act contains the provision for imposition of damages for delayed payment of contributions. Before its amendment that Section read thus:

85B: Power to recover damages:- (1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer such damages not exceeding the amount of arrears as may think fit to impose:

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

(emphasis supplied)

Section 85B was amended by Act 29 of 1989, with effect from 1-1-1992 and after amendment, the Section reads thus:

85-B. Power to recover damages:- Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations:

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

Provided further that the Corporation may reduce or waive the damages recoverable under this section in relation to an establishment which is a sick industrial company 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 regulations.

(2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue or u/s 45C to section 45-1.

(emphasis supplied)

The Employees State Insurance (General) Regulations, 1950 contains a similar provision like clause 32A of Employees Provident Fund Scheme. The said regulation namely, 31C reads thus:

3C. Damages or contributions or any other amount due, but not paid in time:- If an employer fails to pay contributions within the periods specified under regulation 31, or any other amount payable under the Act, the corporation may recover damages, not exceeding the rates mentioned below, by way of penalty:

Period of delay	Maximum rate of damages in percent per annum of the amount due.
(i) Less than 2 months	5%
(ii) 2 months and above but less than 4 month	10%

(iii) 4 months and above but less than 6 months	15%
(iv) 6 months and above	25%

Provided that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may :-

(a) in case of a change of management including transfer of undertaking(s) to workers'' Co-operative (s) or in case of merger of amalgamation of sick industrial company with a healthy company, completely waive the damages levied or leviable;

(b) in other cases, depending on its merits, waive upto 50 per cent damages levied or leviable;

(c) in exceptional hard cases, waive either totally or partially the damages levied or leviable.

11. A Division Bench of this Court has in Regional Director, E.S.I. Corporation v. Sakthi Tile Works, 1988 (2) KLT 280, came to conclusions identical to those I have come to, which according to me, is on the basis of the principles laid down by the Supreme Court in Hindustan Steel''s case (supra), although the same does not refer to the said decision, but uses identical expressions used in that decision. The Division Bench, held thus:

It was not disputed that from any levy of damages it is open to the employer to take up the matter before the Insurance Court under S. 75 read with S.78 of the Act. The only question focused was that the Insurance Court cannot interfere with the quantum of damages. A mere look at S. 85B will show that even where the employer fails to pay the amounts due in respect of any contribution payable under the Act, it is not obligatory o the Corporation to levy or recover damages. The power to levy damages is discretionary. The section has only stated, the maximum amount that can be so recovered. The power to levy and recover damages provided in S. 85B of the Act is in the nature of a quasi-penal provision. An order, levying damages for failure to pay the amount due in respect of any contribution payable under the Act, is a quasi judicial proceeding. The proviso to S. 85B itself indicates that before recovering such damages, the employer should be given a reasonable opportunity of being heard. It postulates that there should be an adjudication in the matter. Since the failure to carry out the statutory obligation should be adjudicated by a quasi judicial enquiry, and the levy of damages is quasi penal in character, we are of the view that such damages will not ordinarily be imposed unless the party obliged to pay the amount due, acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its

obligation. The mere fact that the Corporation is empowered to recover damages does not mean that the Corporation can act mechanically and without taking into account the facts and circumstances of each case. It is to be noted that the statutory provision does not prescribe any minimum to be recovered as damages. What is provided is the maximum that can be recovered. We are of the view, that since the opportunity that is provided before recovering the damages should be effective and meaningful, the authority empowered to levy damages should have the discretion either to levy the damages or to dispense with the levy of the damages. The Corporation will not be justified in levying the damages in case where the employer, or the person, who is bound to pay the amount in respect of the contribution payable in this regard, is able to offer sufficient or cogent explanation for non-remittance, or in case where there is only a technical or venial breach of the provision of the Act, or there exists bona fide circumstances, which will point out that there was no deliberate omission on the part of the employer. In this perspective, we hold that the Insurance Court, which is a proper forum prescribed by the Act to adjudicate as to whether the order or proceeding initiated by the Corporation to recover damages is justified, can evaluate the entire matter, and if it is satisfied that there are extenuating circumstances, it can dispense with the recovery of damages, or delete or reduce the quantum of damages levied or afford such other relief, which in its opinion, is deserved in the circumstances. Delivering the judgment of the Bench, Subramonian Poti, J. in C.L. Anand v. Regional Director, (1980 KIT 139 : 1980 Lab I.C. 90) stated thus:

Being a provision which confers a power to impose penalty, S. 85(B) of the Employees'' State Insurance Act must be taken to confer a discretion on the Regional Director in the matter of determining the quantum. But, that discretion calls for objective exercise within the limit pointed out in that Section and such exercise must be apparent in the order. We have also indicated that it is necessary to find guilty conduct on the part of a parity to justify the imposition of damages and the quantum of guilt or the gravity of misconduct should naturally determine the gravity of the punishment. Therefore while one would not expect the order of the Regional director to state with precision how exactly the damages have been assessed, it must be possible to see from the order the presence of punitive circumstance justifying the imposition of damages and the gravity of the punitive element. That would be necessary to appreciate whether the damages imposed could be said to be reasonable.....If the damages is imposed as merely related to the delay without reference to the punitive element, that may not be justifiable.

We fully concur with the above statement of the law. In I.C. 20 of 1986 the Insurance Court held that the period of delay in remitting the amount varies from 11 days to 473 days and mechanical levy of 19 per cent damages for all the periods is irrational and unfair. So holding, the Insurance Court directed the Corporation to fix damages at the rate of 10 per cent for all periods involved in the case. Similarly, in I.C.42 of 1986 the Insurance Court adverted to the fact that the employer (applicant) is a

Co-operative Society registered under the Co-operative Societies Act and the Government has register it as a sick unit. In view of the matter, interests of justice require a reduction of damages and directed the Society to pay 10 per cent of the contribution as damages. We are of the view that the direction given by the Insurance Court to limit the percentage of damages in both the cases at 10 per cent is well justified and do not call for any interference. The Insurance Court has acted in accordance with law. At any rate we are of the view, that no substantial question of law is involved in both these appeals."

(emphasis supplied)

This decision was followed by another Division Bench in E.S.I. Corporation v. Hindustan Tile Works, 1992 (2) KLT 851 holding that unless, by not paying contributions in time, employers have acted either deliberately or in defiance of law or are guilty of contumacious or dishonest conduct and acted in disregard of its obligation, penalty cannot be imposed by way of damages u/s 85B. A still later Division Bench of this Court, in E.S.I. Corporation v. Bhaskaran, 1998 (1) KLT SN 28 Case No. 24, held that since the failure to carry out the statutory obligation should be adjudicated by a quasi-judicial enquiry and the levy of penalty is quasi criminal in character, such damages will not ordinarily be imposed unless the party obliged to pay the amount due acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation. It is significant to note that in all these decisions, the Division Benches use exactly the very same expressions used in the decision of the Supreme Court in Hindustan Steel''s case (supra), from which it is abundantly clear that all the Division Benches were of the unanimous opinion that the imposition of damages u/s 85B of the E.S.I. Act, regardless of the change in the wording before and after amendment was in the nature of penalty and therefore the principles enunciated by the Supreme Court in that decision regarding imposition of penalty, squarely apply to recovery of damages u/s 85B. Since Section 14B of the E.P.F. & MP. Act and Section 85B of the E.S.I. Act are in pari materia, those principles should be equally applicable to imposition of damages under the E.P.F. & M.P. Act also.

12. I have to also dispose of the contention of the counsel for the 1st respondent that in view of the words " as may be specified in the Scheme" now occurring in Section 14-B and the new clause 32A of the Employees Provident Funds Scheme, the 1st respondent has no discretion in the matter, except to apply the formula in clause 32A for quantification of damages also. Clause 32A reads thus: "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 subsection (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 u/s 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:-

Period of Default	Rates of damages (% of arrears per annum)
(a) Less than two months	17
(b) Two months and above But less than four months.	22
(c) Four months and above But less than six months.	27
(d) Six months and above	37"

I think that the view taken by the 1st respondent is a myopic view of the said provisions. 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 based on any strait jacketed formula. At the best, clause 32A would only serve as a guideline. In fact, the words used in clause 32A is 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 takes into account only the period of delay, but does not take into account the number of instances of delays, which also may be a factor in favour of imposition of higher damages. Further, when Section 14-B envisages maximum damages equal to the amount of arrears, the maximum envisaged by clause 32A is only 37%. Therefore, Clause 32A is purely in the nature of guidelines and not a structured formula of invariable application in all circumstances without reference to the reasons for delay.

13. After referring to all the said cases, a Division Bench of this Court, in which I was also a party, came to the same conclusion in Premanandan''s case (supra). In that case, an identical contention as in this case was raised on the basis of Regulation 31C of the Employees State Insurance (General) Regulations, 1950, which is in parimateria with clause 32A of the Employees Provident Fund Scheme. In that decision, the Division Bench approved the principles laid down "by me in Indian Telephone Industries Ltd.''s case (supra) and held thus:

Counsel for the appellants would submit that since u/s 85-B, the penalty to be imposed as damages for delayed payment of contribution is as specified in the

regulations, and Regulation 31C specifically, lays down the percentage of damages to be imposed on the basis of the period of delay, all what the Corporation is bound to take into account is the extent of delay for deciding the damages imposed. That also may not be the correct interpretation of the provisions. At the most, Regulation 31C would only be guidelines in the matter of imposition of damages. Further, Regulation 31C also specifically states not exceeding the rates mentioned below, which shows that the percentage fixed there is not absolute. This is exemplified by the fact that in the proviso to Regulation 31C in the case of a sick industrial company, separate guidelines have been prescribed for imposition of damages, which also would go to show that the discretion vested in the Corporation u/s 85-B read with Regulation 31C has to be exercised judicially. The same being by way of penalty, the Corporation is bound to adhere to the principles for imposition of penalty as laid down in Hindustan Steel Ltd.''s case.

14. In the decision of Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, , the Supreme Court also laid down exactly the very same principles, while interpreting Regulation 31C, in paragraphs 11 to 21, thus:

11. Section 85-B of the Act empowers the Corporation to recover damages in the event an employer fails to make the payment of the amount due in respect of contribution; subject, however, to the condition that the amount thereof would not exceed the amount of arrears as may be specified in the Regulations. Proviso appended thereto incorporates the principles of ''Natural Justice''.

12. Obligation on the part of the employer to deposit the contributions of both the ''employer'' and the ''employee'' is not in dispute. What is in dispute is as to whether the amount of damages specified in Regulation 31C of the Regulation is imperative in character or not. It is a well known principle of law that a subordinate legislation must conform to the provisions of the Legislative Act. Section 85-B of the Act provides for an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages in the manner prescribed under the regulations.

13. The statutory liability of the employer is not in dispute. An employee being required to be compulsorily insured, the employer is bound to make his part of the contribution. An employee is also bound to make his contribution under the Act. But the same does not mean that levy of damages in all situations would be imperative.

14. Section 85-B of the Act uses the words ''may recover''. Levy of damages thereunder is by way of penalty. The Legislature limited the jurisdiction of the authority to levy penalty, i.e., not exceeding the amount of arrears. Regulation 31C of the Regulations, therefore, in our opinion, must be construed keeping in view the language used in the Legislative Act and not de hors the same.

15. Our attention, however, has been drawn to a decision of this Court in M/s. Hindustan Times Limited Vs. Union of India and Others, wherein it has been laid

down:

From the aforesaid decisions, the following principles can he summarized:

The authority u/s 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 realization 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 u/s 14-B."

16. It was, however, opined that in certain situations, the employer can claim the benefit of ''irretrievable prejudice'' in case a demand for damages is made after several years. In that case, this Court was concerned, inter alia, with a question in regard to the effect of levy of damages after a long time. The question which, inter alia, arose for consideration therein was as to whether suo moto revisional jurisdiction could be exercised by the revisional authority at any time it desires. The Court made a distinction between the cases involving ''recovery of money'' from an employer who had withheld the contributions made by the workmen in trust and other cases. It was in that situation opined supra. We are not concerned with such a situation herein.

17. 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, under the statute is held to be mandatory in character.

18. In M/s. Prestolite of India Ltd. Vs. The Regional Director and another, , this Court rejected a contention raised by the Regional Director of Employees Insurance that under the Employee''s State Insurance General Regulations guidelines have been indicated showing as to how damages for delayed payment are to be imposed and since such guidelines have been followed, no exception should be taken thereto made to the impugned adjudication, stating:

Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act

mechanically in applying the uppermost limit of the table. In the instant case, it appears to us that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment were not to be accepted. There is no indication as to why the imposition of damages at the rate specified in the order was required to be made. Simply because the appellant did not appear in person and produce materials to support the objections, the employee''s case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits.

19. In Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another, , this Court stated:

40. Thus, it appears that there is distinct line of authorities which clearly lays down that in considering a question of penalty, mens rea is not a relevant consideration. Even assuming that when the statute says that one is liable for penalty if one furnishes inaccurate particulars, it may or may not by itself be held to be enough if the particulars furnished are found to be inaccurate is anything more needed but the question would still be as to whether reliance placed on some valuation of an approved valuer and, therefore, the furnishing of inaccurate particulars was not deliberate, meaning thereby that an element of mens rea is needed before penalty can be imposed, should have received serious consideration in the light of a large number of decisions of this Court.

20. We agree with the said view as also for them additional reason that the subordinate legislation cannot override the principal legislative provisions.

The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with no discretion. The legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or imposition of penalty as also computation of the quantumthereof became a foregone conclusion. Ordinarily, even such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance of the principles of natural justice is necessary thereunder.

21. Existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof."

Insofar as the statutory provisions in both statutes are in pari materia, the very same principles apply in the case of interpreting clause 32A of the Employees Provident Fund Scheme also. As such Clause 32A is only a guideline and not a rigid formula to be applied uniformly in all cases of delay in payment of contributions, but shall be applied objectively taking into account the reasons for the delay pleaded by the defaulter also and in appropriate cases lesser amounts than what has been prescribed in clause 32A shall be imposed.

15. Therefore, I am of opinion that merely because there is delay in payment of contributions, liability to pay damages does not arise automatically, but the same shall be decided by applying mind objectively to the merits of each case and not by resorting to mere arithmetic calculation of damages as per a structured formula. Even though liability to pay contributions is statutory, to hold that delay automatically attracts a certain percentage as damages would be too rigid a way of construing the relevant provisions of the Act and the Scheme, especially since the imposition of damages is punitive in nature. There must be application of mind taking into account the reasons for delay and whether the delay could have been avoided by ordinary diligence by the employer. For this, one cannot with any amount of certainty lay down the circumstances, which would mitigate the damages and which would not. The same would differ from case to case, which requires exercise of judicial discretion by the authority imposing damages, by objective application of mind to the circumstances pleaded and proved by the employer.

16. Now let us examine how the two Commissioners have dealt with the question of imposition of damages in these cases. From the beginning the petitioner claimed that the delay in payment of the contributions was on account of financial crisis faced by the company. Two different jurisdictional Commissioners imposed damages on the petitioner applying clause 32A, holding that financial crisis is not a ground for reducing damages u/s 14B. In a batch of appeals filed by the petitioner in respect of its different tea and rubber estates, the Appellate Tribunal, by a common order held thus:

I have considered the rival contentions of both the parties and perused the above judgments relied upon by the parties. There is no doubt that if there is a delay in remittance of PF dues the damages are liable to be levied and further that financial crisis cannot be made a ground to escape the liability of the damages u/s 14B of the Act. Merely because an establishments was suffering from financial crisis at the relevant time would not be justifiable ground for waiving the damages and even in such an eventuality the damages are liable to be imposed. However, at the same time financial difficulty can be taken a mitigating factor while assessing the quantum of damages in view of the judgments rendered by the Hon''ble Rajasthan High Court and Hon''ble Kerala High Court referred herein above.

I do not find force in the contention of the Learned Counsel for the respondent that if RPFC/APFC desired to impose damages, he has to apply rates as prescribed under para 32A of the Scheme irrespective of the mitigating circumstances brought forward by an erring establishment. In RPC v. S.D. College 1997(II) LLJ 69 Hon''ble Apex Court has held that authority cannot completely waive the damages but reduce the same. u/s 14B of the Act also authority has no power to waive the damages but it has discretion to impose damages depending upon facts and circumstances of each case not exceeding the defaulted amount. Even the total amount assessed by applying rates as prescribed under para 32A cannot exceed the

defaulted amount in view of substantive provisions of Section 14B of the Act. Meaning thereby that in such an eventuality a flexible approach has to be adopted. Even otherwise if rates are applied mechanically irrespective of mitigating circumstances then whole purpose of proceedings u/s 14B of the Act being quasi-judicial proceedings would be lost. Keeping in mind the above-mentioned judgments I am of the view that in normal circumstances RPFC/APFC has no discretion but to apply the rates as prescribed under para 32A of the Scheme, but in case mitigating circumstances are disclosed which caused delay in PF remittance due to the reasons beyond control of an erring establishment then he can apply lesser rates then prescribed under para 32A of the Scheme, while assessing the damages.

Accordingly, the impugned orders involved in the above appeals are set aside and the matters are remanded back to the respondents for passing fresh order(s) u/s 14B of the Act keeping in mind the principles as laid down in the aforesaid judgments and the observations made by this Tribunal in this order. Opportunity of hearing be also afforded to the appellant. Appellant shall appear before RPFC, Kottayam on 15-9-2005, RPFC, Calicut on 19-9-2005, RPFC, Kozhikode on 19-9-2005, RPFC, Kochi on 22-9-2005 and RPFC, Thiruvananthapuram on 26-9-2005 and also on subsequent dates as may be fixed by him. Appeal is disposed of in the above terms. Appeal files be consigned to record room and copy of this order be sent to all the respective RPFC and the appellant and a copy of this order be also kept in each case file.

(Underlining supplied)

17. After remand, the petitioner filed statements in all the cases, where they explained the delay thus:

Since 1998-99, the Plantation Industry has been experiencing severe and unprecedented financial crisis. On account of the financial crisis, the company was incurring huge losses since 1999-2000. Since then there has been a serious erosion of the financial status and economic viability of plantation industry in general threatening their very survival. Almost all the plantation companies in South India have been incurring heavy losses. The situation is the direct result of the policies of economic reform and globalization of trade pursued by the Central Government. These are reasons beyond the control of the establishment and the company is in no way responsible for the situation.

Due to the continuing adverse situation of the magnitude never before experienced by the industry, several estates belonging to other companies were forced to shut down their operations or abandon their business. In some of the estates, the workers took law in their own hands and were collecting and selling crop on their own unauthorizedly. Many of the estates did not pay wages to the employees for months together, leave alone the statutory payments including PF contributions.

During this period, our company was making all efforts to keep the operations going and reduce the hardships to the employees numbering around 25000 and their dependents to the minimum. In its attempt to keep the business going without interruption, the company was forced to defer statutory payments, including PF contributions. The delay was neither willful nor deliberate and was occasional due to circumstances beyond the control of the establishment. The financial position of the company with effect from the financial year 1999-2000 is as follows:

Financial Year	Net loss for the year	Accumulated loss
1999-2000	Rs. 15.82crores	Rs. 5.83 crores
2000-2001	Rs. 17.89crores	Rs. 23.72 crores
2001-2002	Rs. 15.90crores	Rs. 39.62crores
2002-2003	Rs. 9.92crores	Rs. 49.54crores

It is submitted that the damages proposed for the period in question is exorbitant, unreasonable and unjustified and if imposed, will result in further erosion of the financial status of the company. It may not be out of place to mention that right from inception, the company, which has been in existence for more than 100 years, has an excellent track record in making statutory remittances including PF contributions. The company has always been making remittances promptly and there has never been any delay in payment of contributions to the fund. Although there has been improvement in the prices of rubber over the last two years, the tea industry continues to suffer on account of unremunerative prices and low crop. Although the company is still carrying huge accumulated losses, with the available resources, the entire arrears towards PF contributions have been wiped out and at present contributions are being remitted on time.

In the circumstances mentioned above, it is prayed that the damages proposed may be waived.

18. After considering the same, the Commissioner, Kottayam, (Sri. Edmund Joseph) held thus in paragraphs 8 and 11:

According to Section 14B and paragraph 32(A) the authority levying damages has to levy damages as per the slab rates laid down under paragraph 32(A) of the Scheme, based on the period of delay and no relaxation in the case of financial constraints

have been mentioned in the above provisions. The track record of the establishment in making payments in time in previous periods may not absolve the employer from levying damages for the defaulted period. The contention that the rates of damages levied are exorbitant and unjustifiable cannot be accepted, since the authority has levied damages strictly as per Section 14B of the Act and according to the slab rates mentioned in paragraph 32(A) of the Scheme, which is mandatory and within the powers of the levying authority.

xx xx xx

Heard the employer''s representative and perused the file. After careful consideration of all the aspects of the case presented before me and perusal of the file, I am of the firm view that damages are leviable by virtue of Section 14B of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952, and the rates at which damages are leviable shall be as per the sliding table provided tinder paragraph 32(A) of the Employees'' Provident Fund Scheme. 1952. The Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 is a social welfare legislation and the successful working of the social security scheme depends on the prompt compliance made by the employer. The damages are leviable as a measure of penalty for the failure to prompt compliance in the matter of remittance of dues under the Act/Schemes. Therefore, the authority has no power to reduce or waive the damages on the ground of financial difficulties of the employer. Therefore after considering all the arguments raised by the employer as well as taking into consideration the cited court cases, the authority has come to the conclusion that damages earlier levied may not be reduced or waived by the levying authority."
(Underlining supplied)

19. The Commissioner, Kochi (Smt. Renu Ramachandran), in her order, held thus:

I have examined the above contentions of the establishment and have gone through the relevant records of the office. The judgment of the Tribunal and the submission of the establishment in their statement dt. 22.9.2005 have also been perused. There is absolutely no dispute on the default committed by the establishment. The point raised by the establishment is that since the delay is due to compelling circumsrtances, they need to be exempted from damages. The issue that has come up for consideration in this case is whether financial crisis of an establishment can be taken as the mitigating factor for reducing the damages and whether in such circumstances, the authority prescribed under Sec. 14-B of the Act has any discretionary power or can waive the damages.

The EPF & MP Act and the Scheme framed there under is very specific about levy of damages and quantum of damages. Upon a simple reading of Section 14B and the related Scheme paragraphs, one can infer that any delay in remittance of the statutory dues is invariably followed by the consequences of levy of damages irrespective of the reason for delay. The only exception is in the case of

establishments falling within the ambit of 2nd proviso to Section 141B "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 (7 of 1986), subject to such terms and conditions as may be specified in the Scheme."

Section 14B providing for damages for default, attracts strict liability and the employer becomes liable for damages the moment he makes a default. The Officer authorised to levy damages has to follow the Act and Schemed strictly. There is no provisions either in the Act or in the Scheme by virtue of which 14B authority can reduce the quantum of damages, other than that provided under 2nd proviso to Section 14B of the Act. There is no doubt on the fact that prior to 1991 the Commissioner had discretion in the matter of levy of damages depending on the merit of the case. The amendment had come into force w.e.f. 1.9.1991. It is apparent that by the amended provisions of Sec. 14B of EPF & MP Act, 1952, read with para 32A of the Scheme w.e.f. 1.9.1991, the Legislature has manifested its intention to divest the authority under the Act of Power to impose penalty according to their discretion. It has mandated the assessing officer to levy damages as provided u/s 14-B of the Act read with Para 32-A of the Employees Provident Fund Scheme, 1952, Para 5 of the Employees'' Pension Scheme and Para 8-A of the Employees'' Deposit Linked Insurance Scheme, 1976 not withstanding the fact that delay or default had occurred earlier. Framing of the table of damages by the Government is a statutory measure for the guidance of the officers of the Government who act under Sec. 14B. Under the table, the amount of damages is related to the delay in payment of contribution. This method of determining damages is entirely reasonable and it shows that no officer acting under Sec. 14B can act arbitrarily but must follow this reasonable guidelines made by the government. The said paragraphs clearly specify the quantum of damages and Para 32-B prescribes without any ambiguity percentage of waiver/reduction in damages which can be allowed in respect of establishments falling within the ambit of 2nd proviso to Section 14-B of the Act. Apart from this there is no provision either in the Act or in the Scheme for waiver/reduction of damages. RPFC/APFC is under obligation to levy damages strictly according to the above provisions of the Act and Scheme if any default occurs in payment of statutory dues. They are not empowered either to waive or to reduced the quantum of damages from the rates specified in the Scheme. It could be seen from the records that this authority has not resorted to levy of exemplary or extraordinary damages. The quantum of damages is strictly in accordance with rates specified in the Schemes.

The aforesaid facts have been upheld by various High Courts. The Division Bench decision of the Hon''ble High Court of Bombay in Union of India v. Super Processors (1993 (1) CLR 457), Andrew Yule and Co. v. Regional Provident Fund Commissioner,

2001(1) LLJ 1385 (Cal), Swastik Woolens, Ludhiana v. Presiding Officer, Employees'' Appellate Tribunal, 2002 III CLR 999; 2003 (1) LLJ 241 (P&H) DB as well as Navnital K. Shah v. Union of India, 2004 (100) FIR 146 p. 155 (Bom.) has clearly ruled that the amended scheme has to be followed while imposing the damages.

The Hon''ble High Court of Calcutta in Atal Tea Co. and or v. Regional Provident Fund Commissioner, (1997 LIC 1207) is also of the same opinion.

Both before and after the amendment it has been optional with RPFC to levy and recover damages by way of penalty. Prior to the amendment, he had the power to levy the damages at the rate this maximum of which was fixed was 100%. It did not however prescribe any minim rate; He was free to impose damages at which rate as he thought fit. After the amendment his power to levy damages up to the maximum rate of 100% appears to have been curtailed. He is not to follow the sliding table incorporated in Para 32A of the Scheme for applying the rates for levy of damages according to the periods of default specified therein even though the liability or the right to enforce the liability for such damages had already accrued long before the amendment was effected. By this amendment, the provisions of section 14B, so far as it conferred the discretionary power to determine the rates at which damages would have to be levied, can be said to have been repealed by implication."

Under the above circumstances, even if there is financial difficulties as submitted by the employer, Damages are to be levied at the Scheme rates as applicable.

The Rajasthan High Court judgment referred by the Tribunal is incorrect as damages levied for the period involved in the said case was prior to 1.1.1991 when there was discretion upon the authority. It is reiterated that the discretion enjoyed by the authority in the matter of levy of damages has been taken away and replaced by a table prescribing the rates of penal damages to be levied in relation to the period of delay for determining the quantum of damages (the sliding table as stipulated in Para 32A of EPF Scheme). Even the matter relevant to waiver of damages has been specifically mentioned in the Section 14B vide proviso 2. The power to waive or reduce the damages is vested exclusively with the Central Board of Trustees of Employees Provident Fund Organization, which is the apex-governing body of the Organisation. The Board is a body wherein employers'' representatives are also adequately included as well as representatives of Employees'' Unions and the Central and State Governments. The establishment is at liberty to move an application before the Central Board of Trustees provided it falls within the ambit of 2nd proviso to Section 14-B of the Act.

While dealing with the question whether financial difficulties of establishment can be a mitigating factor for reducing damages, we will have to see the ruling of apex Court in the case of Organo Chemicals (1979 (002) LIJ 0416 SC). The apex Court has observed that "Even if it is assumed that there was a loss as claimed it does not justify the delay in deposit of Provident Fund money which is an unqualified

statutory obligation and cannot be allowed to be linked with the financial position of the establishment, over different points of time." The Hon''ble Supreme Court of India in the order in Najjam Faraghi @ Nijjam Faruqui Vs. State of West Bengal, rejected the financial difficulty plea for waiving the penal damages and the Hon''ble Tribunal itself has dismissed the appeals in ATA 7(76)/99 and 7(75)/99 considering the legal position upheld by the apex Court.

The expression "damages" occurring in Sec. 14B of EPF and MP Act, 1952 is, in substance, the penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty under Sec. 14B is not merely "to provide compensation to employees". The imposition of damages under Sec. 14B serves two fold purposes. It is both punitive as well as reformative. It is meant to penalize the defaulting employer as also to provide reparation for the loss suffered by the employees. It is not only a warning to the employer in general not to commit a breach of the statutory requirements as stipulated u/s 6 of EPF & MP Act, 1952, but at the same time it is meant to provide compensation or redress the beneficiaries i.e. to re-compensate the employees for the loss sustained by them. The predominant objective is to penalize, so that the employer may be thwarted or deterred from making any further defaults.

In the background of the above, it can be reasonably concluded that financial losses suffered by the establishment cannot be taken as valid reason for waiver or reducing the damages. The Employees'' Provident Fund and Miscellaneous Provisions Act, 1952 is a beneficial legislation enacted by the Act of Parliament for the welfare of working class. The proper implementation of various Schemes under the Act solely dependent upon the prompt compliance by the establishment. Financial ups and downs are invariably an inherent part of any business. The benefits envisaged and provided under the Act cannot be held hostage to the vagaries of profit and loss of establishments. Further, the authority empowered to levy damages u/s 14-B of the Act has no discretionary power either to waive or reduce the damages. The damages can be reduced or waived only by the Central Board of Trustees in case of establishments falling within the ambit of 2nd proviso to section 14B. After carefully considering the unambiguous provisions in the Act and Scheme and keeping in mind the judgment of the Supreme Court, the apex body, I am unable to make any modification to the order remanded back by the Hon''ble Tribunal."
(Underlining supplied)

20. It disturbs my judicial mind to learn that both Commissioners have passed the orders directly contradictory to the specific findings of the Tribunal, which are absolutely binding on the Commissioners. The Tribunal has held on both questions of law in favour of the petitioner to the effect that financial difficulty can be taken as a mitigating factor while assessing quantum of damages u/s 14B and that the Commissioner has discretion in imposing lesser amounts as damages than those

prescribed in paragraph 32A of the Scheme in appropriate cases. The Commissioners have no manner of powers to decide the matter contrary to the order of the Tribunal, quoting other decisions, on a different understanding of law, in so far the decision of the Tribunal is absolutely binding on the Commissioners. Judicial discipline demands that they pass orders after remand strictly in compliance of the order of the Tribunal. Their refusal to do so amounts to negation of the rule of law. It is all the more so when the Tribunal has passed the orders relying on a decision of this Court, binding on the Tribunal as well as the Commissioners. If they do not agree with the Tribunal''s order, the remedy lies in challenging the order appropriately, if they can do so under law. If they have not or could not, they have nothing else to do but to pass fresh orders strictly in accordance with the order and directions of the Tribunal. In these cases they have practically overruled not only the order of the Tribunal but also judgments of High Courts. By doing so they have acted as a super Tribunal. If the same is permitted that would lead to anarchy. In fact non-compliance with orders of the Tribunal would even amount to misconduct. The Tribunal is a superior authority and passing orders contrary to the orders of the Tribunal amounts disobedience of the order of the higher authority and hence misconduct, for which the Commissioners are liable to be punished in disciplinary proceedings. It is all the more disturbing that in the counter affidavits filed in these cases, they have steadfastly chosen to justify their action, in spite of the fact that their action is against the basic tenets of law. I am of opinion that if rule of law is to survive in this democratic country, such tendencies should be curbed with an iron hand and dealt with very strictly, especially since there is an increasing tendency among bureaucrats and politicians to disregard or refuse to comply with orders of even this Court, which is evident from the number of contempt of court cases coming up before this Court every day, complaining of noncompliance with judgments and orders of this Court. Therefore I condemn the attitude of those Commissioners in very strong terms. They must at least now understand where they stand in the hierarchy, that they are masters of only their subordinates, that the Tribunal is a higher authority under the Act, that they are bound by the decisions of the Tribunal and that they have absolutely no right whatsoever to differ with the orders of the Tribunal or to pass orders contrary to the findings of the Tribunal, in an order remanding a case for fresh consideration after laying down the legal principles applicable to the case. The fact that two different Commissioners dealing with the same order of the Tribunal passed identical orders disregarding the Tribunal''s order is a matter of great concern, leaving me to wonder as to whether this is a deliberate concerted action of the Provident Fund Organisation as a whole to undermine the authority of the Tribunal.

21. Accordingly, the impugned orders of the Commissioners in all these writ petitions are hereby quashed. Ordinarily I should again direct the Commissioners to pass fresh orders in accordance with the findings in this judgment. But in view of the attitude shown by the Commissioners, I cannot trust them to pass orders in tune

with justice any more. The petitioner cannot again be driven to go through the expensive process of challenging illegal orders again and again for no fault of theirs. Further in the peculiar facts of these cases, and considering the very difficult times the plantation industry, especially in Kerala, has gone through over the last one and a half to two decades, I am of the opinion that the petitioner may even be entitled to total waiver of damages insofar as they have made out a very strong case in that regard. But since they have already paid 25% of the damages imposed in compliance with interim orders of this Court, I am inclined to restrict the damages to the amounts already paid by them. Ordered accordingly. Consequently damages shall be confined to amounts already paid and there shall be no further action to recover any further damages from the petitioner for delay in payment of contributions for the periods involved in these writ petitions. Considering the recalcitrant attitude of the Commissioners, I am inclined to direct the 1st respondent in these writ petitions to pay costs to the petitioner. In each of these writ petitions, the 1st respondent shall pay to the petitioner, costs of Rs. 10,000/- (Rupees ten thousand only), within one month from today. It would be open to the 3rd respondent to recover the same from the respective Commissioners. It would also be open to the 3rd respondent to take appropriate action against the respective commissioners, based on their misconduct in refusing to obey orders of the superior authority. In any event, this judgment shall form part of the confidential records of the respective Commissioner, if they are still in service. These writ petitions are disposed of as above.